Several Notes Relating to Concept of the Common European Asylum System

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1. Definition of the area of interest, objectives and role of the European Union

A Common European Asylum System[1] is one of the visions and objectives of the European Union. While all the Member States of the European Union are confronted with the issue of refugees, it must be noted that the intensity of this phenomenon and its impact varies. Given the fact that this is a long-term issue, which has unfortunately become an inherent part of our society, this aspect needs to be regulated also at the level of the European Union. Until the 1990s, the aspects of home affairs, and thus also asylum, were covered by the "Third Pillar" of law. When the Amsterdam Treaty came into force (1999), the fields of justice and home affairs, including common visa, asylum and refugee policies, were transferred to the First Pillar and thus became a component part of the common policies of the Union's member countries. In Lisbon Treaty principles of the Common European Asylum System belong to Area of Freedom, Security and Justice.

In general terms, asylum law is embodied at an international level particularly in the 1951 Convention on the Status of Refugees and the subsequent New York Protocol. These treaties were concluded under the umbrella of the United Nations and are binding on all the Member States of the European Union. The common policy of these countries further elaborates the mentioned treaties, while any obligations arising out of the policy must be in conformity with the treaties.

The concept of a Common European Asylum System is the cornerstone of the common asylum policy of the Member States. Indeed, the need for harmonizing the rules in the area of asylum law arose on several grounds. Without any doubt, the first reason lies in an effort to secure, as far as possible, equal treatment of asylum seekers in all the Member States and thus guarantee legal implementation of the right to asylum. On the other hand, unification of the conditions for granting asylum must be perceived as an attempt to prevent arbitrary conduct on the part of asylum seekers, who might be tempted to lodge asylum applications in those countries which apply the most benevolent asylum regime and provide benefits that are not available in other jurisdictions. The common asylum system also reflects cooperation of all the Member States in the area of migration and, consequently, also asylum law.

[1] The Common European Asylum System is defined as a system of common EU rules in the area of asylum. According to the Preambule to the Directives, the commom asylum system should soon include common standarts for a fair and effective asylum procedure in the Member States and, from a long-term perspective, rules of the Community laeding to a common asylum procedure in the European Community.

The concept of a common asylum system is being advanced with the use of the Union's legal instruments, taking the form of regulations and directives. However, in spite of this fact, it must be borne in mind that the common asylum system is not based on acts of the European Union that would create any autonomous rules of assessment as to whom asylum should be granted and that would stipulate uniform rules for decision-making on asylum, while establishing a joint European authority to make decisions on behalf of all the Member States in a situation when an asylum seeker finds himself in the territory of one of the Member States. On the other hand, since the Common European Asylum System is being developed as an aggregate of the individual national asylum systems, the European Union strives to harmonize these national systems as far as possible in terms of their basic features so as to eliminate any major differences amongst them and to ensure a uniform approach in resolving individual basic aspects.

2. Basic legal instruments

2.1. "Dublin II" Regulation (2003)

The instruments employed to regulate the area of asylum law include a legislative act based on Art. 63 of the Treaty establishing the European Community, specifically 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 (Dublin II). The Regulation was adopted in response to the requirement of the Amsterdam Treaty to adopt, within a period of five years after its entry into force, appropriate measures on asylum at the level of the European Union, regulating the subject of the common asylum system and determining the Member State responsible for asylum procedures concerning the specific applicants. The necessity of establishing regulation at the level of the European Union followed from the need to eliminate, on the one hand, a negative competence conflict amongst Member States, i.e. a situation where none of the Member States considers itself competent to consider an application for asylum, and the related phenomenon called "refugee in orbit", and on the other hand, a positive conflict, involving a chain of asylum procedures gradually pursued by the individual Member States in respect of asylum applications submitted by the same person, or asylum procedures pursued in parallel by several Member States on the grounds of several applications lodged by the same applicant ("asylum shopping"). The thus-defined objectives would be very difficult, or even practically impossible, to achieve through regulation applicable only at the level of the legislations of the individual Member States.[2]

[2] Paragraph 6 Council Directive 2005/85/EC „*The approximation of rules on the procedures for granting and withdrawing refugee status should help to limit the secondary movements of applicants for asylum between Member States, where such movement would be caused by differences in legal frameworks*."
Paragraph 7 Council Directive 2004/83/EC „*The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks*."

Dublin II sets the binding criteria for determining the country in the European Union that is competent to hold an asylum procedure, where these criteria must be applied exactly in the set order.[3] If the country where an application for asylum was lodged determines that it is not competent to pursue this procedure, it is authorized to transfer the foreigner to the country that has the required competence based on the criteria stipulated by Dublin II.[4] An application lodged by a foreigner can thus be considered only once in the European Union (the "one-chance-only principle).[5]

This fact is linked with the need to provide at least for minimum standards of asylum procedures in the given country, where substantial variations in the national asylum systems would result in unequal treatment of asylum seekers, which could in turn be a reason for illegal migration of asylum seekers within the European Union and search for the most favourable conditions for granting asylum, often under a different identity.

