

Common procedure for asylum

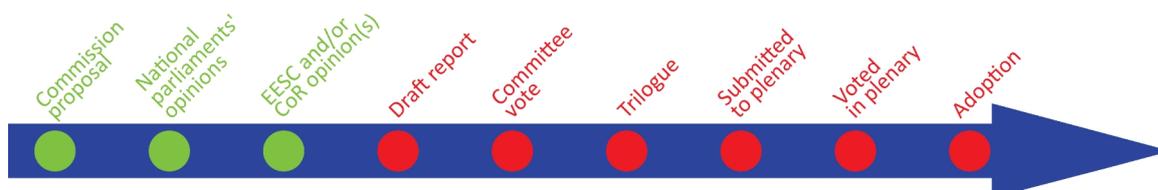
OVERVIEW

As one of five key acts of the common European asylum system (CEAS), the Asylum Procedures Directive sets out common procedures for Member States for granting and withdrawing international protection in accordance with the Qualification Directive. Following the large influx of asylum-seekers to the European Union since 2014, the directive came under criticism for being too complex and leaving Member States too broad a discretion, leading to differences in length of procedures and procedural guarantees, for example through the use of accelerated procedures and safe country lists.

As part of the reform of the CEAS, on 13 July 2016, the Commission published a proposal to replace the current directive with a regulation establishing a common procedure for international protection in all Member States. The choice of a directly applicable regulation is expected to bring about full harmonisation of the procedures, ensuring same steps, timeframes and safeguards across the EU.

Proposal for a regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU

<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2016) 467 13.7.2016
<i>Rapporteur:</i>	Laura Ferrara (EFDD, Italy)	2016/0224(COD)
<i>Shadow rapporteurs:</i>	Jeroen Lenaers (EPP, the Netherlands) Péter Niedermüller (S&D, Hungary) Ska Keller (Greens/EFA, Germany) Jussi Halla-aho (ECR, Finland) Cecilia Wikström (ALDE, Sweden) Marina Albiol Guzmán (GUE/NGL, Spain)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



Introduction

As part of the common European asylum system (CEAS), the [Asylum Procedures Directive](#) establishes common standards for procedures aimed at granting and withdrawing international protection, which in the EU context encompasses refugee status and subsidiary protection status. Alongside the [Qualification Directive](#), it sets an EU framework for national authorities who assess applications for asylum, i.e. protection given by a State on its territory to a person who is unable to seek protection in their country for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

While adhering to the same set of standards, national asylum legislations differ in the types of procedures used, the recognition rates for asylum applications and the protection status granted. The Commission, taking note of these divergences and addressing [shortcomings](#) amplified by increased [migratory flows](#) since 2014, announced a reform of the CEAS under its [European agenda on migration](#). On 13 July 2016, the Commission [proposed](#) to replace the current Asylum Procedures Directive with a regulation that would establish a common procedure for international protection in all participating Member States.

Existing situation

The Asylum Procedures Directive 2013/32/EU, which was recast and is applicable only since 21 July 2015, was aimed at harmonising standards for granting and withdrawing international protection by national authorities, in accordance with the Qualification Directive. However, the current situation is far from harmonised and has been [criticised](#) for being too complex and leaving Member States too broad a discretion to ensure that similar cases are treated alike. Procedures for obtaining and withdrawing international protection currently differ between Member States, for instance as regards the time taken for examining a claim, procedural guarantees provided to applicants, and the use of accelerated and inadmissibility examination procedures.

Recognition rates

One of the most criticised aspects in the functioning of the CEAS is that due to differences in the treatment of asylum applicants and their claims, the system motivates asylum-seekers to travel onward to Member States where their applications might have a higher chance of success. This results in secondary movements within the Schengen area, multiple applications in different Member States, uneven distribution of applications in the EU and ultimately renders the Dublin system unworkable.

[EASO's annual report 2015](#) shows that while EU+ countries (EU Member States, Switzerland and Norway) were relatively similar in terms of Syrian, Albanian and Kosovar applicant recognition rates, there were significant discrepancies between their recognition rates of applicants from countries such as Iraq (from 21 % to 98 %), Afghanistan (14 % to 96 %), Pakistan (2 % to 52 %) and Serbia (0 % to 38 %).

This does not necessarily mean that Member States have a different approach to recognising needs for international protection, although it is true that no EU-wide asylum status exists. The potential for a uniform status for asylum or subsidiary protection was provided after the entry into force of the Lisbon Treaty in 2009 (Article 78(2)(a) and (b) [TFEU](#)), but ultimately was not created in the recast CEAS completed in 2013.

