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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE APPLICATION OF DIRECTIVE 2005/85/EC OF 1 DECEMBER 2005 ON MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING REFUGEE STATUS

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1. INTRODUCTION

Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status (the "Directive" or "APD")[1] is one of five asylum instruments which laid the foundations for a Common European Asylum System (CEAS), based on the conclusions of the 1999 Tampere European Council and in line with the Hague Programme. It applies to all Member States except Denmark[2].

This report is prepared pursuant to Article 42 APD and gives an overview of the transposition and implementation of the Directive in Member States, including possible problematic issues. It is based on an analysis of transposition measures notified to the Commission, consultations with Government experts, NGOs, asylum lawyers and UNHCR, Member States' replies to the Commission's questionnaire, studies on the implementation of the Directive[3], reports on projects co-funded by the European Refugee Fund, the report on asylum procedures in the IGC states[4], and the ECRE/ELENA survey on legal aid for asylum seekers. It should be read in conjunction with the Impact Assessment accompanying the recast of the Directive[5].

For those Member States which had not notified complete transposition measures at the time of preparation of the report, relevant information was gathered on the basis of legislation in force and, where relevant, draft legislation.

2. HISTORICAL AND POLITICAL CONTEXT

The Directive was adopted by the Council by a unanimous vote after consulting the European Parliament. It is aimed at establishing minimum standards for fair and efficient asylum procedures. The Hague Programme invited the Commission to evaluate the first phase standards and to propose second generation instruments with a view to their adoption by the end of 2010. In the Policy Plan on Asylum[6], the Commission proposed the completion of the second stage of the CEAS through reducing divergent procedural arrangements, raising the standards of protection and ensuring their consistent application across the EU. The European Pact on Immigration and Asylum of 16 October 2008 provided further political endorsement

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1 OJ L 326, 13.12.2005, p. 13

2 In this report "Member States" means the Member States bound by the Directive

3 See: Nijmegen University, "The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States", K. Zwaan (ed.) March 2008; UNHCR, "Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice", March 2010.

4 IGC, "Asylum Procedures. Report on Policies and Practices in IGC Participating States", May 2009.

5 Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, 21 October 2009, COM(2009)554.

6 Policy Plan on Asylum 'An integrated approach to protection across the EU', 17 June 2008, COM(2008) 360

for this objective, by inviting the Commission to present proposals for establishing *inter alia*, in 2010 if possible and in 2012 at the latest, a single asylum procedure comprising common guarantees, and the Stockholm Programme confirms this commitment.

On 21 October 2009, the Commission presented a proposal for the amendment of the Directive. It aims, in particular at streamlining and consolidating procedures and improving the quality of first instance decisions across the EU. The envisaged standards are *inter alia* informed by best practices identified by the Commission in a number of Member States.

3. MONITORING AND STATE OF TRANSPOSITION

The deadline for transposition of most of the Directive was 1 December 2007, while Article 15 which concerns legal assistance had to be transposed by 1 December 2008. Following expiry of these deadlines, 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 dispatched 17 letters of formal notice and 5 reasoned opinions. At present, all Member States have notified their complete transposition measures except BE and IE. The Commission has taken a decision to refer the cases against BE and IE to the Court of Justice, and dispatched a letter of formal notice to EL with respect to its failure to implement properly several provisions of the Directive, notably those on access to the procedure and treatment of unaccompanied minors.

Between 1 January 2008[7] and 31 December 2009, the number of asylum applications registered by the 26 Member States bound by the APD was 492,995. During the same period, these Member States issued 444,165 first instance decisions and 125,785 appeal decisions[8].

4. GENERAL PROVISIONS

4.1. Definitions (Article 2)

The Directive's definitions are generally reflected in national legislation. In several Member States (e.g. BE, IE, LT, PL, SK, SI and the UK), the national definition of an applicant for asylum does not however explicitly include the directive's requirement to consider a person as an applicant until a final decision has been taken, and the IE legislation does not reflect the directive's definition of an unaccompanied minor.

4.2. Scope and responsible authorities (Articles 3 and 4)

All Member States except IE have put in place a single procedure, hence applying the directive with respect to the determination of both refugee status and subsidiary protection status. The vast majority of Member States have designated a single determining authority, typically a specialist administrative body. In several Member States, other authorities are involved in certain specific procedures or cases, namely a border procedure (EE, FR), a preliminary procedure for subsequent claims (BE), national security cases (BE), and European safe third country cases (DE).

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7 Decisions included in this paragraph on claims made before 1.12.2007 were not covered by the APD.

8 Appeal decision data are, however, not complete as 3 Member States did not supply data for 2008 and data for 9 were missing for 2009.

5. SPECIFIC PROVISIONS

5.1. Basic principles and guarantees

5.1.1. Access to the procedure (Article 6)

Member States are required to provide for the right to apply for asylum and ensure that the relevant authorities are able to facilitate access to the procedure for persons who wish to make an application. Other aspects of access procedures are left to the discretion of Member States.

While all Member States formally provide for the right to apply for asylum, national access systems, as they stand now, vary considerably. In some Member States, law enforcement authorities, typically police and/or border guards, are competent to receive asylum requests (e.g. BE, CY, FI, FR, LT, EE, EL, IT, LV, PL, PT, RO, and SK). In others, an application must be lodged in a designated place, such as an application (reception) centre or the premises of the determining authority (e.g. AT, BG, DE, CZ, HU, FR, NL, MT, SI, SE, and the UK). In several Member States, this system provides for the possibility to initially communicate an intention to apply for asylum to other authorities (e.g. AT, DE, BG, SI). In FR, persons staying irregularly on the territory should first apply for the right to stay to a *prefecture,* and subsequently lodge an application with the determining authority.