In the legal order of the Czech Republic, decision – making and determining a Member State of the European Union competent to examine an application for granting of international protection is entrusted to the Ministry of the Interior.[6] If another Member State of the European Union is competent to examine the application for international protection, the application for international protection is inadmissible and Ministry has to ensure transportation of the applicant for to the Member State of the European Union competent to examine the application for international protection.[7]

According to the Dublin Regulation, in 2009 the Czech Republic received a total of 655 requests from other Member States for taking foreign nationals back into its territory or taking charge of asylum applications. In 449 cases, the responsibility of the Czech Republic to examine the applications proved to be correct and the asylum seekers were handed back into its territory. Only 213 of these asylum seekers, which was some 47 %, were actually handed over to the Czech Republic. In the same period, the Ministry of the Interior of the Czech Republic sent 269 requests to other Member States to take foreign nationals back or to take charge of their applications. In 249 of these cases, the Member State agreed to receive the persons into its territory. During this period, a total of 238 persons, which was some 97 %, were handed over from the territory of the Czech Republic to a different Member State.[8]

[3] The criteria set by the Dublin II Regulation include evaluation of family ties; residence documents; unlawful entry into the territory of the European Union and residence in the territory of a Member State; the manner of crossing the borders of a Member State where the applicant does not require a visa; and lastly the place where the application for asylum was submitted.

[4] See: the judgement of the Czech Supreme Administrative Court sp.zn. 2 Azs 93/2008 (http://www.nssoud.cz).

[5] If the application for asylum is dismissed, nothing prevents the foreigner from lodging a new application in a non-Member State.

[6] Section 10a of the Act No. 325/1999 Coll., on asylum.

[7] More in Kosař David, Molek Pavel, Honusková Věra, Jurman Miroslav, Lupačová Hana: Zákon o azylu.Komentář. (Asylum Act – commentary).Wolters Kluwer. 2010. ISBN 978-80-7357-476-5.

[8] See : Annual Report on the Situation in the Field of the International Protection in the Czech republic in 2009.

2.2. Directives and their implementation

Directives constitute yet another instrument to regulate the Common European Asylum System. In this case, consideration must be taken of the mechanism of transposing the rules stipulated in the directives into the legislations of the individual Member States. The transposition process can be basically conceived within three stages of implementation of asylum law.

The first stage provides the actual basis for implementation at the level of the legislature, i. e. the Parliament of the Czech Republic. Indeed, the quality of the legislative process is decisive for further implementation of the rules of conduct embodied in the regulations. Those legal provisions which encompass the definition of the terms used within asylum law and their gradual specification in response to the development of the concept of the given term from the viewpoint of European acts are particularly important in this respect.[9]

The second stage may be perceived in evaluation of the application of asylum law by the competent authorities empowered to pursue proceedings in this area. Within the legislation of the Czech Republic, proceedings in matters of asylum fall within the competence of the executive power; the Ministry of Interior as the central governmental authority is the authority competent to hold these procedures as such.

In conformity with Art. 36 (2) of the Czech Charter of Fundamental Rights and Freedoms and the international commitments of the Czech Republic, decisions of the Ministry are subject to judicial review.[10] Procedures in matters of asylum (on granting international protection) are conceived as single-instance administrative proceedings, where the applicant is entitled, after having received the administrative decision, to refer the case to a regional court; the ruling of the latter may be further reviewed by the Supreme Administrative Court in cases stipulated by law. In spite of the fact that precedents are not sources of law in the strict sense under the conditions of the legislation of the Czech Republic, being a system of continental law, administrative justice in matters of asylum law nevertheless plays an important role, particularly given its attempts to construe the provisions of the Asylum Act in a manner conforming to European law. The activity of the courts within judicial review of decisions in asylum matters thus constitutes the third stage of transposition of European law into the legislation of the Czech Republic.

By means of directives, the European Union sets the "minimum standards" of asylum procedures, which are binding on the Member States. These are thus the basic rules that must be implemented by each Member State at the national level. Nonetheless, the rules in question are not fully regulated by the EU; the Member States are left a relatively wide space to adopt national regul-

[9] For example, the Czech Republic adopted a total of 21 legal regulations amending Act No. 325/1999 Coll., on asylum, as amended, most of them to fulfil international legal commitments of the Czech Republic.

