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Seeking Asylum in the European Union:Is the Spirit of Tampere Present in New Legislation?

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Background

In the past decade, Europe has seen a significant increase in the numbers of displaced persons, and the spring 1999 events in Kosovo in particular became a catalyst in developing the EU's own refugee protection regime. On the basis of the guidelines set up in the Treaty of Amsterdam, the 1999 European Council of Tampere reaffirmed that the EU and its member states were committed to absolute respect of the right to seek asylum. The Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the 1951 Geneva Convention (the "Refugee Convention") ensuring that no one is sent back to a country in which his/her life or freedom would be threatened, i.e. maintaining the principle of non-refoulement.

The Tampere Council urged stepping up efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between member states. It also required the Council to promptly finalise its work on the system identifying asylum seekers by creating a consolidated Eurodac fingerprinting system.[1] The Tampere Council addressed the importance of harmonisation, noting that cumbersome asylum procedures in many member states have caused numerous problems, and it went even further, stating that a common EU policy was necessary to solve those problems.

In accordance with the Tampere goals, the EU system should include, in the *short term,* a clear and workable determination of the state responsible for the examination of an asylum application, common standards for fair and efficient asylum procedures, common minimum conditions for the reception of asylum seekers, and the approximation of rules on the recognition and content of refugee status. It should also include measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. To that end, the Council was urged to adopt, on the basis of the Commission proposals, necessary decisions according to the timetable set in the Treaty of Amsterdam.[2] In the *longer term,* Community rules should lead to a common asylum procedure and a uniform status valid throughout the Union for those who are granted asylum.

This paper will present an overview of the legislation enacted during the past five years for a comparative picture between the previous situation and the current status of the specific issues addressed by the European Council. In so doing, we will also be able to establish whether the goals of the European Council in Tampere have been achieved.

Minimum rules on temporary protection

Most member states established exceptional temporary protection schemes in order to respond to the 1999 events in Kosovo, and to avoid serious disruption to their asylum systems. At that time, significant variations were revealed in the welfare rights and benefits granted by the member states to persons enjoying temporary protection. Taking into account this situation, the Tampere Council stressed the importance of reaching a rapid agreement on the issue of temporary protection for displaced persons on the basis of solidarity between member states.[3]

Following the Tampere warning, on 20 July 2001 a Council Directive was adopted on minimum standards for giving temporary protection (TP) in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof.[4] The main aim of the Directive is to provide for evacuation and for mechanisms to share responsibility between EU member states, and the Directive is seen as a step towards the goals of the Tampere Conclusions. It was very welcome, as it stressed the exceptional character of TP and guarantees access to the asylum determination procedure.[5]

After a declaration acknowledging a massive influx is lodged, each member state involved in the process of receiving persons eligible for TP will be given an amount of money proportional to its capacity to receive them. This is carried out with help from the European refugee Fund (Article 24 of the Directive). The Directive also presents acceptable standard of rights to be conferred to those protected by it and provisions for especially vulnerable groups. TP measures are in principle granted for a limited time, one year, which is only renewable up to three years (Article 4).

However, this legislation does not seem to do anything to ease admission for persons arriving outside evacuation programmes. Nor does it prevent the imposition of non-entry measures on nationals from countries experiencing

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large refugee outflows. It does not provide for the possibility of an appeal in case TP is denied. And last but not least, it does not refer to the right of freedom of movement within the Union. Therefore we can conclude that this Directive on temporary protection, although it presents several positive points, can not be said to have reached the standards desired by Tampere.

Rules governing which state is responsible for considering the application for asylum by each asylum seeker in the EU.

The 2002 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)[6] aimed to replace the Dublin Convention, which was at the time the legal instrument in force regulating asylum in the EU.

The main goal of the Regulation is to ensure that applications are examined by at least one member state. Under the Regulation, the member state responsible for examining an asylum application is to be determined as quickly as possible (Article 3). Article 3 has also the function of stopping the "asylum shopping," as a single member state will be responsible for the examination of an application, and therefore the asylum seeker is not entitled to choose the country he wants to be in. It sets "reasonable time limits" for each of the phases for determining the member state responsible for examining an asylum application (Article 3.2).

The Regulation establishes several criteria to determine whether the member state where the asylum application is lodged may send the responsibility to another member state: in case of existing family (Articles 7 and 8) and cultural links in a second member state, or the applicant's possession of a residence permit or a visa (Article 9) or the irregular entry into the territory of a member state (Article 10). The Regulation thus, as compared to the Dublin Convention, gives primacy to family reunification and prominence to unifying children with their parents or guardians. The Regulation also includes a humanitarian clause through which even if a member state is not responsible for examining the application, it may still do so for humanitarian reasons, in case the applicant gives his consent.[7]

Article 22 of the Regulation calls for administrative cooperation. Member states can exchange information they need about a specific asylum seeker, but such exchanges must be for a clearly stated reason and without breaching the rights of the asylum seeker established in the Regulation or in Directive 95/46/EC. Member states can also cooperate in establishing a simplified procedure or shortening the time limits.[8]

Article 3.1 of the Regulation establishes that an asylum application shall be examined by a *single* member state, which will be identified by the procedures provided for in the Regulation. Unlike the Dublin Convention, the Regulation does not include an obligation to examine the application with respect to the member states' international obligations, such as the European Convention of Human Rights and Fundamental Freedoms and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment. The absence of this point in the Regulation is regrettable.