Applications made by parents generally cover dependent minors, and CY, FR, EL, HU, MT, PL, and PT also provide for the possibility of an application on behalf of dependent adults. In certain Member States (e.g. EL, NL, DE), the right to lodge an application is recognized for minors of a certain age. A guardian or other representative is competent to lodge an application for an unaccompanied minor in BE, DE, FR, EL, LT, NL, and SK.

Member States require either certain authorities[9] or public authorities in general[10] to refer *de facto* asylum seekers to the competent authority (e.g. EL, LV, NL, MT, SK) and/or to notify that authority of the asylum claim (e.g. AT, BE, CZ, EL, HU, LV, MT, and SE). Time periods for completing formalities related to the making of applications vary. It may take from 3 to 5 months (MT), 36 days (FR[11]), 1 month (NL[12]), or 2 weeks (CY), while BE, CZ, FI, HU, LT and SE have reported time periods not exceeding 3 days. Long delays and other practical difficulties are reported with regard to access to the procedure in EL.

5.1.2. Right to remain in the Member State (Article 7)

The right to remain in the Member State pending the outcomes of first instance procedures is generally recognised in national legislation. Member States adopt divergent approaches, however, with respect to surrender or extradition related exceptions. In a number of Member States, the extradition of an asylum seeker to the country of origin is only possible after a negative decision on the asylum request has been taken (e.g. EE, EL, ES, FI, HU, LT, LV,

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9 With reference to BE, CZ, EL, HU, FR, MT, SK

10 With reference to AT, BG, FI, LV, NL, SE

11 This includes a period of 15 days for a *préfecture* to issue permission to stay and 21 day for an applicant to file an application. In practice, it takes 20 days in average to complete the process.

12 With reference to a waiting period in a transitory centre.

NL, PT, SI, SK and the UK). Exceptions are allowed in AT, CY, CZ, DE, FR[13], IE, IT, LU, MT, PL, and SE. In RO, the exception is only allowed in terrorism related cases.

5.1.3. Requirements for decision making and guarantees for applicants (Articles 8, 9 and 10)

Applications may neither be rejected nor excluded from the examination on the ground that they have not been made as soon as possible, and Member States generally comply with this principle. However, FI and MT[14] make the lodging of a request at a later stage subject to certain conditions, while in FR and CZ persons in detention must make an application within respectively 5 and 7 days of being informed of that right[15].

Pursuant to the Directive, applications must be examined individually, objectively and impartially by competent asylum personnel and based on accurate and current country of origin information. AT, CY, DE, EL[16], FI, HU, IT, LU, RO, SI and the UK have transposed these standards with sufficient clarity and detail[17], while in other Member States national rules reflect them only implicitly. Institutional arrangements for training, including follow up training, are in place in AT, BE, FI, DE, SE, HU, NL, and the UK. Other Member States tend to rely on *ad hoc* training, and the length, intensity and content of training vary considerably.

Member States generally require the authorities to take decisions on applications in writing, to indicate the reasons for rejection in fact and in law and to give information on how to challenge the decision[18]. There are, however, wide divergences with regard to the structure and content of decisions, and deficiencies are reported with respect to the quality of reasoning[19]. CY and NL avail of an optional clause making it possible not to state reasons where the person who is refused refugee status is offered a status which offers the same rights.

National legislation generally reflects the guarantees listed in Article 10 (1) APD. The vast majority of Member States provide information to an applicant in a language he/she is supposed to understand. Some, however, entitle applicants to receive information in a language they understand (AT, CZ, HU, LT, PL, BG), hence going beyond the Directive's standards. To inform the persons of the procedure, Member States widely use printed materials in a variety of languages (AT, BE, ES, CY, CZ, EE, FI, FR, IE, HU, LT, LV, MT, NL, PL, SE, SK, RO), and several Member States include relevant information in procedural documents specifically addressed to the person (BG, CY, CZ, SK) and/or inform the applicant orally (FI, LT, MT, SK).

In the vast majority of Member States, national rules guarantee the services of an interpreter free of charge at least at a personal interview, as provided for in Article 10 (1) (b). The

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13 Although the two procedures are carried out in parallel, FR does not extradite asylum applicants to the country of origin.

14 In MT, a claim must be lodged within 60 days of the arrival. Later submissions may be allowed only for special and exceptional reasons.

15 After the lapse of the time limit, an application is considered inadmissible in FR, while in CZ 'the right to apply for asylum expires'.

16 Problems are, however, reported with regard to application of these standards in practice

17 In some Member States (e.g. DE, FI and HU) legislation does not contain explicit rules on qualifications of asylum personnel. Training is, however, provided in practice.

18 Some Member States (e.g. NL and FI) rely on common administrative law, in particular as concerns the requirement to give reasons for decisions.

19 Particular concerns have been expressed with regard to the reasoning of decisions in EL.

transposition of this provision is not completed in BE and IE[20], and in EL interpreters' services are reportedly made available in the capital only. Some Member States (e.g. FI, FR, LT) use video or tele-conferences to address the shortages of interpreters in particular languages or in particular locations, and important practical cooperation initiatives, notably the Interpreters' Pool Project, have been carried out in this respect. The European Asylum Support Office is expected to give further impetus to such cooperation initiatives.