[10] At the factual level, there should be mentioned also certain reservations to decisions of court, by some constitutional bodies (officials) or leading administrators, which can be considered the factor making the process of public administrativ cultivation more difficult without any doubt. See Skulová Soňa:Discretionary Power of Public Administration in the Czech Republic at the Begining of the Third Millennium and in the European kontext. In Hurdík Jan,Polčák Radim, Terezie Smejkalová:Czech Law in European regulatory Context. Medium und Recht Verlag. Munchen 2009. ISBN 978-3-939438-09-0.p.120.

ations that will be more favourable for the asylum seekers and will provide them with more rights and standards than stipulated by the directives. The fact that a "minimum level", rather than a "ceiling", is set in the imaginary pyramid of the rights of asylum seekers and duties of the States binding in the area of asylum law leads ultimately to a non-uniform approach of the individual Member States and to the existence of varying approaches in evaluation of the grounds claimed in asylum applications.[11]

Individual areas of regulation

Council directives are principally aimed at three areas. In the first area, the Council stipulates the minimum rules for the reception of asylum seekers; these rules are reflected in Directive 2003/9/EC (the Reception Directive). The second area concentrates on regulation of substantive law, i. e. setting the rules for determining to whom asylum is to be granted and specifying the actual contents of the concept of asylum in terms of substantive law – Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the Qualification Directive). The attention of the European Union is also aimed at the area of procedural law; the minimum standards for procedures in the Member States for granting and withdrawing refugee status are embodied in Council Directive 2005/85/EC (the Procedural Directive). Directives regulating asylum law also include Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive).

Conclusion

As discussed above, by stipulating the rules reflected in the above-specified Directives, the European Union aims to ensure that the Member States apply common criteria for determining which persons really require asylum (international protection)[12] and, on the other hand, to ensure that the extent to which these persons are provided with advantages and benefits is similar in all the Member States.[13] In terms of procedural law, the Directive lays down

[11] The common asylum system relying on basic regulation by the European Union and leaving a relatively wide autonomy to the Member States in setting rules that are more favourable for asylum seekers fails to avoid situations where an asylum seeker obtains international protection in one of the Member States, while another asylum seeker referring to the same grounds, but submitting his application in a different Member States, is not afforded such protection (cf. Comments from European Council on Refugees and Exiles on the Proposal for a Regulation of the European Parliament and the Council establishing a European Asylum Support Office, 2009).

[12] International protection is a new term in asylum law and represents a broader concept of the term "asylum", including not only the protection provided by asylum, but also "supplementary protection".

[13] In this area, the relevant Directive deals particularly with the possibility of integrating the asylum seeker into society and the related requirement for securing access to education and employment, as well as social and health care.

the fundamental procedural rights of asylum seekers, while leaving it to the discretion of the individual countries to determine the authority competent to assess the applications, i.e. to determine whether this power shall be entrusted to the judiciary or to the executive branch, or whether the applications shall be discussed, e. g., at the municipal level according to the place of submission of the given application. The basic requirements include the provision of charge-free legal advice and the right to remain in the territory of the given country until a ruling is made on the application for asylum, together with the right to lodge an effective remedy. Furthermore, special attention is paid to the position of unaccompanied minors.

Implementation of the rules thus set in the Directives at the level of the Member States of the European Union factually creates, in its aggregate, the mentioned Common European Asylum System. The will of the Member States to harmonize the common procedures is manifested in specification of the minimum standards, where each country is given autonomy to establish more favourable legislation. However, foreigner law increasingly tends to create a package of uniform rules, in terms of both substantive and procedural law, applicable in a uniform manner in all the Member States. The reform processes in the area of asylum law as part of home affairs and justice, which are aimed precisely to harmonize the individual national asylum systems, are contained in the Stockholm Programme, and the fulfilment of the given objective is envisaged in 2012. Another step consists in founding the European Asylum Support Office (EASO)[14], which, according to the draft regulation on its establishment, should focus on "*supporting practical cooperation on asylum, supporting Member States under particular pressure and contributing to the implementation of the Common European Asylum System, where however the main responsibility for asylum procedures will remain with the Member States".* This is thus not a body which should be competent to make decisions on asylum. Foundation of this authority and commencement of its activity is yet another step in constructing the Common European Asylum System, while nevertheless the individual Member States remain competent to set autonomous rules within their national asylum systems.[15]

[14] One of the important aspects of the Czech Presidency was building the Common European Asylum System in order to provide access to international protection to those who really need it, under equal conditions in all EU Member States. The Czech Republic will also strive for a considerable progress in the EU Council debate on the proposal for the Regulation on the European Asylum Support Office. See: Programme of the Czech Presidency in the Council of the European Union in the Area of Justice and Home Affairs (http://www.mvcr.cz).

[15] This article results from paper in book published in co-operation with The John Marshall Law School.