The Negotiations on the Asylum Procedures Directive

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1. Introduction

On 20 September 2000 the Commission adopted a proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. The aim of the proposal was to introduce a minimum level playing field in the EC with respect to asylum procedures. In accordance with the mandate of the 1999 Tampere Presidency Conclusions, calling for ‘common standards for a fair and efficient asylum procedure’, the proposal introduced guarantees for a fair procedure and mechanisms and tools to ensure an efficient procedure.

The legal basis for the proposal was Article 63(1)(d) of the Treaty establishing the European Community (hereafter EC Treaty). In accordance with Article 67 EC Treaty, the Council would decide on the basis of unanimity on this proposal, after consulting the European Parliament.

The proposal would be subject to more than three years of negotiations in the Council and many informal consultations between the 14 Member States concerned before the Council could accept a general approach on 29 April 2004. This approach would be modified slightly at the JHA Council of 19 November 2004, in order to postpone the adoption of a minimum common list of safe countries of origin until after the adoption of the Directive. At the time I submitted this article, the European Parliament had not yet taken position on the general approach. Nevertheless, the general approach itself was already welcomed as a crucial step towards the second stage of the Common European Asylum System (hereafter ‘CEAS’) and the new institutional rules of the game in the EU which should follow from the Nice Treaty, and this irrespective of the contents of the approach.

The purpose of this article is to describe how the original proposal of the Commission evolved into a text acceptable for all Member States. While I will elaborate on the

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2 In accordance with the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of the Directive, while the United Kingdom and Ireland notified their wish to participate in the adoption of the Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland.
reasons why Member States sought amendments to the proposals of the Commission and seek to explain the outcome of the discussions, I do not intend to justify or defend the reasoning of Member States or the final outcome. Instead, some introductory observations of a more general nature are in order to better understand the hurdles which had to be overcome during the negotiations.

The points of departure of Member States were too different from one another to come to more than an agreement on basic principles. The administrative framework for decisions on asylum applications in each Member State has been developing purely within a domestic context. Asylum procedures are embedded in general administrative law, national administrative traditions and specific constitutional arrangements. Admittedly, procedural law is difficult to harmonise and this was one of the first instruments on procedural law affecting national proceedings to be negotiated at EU level. Moreover, Member States have had very different experiences in terms of the number of cases. Germany had more than 350,000 asylum seekers in 1992, whereas Italy and Ireland hardly had any applications and only started to develop their asylum system in the early nineties.

The agreements reached on the ‘Resolutions’ in the framework of Title VI (provisions on co-operation in the fields of justice and home affairs) of the Treaty on European Union did not change these basic facts. The Resolutions on a harmonized approach to questions concerning host third countries, manifestly unfounded applications for asylum, minimum guarantees on asylum procedures, unaccompanied minors who are nationals of third countries and the Conclusions on countries in which there is generally no serious risk of persecution, did not compel Member States to make choices but merely spelt out the diversity in national practices. They laid down basic principles, without, however, excluding any existing exceptions to those principles.

Moreover, the outcome of the negotiations was influenced by shifting domestic political agendas in Member States. In the course of the negotiations several Member States, notably Austria, France, Germany, the Netherlands and the United Kingdom, brought forward new domestic legislation pertaining to the standards in the proposal of the Directive, further complicating the negotiations. Individual positions of Member States also shifted as a result of new political views on the scope of EC legislation in this field, in particular with respect to safe countries. These facts may to a certain extent also explain the different working methods the Presidencies used to deal with the draft Directive.

Finally, the drafting of an EC legislative instrument on ‘minimum standards for granting refugee status’ was perceived in several capitals as an exercise which could not amount to giving up tried and tested effective restrictive practices. Member States were not willing to trade in known national certainties for unknown policy tools in the name of a vague ideal of harmonisation. Would minimum standards lay-

3 WGI 1283.
4 WGI 1282 REV 1.