As regards the duty to give notice of the decision, a group of Member States deliver the decision in person to the applicant in a meeting (e.g. BG, EE, CZ, IT, LT, ES[21]), while others send the decision by post (e.g. FR, DE, EE). Several Member States serve it on both the applicant and his/her legal counsellor (e.g., BE, BG, CZ, LT, NL[22], SI), while DE and NL[23] make use of the clause making it possible to notify the decision to a legal counsellor only. The UK uses all the forms described above depending on the procedure.

The authorities inform applicants of the result of the decision and of their appeal rights either orally, including through the presence of an interpreter (BG, CZ, EE, EL, IT, FI, IT, LT, ES) or by providing a written translation (AT, CY, EE, DE, FR, PL, RO, SI) when serving the decision. BE, ES and NL rely on free legal assistance[24]. In IE, legislation lacks explicit rules implementing this guarantee, while in EL applicants are reportedly not properly informed of the decision and of their appeal rights. In EE, LT, BG and SI, the entire decision is read to the applicant via an interpreter or translated in writing, hence representing good practice.

5.1.4. Personal interview (Articles 12, 13 and 14)

While all Member States provide for the right to a personal interview, some make use of optional exceptions. The interview may be omitted where the authority has already had a meeting with the person to assist him/her to complete the application (CY, EL, SI, the UK), the applicant has raised irrelevant issues (CY, EL, SI, and the UK), his/her statements are inconsistent, contradictory, improbable or insufficient (CY, EL, SI and the UK), he/she comes from a safe country of origin (EL and SI) or a safe third country (EL, FI, SI and the UK), submits a repeat application (CY, CZ, DE, FI, EL, IT, LU, SI and the UK) or makes an application to delay removal (CY, EL, SI and the UK). In several cases, national exceptions depart from the Directive's wording[25].

The directive requirement that an interview be conducted without the presence of family members is generally reflected in national rules. In FR, NL, SI and IE, however, the legislation is not sufficiently explicit in this respect. In some Member States (e.g. BG, CZ, ES, FI, DE, NL, and SI), legislation does not explicitly address the Directive's requirement to ensure appropriate confidentiality of personal interviews, and problems are reported with regard to practices in EL and ES.

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20 In IE, legislation requires the presence of an interpreter in an interview only 'where possible'. In BE, an interview may be omitted where an interpreter is not available.

21 With reference to the prevailing administrative practices

22 With reference to the procedure in an application centre

23 With reference to the extended procedure

24 Article 10 (1) (e) APD allows Member States to derogate from this obligation where free legal assistance is available.

25 The interview may be omitted where an interpreter is not available (BE) or where the claim is manifestly unfounded (FR). In SI, the interview is not obligatory in the accelerated procedure and is reportedly often omitted in practice.

The Directive requires Member States to conduct personal interviews under conditions which allow applicants to present their claims in a comprehensive manner. While this standard is of relevance to those applicants who due to their gender, age and/or consequences of trauma may be in need of additional support, the Directive does not explicitly set guarantees for applicants with special needs, such as gender-sensitive interviews. Some Member States, however, have put in place relevant arrangements, such as the provision of an interpreter and/or interviewer of a same sex (AT, BE, BG, CZ, DE, ES, NL, LT, IT, HU, SK, SI and the UK) and provision of information about gender related elements of refugee status determination (AT, DE, SE).

The Directive requires communication at an interview to take place in a language the person 'is reasonably supposed to understand', and national rules in several Member States (AT, BG, CZ, BE, HU, LT, IT, EL) go beyond this standard, referring to a language a person understands, while others stick to the Directive's wording. Legislative rules are reportedly not always followed in practice, notably due to the shortage of interpreters[26], and in some Member States (e.g. BG, ES, FI, DE, NL, IE), national rules do not explicitly address the Directive's standard on the qualifications of interviewers.

The requirement to prepare the interview report and make it available to the applicant is generally reflected in law. Practices are, however, highly divergent with some Member States producing a report (e.g. EL, IT, NL, DE, CY, HU, IE, MT, PT, RO, SE), others making a transcript (e.g. BE, BG, FR, CZ, FI, LT, SI, the UK, SK, PL) and some providing for audio and/or visual recording (AT, FI, ES, HU, LU, LV, PL and the UK). While some Member States allow the applicant the possibility to provide his/her comments on the interview document (e.g. CY, FI, HU, DE, BG, NL, PT, MT, PL, RO and SK), this is not a standard practice in all Member States. The accuracy of records therefore varies. Divergent practices are reported with regard to access to the report. In some MS (e.g. FI, DE, HU, IT, NL, CZ SK, PL and the UK), such access is provided in the first instance procedure, whilst others (e.g. CY, EL, BE, BG, RO and FR) allow access only after a decision is taken.