However, EASO noted that the discrepancies in Member States' recognition rates can also be linked to the fact that asylum-seekers' profiles may differ across the EU. For instance, the number of applications from Syrians – the largest group of applicants in 2015, representing 28 % of all applicants in the EU+ – rose in 21 out of 30 EU+ countries, a rather broad dispersion. In contrast, applicants from Western Balkan countries (Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, and Serbia), accounting for 14 % of all asylum applications in EU+ in 2015, predominantly (72 %) applied for asylum in Germany.

Safe country concepts

Another aspect leading to different recognition rates derives from the differing use of admissibility and accelerated procedures, most notably the safe country concepts. Pursuant to Article 33 of the directive, 'Member States are not required to examine whether the applicant qualifies for international protection', where an application is considered inadmissible because the applicant comes from a safe third country or first country of asylum. The provision thus creates an option, not an obligation for Member States to use the admissibility procedure for such applicants.

The directive also permits the use of an accelerated procedure when the applicant comes from a safe country of origin. Article 36 of the directive sets out the criteria but leaves the Member States [discretion](#) to 'lay down in national legislation further rules and modalities' on its application. Thus, unsurprisingly, national [safe country of origin lists](#) are homogenous and some Member States (Spain, Italy, Poland and Sweden) do not apply the concept at all. The uneven use of admissibility and accelerated procedures can understandably lead to different recognition rates for similar asylum applications, and motivate asylum-shopping. Unfortunately, aggregated data on the use of admissibility and accelerated procedures in Member States is [not collected](#) systematically, making it difficult to evaluate current practices in light of the new Commission proposal.

Length of procedures

Under Article 31(3) of the directive, the maximum time limit for processing asylum applications under the regular procedure is six months from 'lodging of the application'. This evokes the specific steps in the current asylum procedure, differentiating between making an application (expressing the wish) and formally lodging an application. A recent Asylum Information Database (AIDA) [study](#) indicates that, while according to the directive all claims must be registered within three working days and lodged as soon as possible, in practice asylum-seekers often have to wait much longer to be able to formally lodge an application. Moreover, some countries have set timeframes significantly shorter than six months for the regular procedure, although in practice these are often more indicative than binding. This homogeneity increases as regards special, i.e. admissibility, or accelerated procedures. In its proposal, the Commission observes that national time limits to process such claims vary between a few days to five months.

Safe country concepts

First country of asylum

Country in which an applicant has received refugee status and can avail him or herself of that protection, or otherwise enjoys sufficient protection from *refoulement*.

Safe third country

Country through which an applicant transits, which is considered as capable of offering him or her adequate protection against persecution or serious harm.

Safe country of origin

Country whose nationals may be presumed not to be in need of international protection.

European Parliament starting position

The European Parliament took a stand on the asylum procedures in its [resolution](#) of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, underlining that common rules for asylum procedures are already included in the CEAS but have not been fully implemented by the Member States. The Parliament stressed that implementation is a key condition for achieving harmonisation and solidarity among Member States, who can, if needed, seek support from the European Asylum Support Office (EASO).

With regard to solidarity, Parliament noted that ‘harmonisation of reception conditions and asylum procedures can avoid stress on countries offering better conditions and are key to responsibility sharing’.

The Parliament observed that the current mechanisms have not managed to ensure a ‘swift access to protection’ and referred to inadmissible applications, subsequent applications, accelerated procedures, and border procedures as examples where the current Asylum Procedures Directive ‘tried to strike a delicate balance between the efficiency of the system and the rights of the applicants’. The Parliament acknowledged the Commission’s proposal for an EU list of safe countries of origin, aiming to replace diverging national lists with one common list to ensure uniform application of the concept. The Parliament warned, nevertheless, that any such list should not affect every applicant’s right for an individual examination of his or her claim for international protection. The Parliament reminded that under Article 3 of the [Geneva Convention](#), Member States have an obligation not to discriminate against refugees on the basis of their race, religion or country of origin.

Regarding detention, Parliament insisted that any form of detention required judicial control and called on Member States to ‘correctly apply the Asylum Procedures and the Reception Conditions Directives in relation to access to detention centres’ when alternatives to detention have been exhausted.

European Council starting position

The European Council of [18-19 February 2016](#) addressed the migratory challenge by calling for a reform of the CEAS to ‘ensure a humane and efficient asylum policy’.

A month later, the European Council of [17-18 March 2016](#) took note of the Commission communication ‘Next operational steps in EU-Turkey cooperation in the field of migration’, in particular as regards the concepts of ‘first country of asylum’ and ‘safe third country’ and how these could be applied in the context of the [EU-Turkey statement](#) of 18 March 2016.