Minimum rules on procedures for considering applications for asylum

The Draft Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status,[9] proposed in 2002, aims to provide:

- common definitions;
- common requirements for inadmissible and manifestly unfounded cases (including the "safe country" concept);
- time-limits for deciding in first instance and in appeal, a minimum level of procedural safeguards;
- minimum requirements for decisions and decision-making authorities, with a view to reducing disparities in member states' examination processes (and avoiding "asylum shopping" for the most advantageous conditions for asylum seekers).

A "general approach" on the Directive has been agreed upon at the Justice and Home Affairs Council of 30 April 2004 in Luxembourg, but due to numerous changes due to national parliamentary scrutiny reservations from Germany, Netherlands, Sweden, and the UK, the European Parliament has to be re-consulted.[10]

Although the Directive represents an improvement in some aspects, in some other areas it still allows for practices that can put refugees in danger. A clear example is the establishment of a minimum list of "safe countries of origin,"

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whereby asylum applicants coming from those countries will have their application denied in an accelerated procedure, which at the same time can be an added danger for the asylum seeker. The Directive, by permitting the refoulement of refugees from "safe third countries," could push some member states to lower the standards on asylum procedures.

The European Court of Human Rights has repeatedly ruled against member states with low levels of procedural protection for asylum seekers, requiring an effective examination of a claim that expulsion of a person would result in torture or other inhuman or degrading treatment and limiting the ability of member states to expel a person in the meantime.[11] The Directive, if adopted in its present reading, also can be expected to come under fire from international and domestic human rights monitors for violations of basic human rights of asylum seekers.

Minimum rules on reception conditions for asylum seekers

Pursuant to the Tampere goals, the Council has adopted a Directive laying down minimum standards for the reception of asylum seekers[12] which entered into force on 6 February 2003. It applies to all EU member states, except Denmark and Ireland. According to the Directive, the 13 EU member states which are bound by it shall bring domestic legislation in compliance with the Directive by 6 February 2005.[13]

The Directive provides for the minimum requirements for the reception of asylum seekers, and should have the effect of improving reception conditions and strengthening the legal framework of reception practices in the member states. The Directive grants asylum seekers rights, such as information about any established benefits and of the obligations with which they must comply relating to the reception conditions within 15 days of applying for asylum (Article 5), and documentation certifying the person as an asylum seeker within three days of an application being lodged (Article 6).

Importantly, the Directive contains provisions relating to the prevention of racist and xenophobic actions against asylum seekers, granting access to NGOs and legal advisors, access to primary health care under the regular procedure (Article 15), and again the recognition of the important need to maintain family unity (Article 8).

However, although the Directive represents a great step forward in the path towards a European asylum law, some provisions appear to exclude the "spirit of Tampere." Compared with the Commission proposal, the adopted text allows more scope for different interpretation, particularly as regards provisions on access to employment, they will have conditional access to the labour market after 12 months of awaiting for a decision at first instance (Article 11).

Another weak point in the Directive is the fact that its scope covers only those applying for status under the 1951 Geneva Convention, while it is left to the discretion of member state to apply the Directive to applicants for subsidiary forms of protection, or to cases awaiting removal under the Dublin Convention.

There have been several studies on the impact of the Directive on reception policies in different member states, and the findings indicate that many articles offer weaker protection than the present standard of reception in many member states.[14] There is a risk that in those countries with a higher standard than that of the Directive, this text could provide a reason for reduction of reception standards. A stand-still clause would have been very desirable in this respect.

Minimum rules on the definition of refugees

Minimum rules on definition are contained in the proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.[15]

The draft Directive followed the Commission proposal of 12 September 2001, which aimed at a common definition of a refugee and a minimum level of protection for the beneficiaries of both refugee and subsidiary protection status in all member states. It also aimed to avoid secondary movements when asylum seekers apply in countries, which offer them the most favourable protection ("asylum shopping").

The draft Directive was significantly informed by the 1951 Geneva Convention and the New York Protocol thereto, which provide the starting point on a common asylum policy in Europe.[16] The draft also states that persecution can also originate from non-state agents and contains specific provisions for women and children.

The text lays down rules for determining which applicants for international protection qualify for refugee status and which qualify for subsidiary protection status, and establishes the minimum standards of treatment for each group. The proposal is congruent with the Conclusions of the Presidency at the 1999 Tampere European Council, and the following articles can be pin-pointed as the most significant achievements:

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- Article 9 provides a correct definition of sources of harm that include non-state actors where the state is unable or unwilling to provide effective protection, an issue that has caused many problems over the past years;
- Article 7 provides that a well-founded fear of persecution must be objectively established, thereby eliminating the risk of denying refugee status to a person who is deemed not to be sufficiently subjectively fearful;
- Article 12 establishes that a claim based on "membership of a particular social group" includes groups defined by "relation to certain fundamental characteristics, such as sexual orientation, age and gender," or comprising of persons who share a common background or characteristic fundamental to identity or conscience" or groups treated as "inferior in the eyes of the law";
- Article 14 provides that exclusion from refugee protection is to be based solely "on the personal and knowing conduct of the person concerned";
- Finally, Article 18 states that the refugee rights set out in the draft directive are "without prejudice" to the rights provided by the Refugee Convention, meaning that member states will not be able to lower the rights provided for the Geneva Convention of 1951.