5.1.5. Legal assistance and representation (Articles 15 and 16)

The right to consult a legal advisor or counselor is formally recognized across the EU, but Member States are divided as regards the provision of free legal assistance. CY, EE, EL, FR, DE, IT, LV, MT, PL, RO, SK, SI stick to the Directive's wording, hence making it available only at the appeal stage. Others, however, go beyond this standard granting either legal aid (BE, ES, BG, FI, HU, IE, NL, LT, LU, SE, PT, and the UK)[27] or free legal advice (AT, CZ[28]) already in first instance procedures. As regards the appeal stage, most Member States grant legal aid for both the first tier proceedings and for onward appeals. AT and CY, however, make legal aid in the form of representation available only in proceedings before higher courts. While BE, BG, CZ, FI, HU, LT, RO, SI and SE do not apply a merits test before granting legal aid, other Member States do this and national systems vary considerably as regards the applicable threshold, appeal stages and authorities in charge. A lack of sufficient resources is a formal pre-condition for benefiting from legal aid in most Member States[29].

Member States are required, subject to several conditions, to grant access to the applicant's file to a legal advisor or counselor, and to make it available to the appellate authorities. A

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26 Serious problems are particularly reported with respect to EL.

27 In FI, ES, HU, LT, IE and the UK, this right is, however, subject to a means test

28 With reference to NGO services co-funded from public funds

29 This condition is not applied in BE, CZ and RO.

majority of Member States grant such access to legal advisors without imposing restrictions. Limitations, mostly on national security grounds, are applicable in EL, CY, LT, IE, ES, NL, and the UK. In some Member States (FR, IT), legal advisors may reportedly not have access to country of origin information relied upon by the determining authority. Appellate authorities generally have access to the entire information in the applicant's file[30]. In all Member States except FR a legal advisor is allowed to attend a first instance interview.

5.1.6. Guarantees for unaccompanied minors (Articles 2 (i) and 17)

All Member States provide for representation of unaccompanied minors in the procedure, and the appointment of a legal guardian or an institution having competence to act as a legal guardian is a prevailing trend. Such a system is in place in AT, BE, BG, CY, ES, CZ, DE, EL, EE, FI, FR, HU, IT, LT, LV, MT, NL, PL, PT, SE, SK, and SI, albeit varying considerably in terms of institutional arrangements, authorities involved, and the guardians' role and qualifications. Some Member States have systems where a different type of representation is used at certain stages or throughout the procedure, including representation by a legal advisor (AT, PL), NGOs (CZ, FR[31], PT), or social services (ES). In IE and the UK, minors are represented by an organization responsible for the care and well-being of the minor.

Only a few Member States apply exceptions to the duty to appoint a representative. EL provides for an exception where it is expected that the child will turn 18 before a first instance decision is taken, or he/she is married or has been married, or is 16 years old and is able to pursue the application. The latter exception is also applicable in DE.

Medical examinations to determine the age of unaccompanied minors is possible in SK, LU, LT, AT, IT, CY, BG, HU, DE, CZ, BE, SE, MT, PL, RO, SI and the UK, and minors are informed of the age assessment procedure either verbally or in writing. These Member States also request the minor's and/or his/her representative's consent to undergo a medical test. Where a person refuses to consent, he/she is treated as an adult (CZ, HU, NL, RO, PL and SK), the credibility of his/her statements is affected (AT and LU), or he/she may not rely on the benefit of the doubt principle (LT). The latter is at variance with the Directive.

5.1.7. Withdrawal of the application (Articles 19 and 20)

Where an application is *explicitly withdrawn*, the procedure is, as a general trend, discontinued by either taking a decision (e.g. BE, BG, CZ, FI, DE, HU, PL and SI) or entering a notice in the file (e.g. ES, FR, NL and the UK). In CY, IT[32] and the UK, an application is rejected, and in EL and MT, legislation follows the directive's wording, hence allowing for either a discontinuation of the procedure or rejection of the application.

The notion of *implicit withdrawal* is in use in the vast majority of Member States. It is not formally transposed in FR and IT. The situations which give rise to an assumption that the claim is withdrawn, in addition to the examples described in the directive, include an attempt of unauthorised entry into the territory of another country (CZ) or voluntary return to his/her country of origin (AT, BE, BG). National rules allow for discontinuing the procedure, typically as a first step (e.g. AT, BG, CY, ES, FI, FR, CZ, HU, LT, MT, NL, PL, PT, SI) and/or rejecting the application (e.g. AT, BE, BG, CY, CZ, EE, EL, MT, RO, the UK).

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30 National security related restrictions are possible in LT and ES.

31 With reference to the system of ad – hoc administrators

32 In IT, this rule applies if an interview has already taken place.

5.2. Procedures at first instance

5.2.1. Examination procedure and unfounded applications (Articles 23 and 28)

The Directive requires Member States to complete the procedure as soon as possible. Member States' approaches vary. In CY, EE, FR, FI, DE, EL, IE, LU, MT, SI, SE and the UK, national rules either follow the Directive's wording (e.g. EL, EE, CY, the UK) or provide for the principle of due diligence and the right to receive information about progress in administrative procedures (FI, SE). In addition, some determining authorities (e.g. DE, SE, and the UK) set targets for completing cases. In other Member States, legislation imposes time limits for taking a decision. These are 1 month (RO), 2,5 months (HU), 2,6 months (PT), 3 months (BG, CZ, LT, LV, SK), and 6 months (AT, ES, NL[33], PL). The time limit may be extended by 1 month (HU, RO), 3 months (BG, LT) or 9 months (LV). In PT, it may be extended up to 6 months. In AT, CZ and PL, extension is not subject to time limits. In IT, specific time frames are set for certain steps in the procedure.