Preparation of the proposal

In the European agenda on migration, the Commission listed a key action, under the third pillar, ‘Europe’s duty to protect: a strong common asylum policy’, to establish a CEAS monitoring system and provide guidance to ‘improve standards on reception conditions and asylum procedures’.

On 23 September 2015, the Commission complemented the migration agenda with a [communication](#) ‘Managing the refugee crisis’, setting out priority actions to be taken within six months. In this communication, the Commission explicitly called on Member States ‘to take urgent steps to transpose, implement and fully apply’ CEAS instruments, including the Asylum Procedures Directive.

The Commission assessed the progress of the priority actions in its [communication](#) of 10 February 2016, publishing the state of play of the implementation of EU law in [Annex 8](#). The Commission signalled 58 new [infringement](#) decisions taken after 23 September 2015, listing all letters of formal notice and reasoned opinions, including 21 on the transposition and implementation of the Asylum Procedures Directive.

On 16 March 2016, the Commission published a [communication](#) 'Next operational steps in EU-Turkey cooperation in the field of migration', ahead of the EU-Turkey statement of 18 March 2016. In its communication, the Commission discussed the legal safeguards for returning persons in need of international protection to Turkey. Pursuant to the [European Convention on Human Rights](#) and the [EU Charter of Fundamental Rights](#), every case needs to be treated individually following the procedures laid out in the Asylum Procedures Directive. Therefore, the Commission assessed, there is 'no question of applying a "blanket" return policy, as this would run contrary to these legal requirements'. At the same time, the Commission took note of the option to apply, in certain circumstances, an accelerated procedure without examining the substance of the application. These claims would be considered inadmissible on the premise that the applicant has already been recognised as a refugee or would have sufficient protection in a 'first country of asylum', or has come to the EU from a 'safe third country' that can provide effective access to protection.

On 6 April 2016, the Commission [announced](#) a reform of the CEAS. While admitting that proper application of the existing rules is essential to manage the situation, the Commission referred to the conclusions of the European Council of [February](#) and of [March](#) 2016, which called for reform to enhance both the protection and efficiency of the current system.

As part of the second implementation package presented on 13 July 2016, the Commission proposed the adoption of a regulation replacing the current Asylum Procedures Directive. The Commission explained that full harmonisation can best be achieved through a regulation, a directly applicable legal instrument that can be relied upon by individuals.

The changes the proposal would bring

In order to address the differences identified in the treatment of asylum applications, the proposal intends to establish a common procedure for international protection that would apply in the same way across the EU. In addition, not only would the procedure be the same in every Member State, but the intention is to make it 'faster, simpler and more effective'. The Commission explains that the new regulation will provide the necessary instructions for national authorities to decide on cases and also guarantee the same safeguards for asylum applicants throughout the EU. Some of the main changes introduced by the proposal are the standardised use of the safe country concepts, the mandatory inadmissibility procedure and the shortening of procedures.

Safe countries and inadmissibility

Article 36 of the current directive leaves Member States the discretion to set rules for the application of the safe country of origin concept and return the applicant to the country considered safe for the purposes of national asylum law. As discussed above, countries currently apply the safe country concepts to a diverging degree.

In the proposed regulation, this option is replaced by an obligation, pursuant to which national authorities 'shall assess the admissibility of an application', and 'shall reject an

application as inadmissible' if it is lodged by an applicant entering the EU from a first country of asylum or a safe third country. This wording does not leave discretion to the Member States and creates an obligation to reject those applications as inadmissible.

It is worth noting that countries of first entry are now required to assess the admissibility of a claim before processing the application on its merits, putting it ahead of any determination-of-responsibility procedure. Another procedural step is thus added, as well as a further obligation on the country of first entry.

Determining the new admissibility procedure's fit with the current Dublin logic might take reference from the recent [Mirza](#) judgment of the Court of Justice of the EU (CJEU). In the decision, delivered on 17 March 2016, the CJEU took a permissive view of the current application of the safe third country concept, stating that 'the Dublin III Regulation allows Member States to send an applicant for international protection to a safe third country, irrespective of whether it is the Member State responsible for processing the application or another Member State'. The decision specified that this right may also be exercised by a Member State after it has accepted that it is responsible for processing the application and within the context of the procedure to take back applicants.

Moreover, Article 38(2)(a) of the current directive requires Member States to set rules requiring a sufficient connection between the applicant and the third country, to ensure that it would be reasonable for him or her to return to that country. However, as [appears](#) in the light of the EU-Turkey statement, the Commission seems to have lowered the 'sufficient connection' threshold to accommodate the agreement.