The Justice and Home Affairs Council on the 30 March 2004, adopted a full text on this Directive.[17]
Due to the fact that there is no *acquis* on the field of asylum law, the Commission based its research for the drafting of this Directive on case law of the European Court of Human Rights and on references from Humanitarian law in general to the concept of subsidiary protection. In order to draft the Directive, research was done also by the Commission among the different member states on their systems of subsidiary protection in order to identify best practices and indicate a common approach to the matter. The Directive does not create new *"ratione personae"* to the subject matter, but clarifies and codifies the existing international legislation in this regard. The Directive provides for minimum rights and benefits to be given both to persons enjoying the status of refugee and to those having subsidiary protection status. They both would enjoy the same rights.

Conclusion

Analysis of the "asylum *acquis"* that has been achieved over the past five year and comparison with the goals set down at the European Council of Tampere indicates both positive and negative results. On the one hand, from the perspective of a minimum standard of harmonisation in the European Asylum Policy, the Directives and Regulations now in force have set the minimum criteria for the member states to comply with when implementing new asylum legislation. The deadline has also been met within the framework of the two last Justice and Home Affairs Councils.[18]
Notwithstanding the set minimum level of harmonisation, many provisions allow for a great, perhaps even excessive, margin of appreciation for national legislators. By choosing this approach, the European Union has left national legislators the opportunity to maintain their previous asylum legislation, which again can lead to great disparities among member states in asylum policy, rendering the Tampere achievements empty.
Still, the importance of the legislation enacted in the past five years is undeniable. For the first time in the European Union there is a clear determination on the part of member states to reach a common approach on asylum policy. It represents an essential milestone in the construction of a Common European Asylum Policy.
The adopted legal instruments are a starting point of a process that must be further developed and improved.

Footnotes

[1] To establish a system for the comparison of asylum applicants' and illegal immigrants' fingerprints and facilitate the application of the Dublin Convention, which makes it possible to determine the state responsible for examining the asylum application. To follow this initiative, a Council regulation has been enacted **(Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention.**
[2] Tampere European Council of 15 and 16 October 1999, Presidency Conclusions at: http://www.europarl.eu.int/summits/tam_en.htm.
[3] Art. 10 ECT.

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[4] Council directive 2001/55/EC 15 July 2001on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof.
[5] ECRE, the European Council on Refugees and Exiles, has welcomed this Directive due to the fact that in the past it advocated for the establishment of a EU TP regime under strict conditions (see in particular ECRE's 1997 Position on Temporary Protection and ECRE January 2001 comments on the Draft for this Directive). This was based on the conviction that TP can represent a reasonable administrative policy in an emergency situation only where individual refugee status determination is not immediately practicable and where its application will enhance admission to the territory.
[6] **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 [Official Journal L50 of 25 February 2003].**
[7] See Article 16, which recalls the principle already stipulated in the Dublin Convention.
[8] This provision has been transferred from the Dublin Convention to the Regulation virtually unchanged, and as such, the provision provides a minimum of protection by limiting the parties to the exchange of information to member states. There is however no provision for a monitoring body to ensure data protection.
[9] COM (2000) 578.
[10] Which will not take place until the new session that is convened in Autumn 2004.
[11] The European Court of Human Rights held in its judgment in the 1989 Soering case that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intendment of the Article" and would "hardly be compatible with the underlying values of the Convention." The Court ruled in the same lime line in two other cases, *Cruz Varas et al. v. Sweden,* Judgment of 20 March 1991, and in *Vilvarajah et al. v. United Kingdom,* Judgment of 30 October 1991.
[12] Council Directive 2003/8/EC Laying down minimum standards for the reception of asylum seekers.
[13] The deadline will also apply to the ten accession countries joining the EU in May 2004, as they are required to accept the EU *acquis* in whichever form it is at the time of joining.
[14] Preliminary assessment of the impact of the Directive on reception policies in individual member states indicates that many of the Articles fall short of the current standard of reception in many Member States. Assessment done by ECRE, see: http://www.ecre.org/.
[15] COM (2001) 510 provisional.
[16] Quoting the European Council of Tampere Conclusions, "The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement."
[17] A political agreement was reached by the Justice and Home Affairs Council on 30 March 2004, after being blocked by a German veto. The Directive as a whole has not been yet adopted due to the fact that a discussion on examination procedures for asylum requests remains blocked.
[18] The two last Justice and Home Affairs Councils, which have been so important for the accomplishment of the five year deadline, were held in Luxembourg on 30 March 2004, and 29 and30 April 2004.

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