Member States are given discretion to *prioritise* or *accelerate* any examination and, in addition, procedures may also be expedited on 16 specific grounds. The circumstances falling under these grounds may also be taken into account when rejecting an application as manifestly unfounded[34]. Relevant national arrangements are consequently highly divergent.

In AT, BE, CZ, FI, EE, EL, FR, LT, LV, LU, MT, PL, RO, SK, SI and the UK, an examination may be accelerated where a specific ground applies. The number of grounds set out in national law varies significantly[35], and some depart from the Directive's wording. In FR, SI and the UK, every application is screened to establish the applicable procedure, whilst other Member States leave it to the discretion of the determining authority. In BG, PT and ES[36], all applications are first examined in a preliminary procedure which may result in either admitting the person into a regular procedure or rejecting his/her claim on the inadmissibility grounds or grounds falling under Article 23 (4) APD. In NL, all applications are first examined in a procedure which may result in rejection of the application, the granting of protection, or referral of the case to the extended procedure. SE accelerates manifestly unfounded cases, while, in IE, certain applications may be prioritised. HU and DE have no arrangements on accelerated procedures.

The various time limits applicable for completing the accelerated procedure are 48 hours (LT); 3 days (BG, MT, RO and the UK[37]); 4 days (ES[38] and FR[39]); 10 working days (LV); 15 days (BE[40] and FR); 1 month (EL, CZ and PL); 2 months (SK, LU and BE); 3 months (AT and ES). No formal time limits are established in EE, IE[41], SE and SI, while in FI, PT and IT

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33 With reference to the extended procedure

34 Article 28 (2) APD

35 There are 5 grounds in LT; 8 in FI; 9 in CZ; 10 in RO; 11 in MT; 14 in EL, and 16 in SI.

36 In ES, following the adoption of the new Asylum Law two different accelerated procedures apply at the border and in-side the territory. The border procedure is similar to the BG model, while the in-side procedure is linked with specific grounds.

37 This concerns the detained fast track procedure, and data refer to working days. Within the detained non-suspensive appeals procedure the time frames are 6 or 10 days.

38 This concerns persons in detention and refers to the working days. It can be extended up to 8 days.

39 This concerns applicants in detention.

40 This concerns applicants in detention.

41 In IE, the priority procedure lasts from 17 to 20 working days in practice.

they are fixed for completing certain stages of the procedure[42]. Accelerated procedures may be conducted without offering the person the opportunity of a personal interview (CY, EE, EL, FR, MT, PL, PT, SI and the UK), attract shorter time limits for lodging appeals (BG, CZ, IE, IT, NL, PL, SI, SK, RO and the UK), or deprive appeals of automatic suspensive effect (AT, CZ, ES, NL, FI, FR, IT, SE, SK and the UK).

Member States are allowed to reject the claim as unfounded or manifestly unfounded only if the person does not qualify for international protection. In CZ, FI, EL, IT, LV, LT, MT, PL, PT, SK and SI applications may, however, be rejected as unfounded or manifestly unfounded where the determining authority establishes a circumstance falling under Article 23 (4) APD, and in BG, CZ, FI, FR, DE, HU, LT, MT, and SI, the corresponding national provisions tend, moreover, to depart from the Directive's wording.

5.2.2. Inadmissible applications (Article 25 (2))

The possibility to refrain from examining the application where another Member State has granted refugee status has been transposed in BG, CZ, CY, FI, HU, SK, EL, ES, IT, LV, MT, PL, PT, SI and the UK. In BG, CZ, CY, HU, EE, EL, ES, FI, DE, IE, IT, LU, LV, MT, NL, PT, RO, SI, SE, SK and the UK, a claim may be considered inadmissible where a person comes from a 'first country of asylum'. The safe third country notion is applicable at the admissibility stage in AT, BG[43], RO, SK, CY, EE, EL, ES, FI, LT, LV, MT, NL, PT, LU, SI and the UK. In BG, NL, CY, MT, SI and PT, an application may be considered inadmissible where a person has been granted or has applied for a status which offer rights equivalent to refugee status. Identical subsequent applications are considered inadmissible in AT, CZ, CY, HU, EL, ES, IT, NL, RO, LV, LT, PL, MT, SI and the UK, whilst CY, EL, PL, MT and PT applies this notion to the claims of dependent adults previously covered by applications made on their behalf and where there are no new facts specific to their situation.

BE and FR have not transposed Article 25 (2), whilst a number of Member States which do make use of this article have no special admissibility procedure (e.g. EE, FI, IE, IT, NL), and others (e.g. AT, BG, ES and PT) have provided for a preliminary procedure in which both the admissibility and substantive criteria are examined. In several cases, national legislation provides for inadmissibility grounds which do not correspond to Article 25 (2)[44].

5.2.3. The concept of first country of asylum (Article 26)

Member States may only consider a third country to be a first country of asylum for an applicant where he/she has been recognised as a refugee there and can still avail him/herself of that protection; or otherwise enjoys sufficient protection there, and where that country will readmit the person. AT, BE, FR, LT and PL have not transposed this optional notion. In BG, CY, CZ, EE, ES, DE, EL, HU, IE, IT, LV, LU, PT, RO, SK, SI and the UK, the provision may be applied to recognised refugees, while CY, DE, EE, EL, ES, FI, LV, LU, MT, NL, PT, SI, SE and the UK have also foreseen the possibility to apply this notion to persons who otherwise enjoy sufficient protection. The notion of sufficient protection is interpreted diversely, including *'some other kind of international protection'* (EE), *'effective protection*

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42 In FI and PT, the average time limits are accordingly 67 and 30 days in practice.