Articles 44(3) and 45(3) of the proposed regulation include a safeguard that allows the applicant a right to challenge the application of the first country of asylum or the safe third country concept based on his or her 'particular circumstances', refuting the presumption of safety. The provisions specify that this could be done when the applicant lodges the asylum application or during the admissibility interview (which is maintained as per the current system). However, considering that the examination of the admissibility claim must be completed within ten working days, it leaves very little time for the applicants to substantiate their case.

Shorter procedures

The Commission proposes to maintain the duration for a regular procedure at six months from lodging the claim. Under the current system this can exceptionally be extended by a maximum of nine months in case of increased pressure to the national asylum system or in highly complex cases. The new proposal shortens this time limit significantly, suggesting three months for an exceptional prolongation. The regulation also introduces the option of suspending the procedure should any changes in the country of origin appear (to be assessed regularly by the proposed European Agency for Asylum, as specified in the proposed [qualification regulation](#)). In such cases, the maximum duration of the procedure would be 15 months.

For accelerated and inadmissibility procedures, which currently differ significantly across Member States, the Commission proposes to set the maximum durations of two and one month respectively.

Advisory committees

The Committee of the Regions is preparing an [opinion](#) 'Reform of the Common European Asylum System – Package II and a Union Resettlement Framework'

(rapporteur: Vincenzo Bianco, Italy), due to be adopted on 8 February 2017. The draft, discussed at the meeting of the Commission for Citizenship, Governance, Institutional and External Affairs on 24 November 2016, advised increasing the maximum length of the regular procedure from nine months to one year. It urged limiting authorities' discretion in refusing legal assistance and ensuring the right to remain for those who did not receive legal assistance during their first application. Regarding the third country concepts, the draft opinion stressed that a 'mere transit through a third country on the way to the EU ... cannot be considered sufficient grounds for returning the applicant to the country in question'.

The European Economic and Social Committee (EESC) addressed reform of the Asylum Procedures Directive in its [opinion](#) on 'Common European Asylum System Reform Package II' (rapporteur José Antonio Moreno Díaz, Spain), which was adopted at the plenary session of 14 December 2016 by 211 votes for, 2 against and 5 abstentions. The EESC recalled that setting rules in the form of a regulation should not lead to a reduction in protection standards. The Committee recommended eliminating the 'automatic application of the concepts of safe third country, first country of asylum and safe country of origin' and ensuring the same procedural guarantees for all procedures.

National parliaments

The subsidiarity deadline for the national parliaments was 4 November 2016. By December 2016, several national parliaments or chambers had completed their [scrutiny](#), and five (Czech Chamber of Deputies, German Bundesrat, Italian Senate, Portuguese Assembleia da República, and Romanian Chamber of Deputies) had initiated political dialogue.

Stakeholders' views

This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

Stakeholders have expressed support for the objective of achieving more harmonisation through the adoption of a regulation, but have also warned against lowering the overall standards and raised concerns regarding some elements of the proposal.

The [Meijers Committee](#), while agreeing that replacing the directive with a regulation could lead to greater harmonisation and allow asylum-seekers to rely directly on its provisions, fears that the change of legal instrument may lower standards currently in place in some Member States. The Committee observes that this is especially probable since one of the objectives stated by the Commission is to reduce 'pull factors'. The Committee is also critical of the proposed wider use of accelerated procedures, especially for applicants from 'safe countries of origin'. It recalls that the CJEU has ruled that this is only possible when asylum-seekers from those countries are allowed to fully exercise the right to seek asylum. The Committee warns against any automatic application of the accelerated procedures, especially when combined with detention, and questions the compatibility of the new procedure with the European Convention on Human Rights. It refers to the risk of violating Articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the Convention, especially in the light of the [Sharifi](#) judgment of the European Court of Human Rights.

The European Council on Refugees and Exiles (ECRE) noted, in its [comments](#) on the Asylum Procedures Regulation, that the proposal includes several improvements to the

current standards, but also some provisions that raise serious concern. While welcoming the extension of the obligation to provide free legal assistance in Article 15(1) of the proposal, ECRE firmly opposed the application of a ‘merits-test’ giving Member States the possibility to exclude the provision of free legal assistance and representation where ‘the application is considered as not having any tangible prospect of success’. In the same vein, ECRE expressed extreme concern regarding the use of the safe country and admissibility concepts by default. In its earlier report on the admissibility, responsibility and safety in European asylum procedures, ECRE observed that the concepts of admissibility and safe country are currently used in a limited and fragmented way. It argued that since there was no evidence-based knowledge on the use of these concepts, the Commission’s proposal to make the use of these concepts mandatory seemed inappropriate. The report emphasised that countries with greater experience in applying the safe country lists, often with judicial guidance, have clarified that mere transit or a short stay in a third country does not amount to a ‘sufficient connection’ with that country.