43 In BG, this ground may be applied in the accelerated procedure, as described in section 5.2.1.

44 This includes the possibility not to examine an application in substance based on the safe country of origin notion (MT), a lack of legitimate interest (BG), the lodging of a new application with another personal data (ES) or where a person is in possession of a residence permit (EE).

under the terms of the Geneva Convention' (PT), and '*the right to reside or to obtain effective international protection'* (ES). DE applies a presumption of safety where a person has lived for more than 3 months in another third country where he/she is not threatened by political persecution, and NL makes use of the concept of *a country of former residence*[45]. SI and EL follow the directive's wording, literally, hence referring to *sufficient protection.* In EE, DE, SE, and FI, the requirement that the notion is applicable only if a person will be readmitted to a third country is omitted in transposition norms.

5.2.4. The safe third country concept (Article 27)

The safe third country concept applies where a person might have requested protection in a third country which is safe and able to offer protection in line with the 1951 Convention and with which the person has a connection. BE, DE, FR, IT, PL and SE have not transposed this notion, whilst other Member States rarely apply it in practice[46]. As regards material criteria for applying the concept to a third country, national rules, in general, either follow or essentially reflect the Directive's wording. Several problems are reported. In CZ and the UK, the applicable legislation does not provide that a third country must respect the principle of non-*refoulement*[47], whilst in RO and the UK the national criteria do not refer to the possibility to request refugee status and receive protection. In FI, IE and LT, an emphasis is placed on the third country's participation in and observance of refugee and human rights treaties rather than on the treatment of a person in accordance with the Directive's specific criteria.

The safe third country notion may only be applied where *a connection* with a third country, which makes it reasonable for a person to go there, is established. National measures lack detailed rules in that respect and merely refer to a person who 'was present' (SI), 'has transited and had an opportunity at the border or within the territory to contact the authorities' (RO and the UK), 'has remained or transited and there is a connection which may, in principle, allow the person to address that country' (PT), 'has stayed' (CZ), or 'has resided' (BG, EL[48] and MT[49]) in a third country. No relevant rules are laid down in AT, FI[50], LT and SK. In EE, ES, LU, CY, national rules require the authorities to establish a connection without specifying the applicable criteria. In NL, relevant rules are in place and *inter alia* require the authorities to assess *the nature*, *length* and *circumstances* of a person's residence in a third country.

Member States may either designate safe third countries and/or apply the notion on a case by case basis. BG, CZ, RO, SK, SI and PT have opted for the former approach, whilst AT, EE, ES[51], FI, EL, LT, LV, MT, NL and SE use a case by case approach. In the UK, both the designation and case by case consideration of safety are foreseen[52]. Member States' approaches vary and generally lack necessary details with respect to an individual examination of safety for a particular person. In a number of Member States, the person is entitled to rebut the presumption of safety already in the first instance procedure (e.g. BG, CZ, EE, FI, NL, SI, SK), whilst in others this opportunity is available through exercising a right of appeal (e.g. CY, RO, LT, MT, EL[53], ES, the UK). While a general trend is that a person may

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45 This refers to a country where a person has obtained or may obtain a residence permit which offers a long term protection against return.

46 Reportedly, only AT, ES, HU, PT and the UK apply it in practice and only in a limited number of cases.

47 For CZ, it concerns Articles 27 (1) (b) and (c). As regards the UK, it concerns Article 27 (1) (c) only.

48 In EL, legislation refers to a residence permit.

49 In MT, national rules refer to 'a meaningful period' and a connection with the country concerned.

50 The only requirement is that the person 'could have enjoyed protection' in that country.

51 With reference to practice

52 In practice, only a case by case approach is used, since no safe third country lists have been adopted.

53 With reference to practice. No explicit rules are provided in legislation.

challenge the presumption of safety on any ground, several Member States limit it only to either Article 3 ECHR grounds (MT, NL, PT) or ECHR grounds in general (the UK). In FI and EL, the grounds are not specified in legislation. It is the Commission's view that the persons concerned must be informed of and have an effective opportunity to rebut the application of the notion before a first instance decision is taken[54].

5.2.5. Safe countries of origin (Articles 29 – 31)

The Court of Justice has annulled the Directive's rules on procedures for the adoption and amendment of a minimum common list of safe countries of origin (the "SCO")[55]. As regards national designation, no SCO notion exists in BE, IT, PL and SE[56]. Wide divergences are identified between Member States which have SCO procedures in place. In CY, EE, HU and EL, the notion is applicable to part of a country. A number of Member States (DE, FI, FR, NL and the UK) may rely on stand-still clauses, hence applying less rigorous criteria for the national designation, and the UK makes use of the possibility to designate part of a country as safe, or a country or part of a country as safe for a specified group of persons. While national laws generally provide for a list of SCO, they have been actually adopted only in several Member States (AT, DE, FR, LU, RO, SK and the UK), and the contents of these lists vary significantly.[57] In EE, CZ, FI, NL and PT, no lists are foreseen and the notion may be applied on a case by case basis, and in BG, FR, PT, MT and RO, national rules do not fully and explicitly reflect the Directive's criteria for considering a country as SCO.

The requirement of an individual examination is generally recognised either as a general principle or specifically in the context of the SCO notion. While the same applies to the possibility to rebut the presumption of safety, reportedly applicants may not always be informed of the authorities' intention to apply the notion[58], and in EE, EL, and SI a personal interview may be omitted in SCO procedures.

5.2.6. Preliminary procedure for subsequent applications (Articles 32 – 34)

The Directive allows Member States to make subsequent claims subject to a preliminary procedure, so as to assess whether they contain new elements or findings which significantly add to the likelihood of qualifying as a refugee. This procedure is in place in BE, DE, EL, LU, MT, NL, PT, RO, SE, and SI. In CZ, ES, HU, LV, similar criteria are integrated into an admissibility procedure and in FR they are part of an accelerated procedure. The interpretation of the Directive's test regarding what constitute new elements varies significantly. In EL and LU, legislation follows the directive literally, DE relies on general grounds for review of administrative acts, NL requires new circumstances which may not be *prima facie* excluded as reasons to review a previous decision, BE examines whether the new circumstances contain significant indications of a well founded fear of persecution or a real risk of serious harm, CZ requires a connection with the reasons for granting protection, while SI, HU, LV and SK put an emphasis on a change of circumstances. SE requires new circumstances which constitute a lasting impediment to expulsion. Member States generally require applicants to submit elements which were not known or could not have been known at the time of the previous examination.

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54 It stems from the principle of respect for the right to be heard. See, in particular case C-349/07, CJ.

55 Case 133/06, Judgement of 6 May 2008.

56 These Member States, however, have transposed the SCO notion linked with a common list.

57 DE has designated 2 non-EU countries, FR – 18 and the UK – 26.

58 With reference to the UNHCR study on the application of the Asylum Procedures Directive.

BE, CZ, PT, RO, SE apply the preliminary procedure only to applications made after a decision has been taken on a previous application, while SI also does so for claims made after the explicit withdrawal of the application, and DE, ES, EL, HU, LU, MT and NL apply the Directive's rules on the preliminary procedure to claims made after either a decision or the explicit or implicit withdrawal of the previous application. Only DE applies the preliminary procedure to persons who fail to go to a reception centre or appear before the authorities at a specified time, pursuant to Article 33 APD.

In CZ, DE, EL, LU, MT and RO rules covering subsequent claims allow for omitting a personal interview, and, in DE, LU, NL, MT and RO the persons concerned are required to indicate facts and submit evidence which justify a new procedure. DE, LU, PT[59] and MT require applicants to submit the new information within a specified time limit.

The directive's rules on subsequent claims have not been transposed in IE, the UK operates a system of 'fresh claims' which differs from the Directive's standards, while in SK legislation merely requires the authorities to terminate the procedure where the facts of the cases have not substantially changed after a decision taken on the previous application.

5.2.7. Border procedures (Article 35)

Border procedures are foreseen in AT, BE, CZ, EE, ES, FR, DE, EL, HU, NL, PT, RO, SK and SI, and vary significantly in terms of personal scope, grounds and types of decisions, and procedural time limits and guarantees. They apply to applicants who lack entry documents (BE, DE, FR, NL, PT), are from a safe country of origin (DE), produce forged documents (CZ), pose a threat to national security or public order (CZ), or whose identity is not established (CZ). AT, EE, ES, EL, HU, PT, RO, SI[60] apply a border procedure to all applicants who request asylum either at the border in general or in specific locations (e.g. airports).

Grounds for rejecting an asylum claim include the safe country of origin notion (AT, DE, EE), admissibility grounds (EE, ES, HU, SI, PT), poorly substantiated claims (AT), manifestly unfounded claims (DE, ES, FR, RO, PT, SI), and claims involving false information regarding identity, nationality or authenticity of documents (AT). In EL, NL and CZ, applications are decided upon at the border on general grounds. The time limit for taking a decision varies from 2 days (DE), to 3 days (RO), to 4 days (ES, FR), to 7 days (PT), to 8 days (HU), to 15 days (BE), to 30 days (EL, CZ), and to 42 days (NL). National provisions on border procedures generally reflect basic principles and guarantees or, in the case of border procedures based on a stand-still clause[61], minimum guarantees listed in Article 35 (3). In particular, persons who are subject to the border procedure are generally given the opportunity of a personal interview. National rules allows for the omission of a personal interview in a border procedure in EE only.

5.2.8. Withdrawal of refugee status (Articles 37 and 38)

The Directive's provisions on the withdrawal of refugee status are generally reflected in national law. DE avails of an optional clause making it possible to decide that refugee status lapses by law where the cessation clauses apply. In 2008 and 2009, in EE, EL, ES, LT, LV,

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59 In PT, the application of a time limit is left to the discretion of the determining authority.

60 In SI, provisions on border procedures have not been applied in practice.

61 Pursuant to Article 35 (2) APD, Member State may maintain procedures in accordance with the laws in force on 1 December 2005 which derogate from the basic principle and guarantees.

MT, PT and RO, no refugee status was withdrawn, while some Member States (IE, LU, HU, PL, SI, SK and SE) reported numbers not exceeding 25 cases per year. In 2008 and 2009, this notion was applied more frequently in AT (105 cases), DE (10 755), FR (220) and IT (95).