A similar view was expressed by the United Nations Refugee Agency (UNHCR) in its [legal considerations](#) on the return of asylum-seekers and refugees from Greece to Turkey under the safe third country and first country of asylum concepts. UNHCR asserted that the ‘first country of asylum’ concept should only be applied in cases where ‘a person has already, in a previous state, found international protection, that is once again accessible and effective for the individual concerned’. As regards the ‘safe third country’ concept, UNHCR underlined that this applies in situations ‘where a person could, in a previous state, have applied for international protection, but has not done so, or where protection was sought but status was not determined’. Both require an individual assessment of the case in accordance with the standards laid down by the 1951 [Geneva Convention and its Protocol](#) to ensure that not only the principle of *non-refoulement* is respected, but that ‘sufficient protection’ is available and that the third country readmits the person. UNHCR observed that while the directive does not define sufficient protection, an interpretation of the provision in the light of Article 18 of the EU Charter of Fundamental Rights would suggest it ‘goes beyond protection from *refoulement*’. Moreover, in its [recommendations](#) to the Slovak Presidency, UNHCR asked the latter to ensure that ‘discussions on further harmonisation of the CEAS are aimed at achieving an appropriate level of protection across the EU’ and that EASO and the European Commission are more engaged in achieving full compliance with the CEAS in all Member States.

Legislative process

The legislative proposal ([COM\(2016\)467](#)) was published on 13 July 2016. It falls under the ordinary legislative procedure ([2016/0224\(COD\)](#)). In the European Parliament, the proposal is assigned to the Civil Liberties, Justice and Home Affairs Committee (LIBE) where preparatory work for a draft report is underway. Laura Ferrara (EFDD, Italy) was appointed as the rapporteur. Opinions on the Commission proposal were to be presented by the Committee on Foreign Affairs (AFET) and the Committee on Employment and Social Affairs (EMPL), the latter however decided not to give an opinion.

On [13-14 October 2016](#), the Justice and Home Affairs Council endorsed the three-track approach suggested by the Slovak Presidency for the examination of the recast CEAS instruments, giving first priority to the regulations on Eurodac and the European Union

Agency for Asylum, followed by examination of the remaining CEAS instruments and finally working on the proposal for the Union resettlement framework.

On [8-9 December 2016](#), Justice and Home Affairs ministers discussed the CEAS reform and were briefed by the Slovak Presidency on the state of play of the files.

Work on the Asylum Procedure Regulation is ongoing in the Asylum Working Party, which examined Articles 1-18 of the proposal at its meetings on 8, 21 and 22 November 2016. The working party [noted](#) that there is general support for the aim of further harmonising asylum procedures in the EU, although Member States have also voiced substantive reservations, especially regarding certain aspects linked to the Dublin Regulation and other CEAS reform proposals.

The European Council of [15 December 2016](#) invited the Council to continue work on the CEAS proposals with the aim of achieving consensus on EU asylum policy during the incoming Maltese Presidency.

EP supporting analysis

European Parliament, EPRS briefing on [European Union Agency for Asylum](#), December 2016.

European Parliament, EPRS briefing on [Reception of asylum-seekers – recast Directive](#), November 2016.

European Parliament, EPRS briefing on [Resettlement of refugees: EU framework](#), October 2016.

European Parliament, EPRS briefing on [Recast Eurodac Regulation](#), October 2016.

European Parliament, EPRS briefing on [European Border and Coast Guard system](#), October 2016.

European Parliament, EPRS briefing on [Reform of the Dublin system](#), September 2016.

European Parliament, EPRS implementation appraisal of [Regulation 604/2013 \(Dublin Regulation\) and asylum procedures in Europe](#), April 2016.

European Parliament, EPRS briefing on [Arbitrary detention of women and children for immigration-related purposes](#), March 2016.

European Parliament, EPRS in-depth analysis on [Work and social welfare for asylum-seekers and refugees: Selected EU Member States](#), December 2015.

European Parliament, EPRS briefing on [EU legal framework on asylum and irregular immigration 'on arrival'](#), March 2015.

European Parliament, Policy Department C study on [The Reform of the Dublin III Regulation](#), June 2016.

European Parliament, Policy Department C study on [The Implementation of the Common European Asylum System](#), May 2016.

Other sources

[Common procedure for international protection in the Union](#), European Parliament, Legislative Observatory (OEIL).

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