5.3. Appeals Procedures

5.3.1. Access to effective remedy (Article 39)

The directive requires Member States to ensure access to an effective remedy before a court or tribunal, to lay down relevant procedural rules and time limits, and to provide for arrangements regarding the right to remain pending the outcome of the appeal. In the majority of Member States, a court acts as the first tier appellate body. These may be specialist courts (AT, FR and SE), administrative courts (BG, EE, EL, ES, FI, FR[62], DE, LV, LT, LU, SI), or courts of general competence (CZ, IT, HU, NL, RO, SK and the UK[63]). Specialised tribunals are in place in BE, CY, IE, MT, PL and the UK. In the UK, the Special Immigration Appeals Commission hears appeals in national security cases. EL is the only Member State where the Supreme Administrative Court (the Council of State) acts as the only appeal instance against asylum decisions taken by the determining authority.

Time limits for lodging appeals vary significantly, and many Member States have reduced them for decisions falling under Articles 23 (4), 28 (2), 32 and/or 35 APD and decisions concerning applicants in detention. The general time limit varies from 8 days (PT), to 10 days (EE, LV and the UK), 14 days (AT, BG, DE, LT, PL), 15 days (CZ, HU, IE[64], SI), 20 days (CY), 21 day (SE), 28 days (NL[65]), 30 days (BE, FI, FR, EL, IT, SK), and 60 days (EL, ES). The reduced time limits are 2 days (FR, RO, the UK), 3 days (SI, DE[66], PT), 5 days (PL, the UK[67]), 7 days (BG, CZ, DE, NL[68]), 10 days (CY), 15 days (BE, IT), and 20 days (SK). The same time limit applies for all asylum decisions in EE, FI, EL, LT, LV, PL and SE.

The principle of automatic suspensive effect applies to all appeals lodged with the first tier appellate body in BG, HU, IE, LT, LU and PT. In other Member States, applicable exceptions are widely divergent and concern decisions not to further examine a subsequent application (BE, DE, ES, LV, MT, NL, SI, RO, and the UK), a refusal to reopen the examination (CZ, DE, SI), decisions taken in border procedures (CZ, DE), inadmissibility decisions (AT, CZ, FI, DE, IT, PL, SK, the UK), decisions falling under Articles 23 (4) and/or 28 (2) APD (AT, CY, CZ, FI, FR, DE, IT, SE, SI, SK, the UK), decisions falling under Article 23 (3) APD (NL), and decisions concerning applicants in detention (IT, NL). In EL and ES, no appeal automatically suspends removal. Where an appeal does not have suspensive effect, interim measures are generally available. However, the right to remain pending the outcome of the procedure for interim measures is not guaranteed by law in CZ, EL and SK. In several other Member States, removal may immediately be enforced with respect to decisions on subsequent claims (FI, NL) or where a person poses a danger to public order or national security (NL). In the UK, where an in–country right of appeal does not apply, a decision may

62 With reference to decisions to refuse entry and decisions to apply an accelerated procedure.
63 With reference to decisions which can only be subject to judicial review.
64 In IE, the time limit is 15 *working* days.
65 With reference to the extended procedure. Legislation sets a time limit of 4 weeks.
66 With reference to the border procedure.
67 With reference to applicants in detention. In the fast track procedure the time limit is 2 days.
68 With reference to the procedure in an application centre.

only be either challenged by seeking a leave for judicial review or appealed against from abroad.

In the majority of Member States, the first tier appeal authority has jurisdiction to review both facts and points of law. However, in EL and SI, the court reviews the legality of first instance decisions only. In the UK, judicial review does not fully examine the merits of the decision, and in NL only limited scrutiny applies to the facts as established by the determining authority. While in BE[69], BG, ES, FI, FR, DE[70], IT and the UK, a court or tribunal has the power to conduct an *ex nunc* assessment of the case, others (e.g. CZ, SI and NL) tend to place restrictions with respect to the possibility to consider new evidence.

The Court of Justice of the European Union has dealt with only one request for a preliminary ruling with respect to this Directive[71]. This situation may change given the entry into force of the Lisbon Treaty which enables national courts of all instances to seek interpretative guidelines from the Court, hence contributing to more consistent application of the Directive.

6. CONCLUSION

This evaluation confirms that some of the Directive's optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and that procedural guarantees vary considerably between Member States. This is notably the case with respect to the provisions on accelerated procedures, 'safe country of origin', 'safe third country', personal interviews, legal assistance, and access to an effective remedy. Thus, important disparities subsist. A number of cases of incomplete and/or incorrect transposition and flaws in the implementation of the Directive have also been identified. The cumulative effect of these deficiencies may make procedures susceptible to administrative error. It is noteworthy, in this regard, that a significant share of first instance decisions is overturned on appeal.

The present report shows that the objective of creating a level playing field with respect to fair and efficient asylum procedures has not been fully achieved. The Commission will continue to examine and pursue all cases where problems of transposition and/or implementation have been identified, so as to facilitate the correct and consistent application of the Directive, and to ensure full respect for the principle of non-*refoulement* and other rights enshrined in the EU Charter. Procedural divergences caused by the often vague and ambiguous standards could only be addressed by legislative amendment. Accordingly, and on the basis of a thorough evaluation of the implementation of the Directive, the Commission adopted on 21 October 2009 a proposal to recast the Directive in order to remedy the deficiencies identified.

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69 In BE, the submission of new elements is, however, subject to certain conditions.

70 With the exception of cases rejected as manifestly unfounded.

71 Case C – 69/10. The Luxemburg Administrative Tribunal has essentially asked whether the Directive requires a remedy against a decision to decide on the application in an accelerated procedure.