GENERAL RAPPORT

PROFESSOR DR. KAY HAILBRONNER, L. L. M.
AND IMELDA HIGGINS BL

INTRODUCTION

The purpose of this General Report is to examine critically national laws and policies in the area of migration and asylum as compared with EU law and policy in this area. The information in the Report is derived from responses received to a questionnaire which was circulated to National Rapporteurs from twenty five European countries: twenty of those countries responded. These countries can be loosely divided into: 1) EU Member States who also participate in Schengen, namely Austria, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden, and Portugal, 2) EU Member States who partially participate in Schengen: Denmark, Ireland, and the UK, 3) EU Accession countries: Estonia, Hungary, Latvia, Malta, and Poland, 4) EEA Member States: Norway and Switzerland, 5) Others: Croatia.

The objective of this General Report differs somewhat from those of the national reports in so far as it is confined to considering issues of particular relevance to EU law and policy. Consequently, not all questions raised in the questionnaire are considered in this Report and in particular those aimed at obtaining information on national structures or procedures.

This General Report will follow the same structure as the questionnaire which was divided into four parts. Part 1 of the General Report, therefore, relates to entry, visa regime and border control. Part 2 deals with admission and residence of third country nationals. Part 3 is concerned with asylum and refugee law. Part 4 pertains to termination of illegal residence, return and repatriation.

In the context of each of the four parts, particular emphasis is placed on the following points:

– implementation of existing EU legislation in the field of migration and asylum law;
– compatibility of national migration and asylum law and policies with pending EC directives and regulations, particularly on asylum procedure, legal status of third country nationals and definition of refugees;

– Prospects and conflicts concerning draft directives and communications of the European Commission on the future development of a European migration and asylum law;
– Long term perspective of EU legislation in the field of migration and asylum law and policy.

PART I ENTRY, VISA REGIME AND BORDER CONTROL

The focus of this part of the General Report is on measures taken against the illegal entry and stay of third country nationals relating to the EU-visa regime and the Schengen rules on border control and the issuance of Schengen visas.

The system of issuing visas is central to the control of illegal entry. In relation to this system, two issues are of particular relevance from an EU perspective. Firstly, control over successive or duplicate visa applications and, secondly, the applicable substantive criteria for issuing or refusing visas.

Procedures for avoiding duplicate or successive visa applications at different EU-consulates

With regard to controlling successive or duplicate visa applications, in so far as Schengen countries are concerned, the Common Consular Instructions on issuing visas require competent authorities to afix a stamp on travel documents when a visa application is made to a Schengen Member State. Where such a stamp is affixed, this constitutes a clear sign to other competent authorities that an applicant has previously submitted an application and may serve to prevent duplicate or successive visa applications. However, one of the weaknesses of the system lies in the fact that, in many cases, migrants do not have travel documents or any other means of identification. Moreover, even where travel documents do exist, the existence of a stamp does not always bar an applicant from making another visa application in another country. Thus, according to the Italian National Report, there is no ban on re-applying for a visa after a refusal.

Aside from afixing a stamp pursuant to the Common Consular Instructions, none of the National Reports indicate any other way of ascertaining whether an applicant has made successive or duplicate applications. Moreover, some countries outside the Schengen area only record the decision to issue or refuse a visa in the travel documents rather than an application

per se[1]. It therefore appears, that, until a decision is made on the application there is no way of knowing how many other applications have been submitted by the relevant applicant.

Some National Reports indicate difficulties in controlling successive or duplicate visa applications in the same country. It appears that, while some countries have either systematic[2] or ad hoc checks[3] on whether successive or duplicate visa applications have been made to other competent authorities of that country e.g. to a number of consulates, others do not.

It is likely that the effective implementation of Eurodac will facilitate the more effective identification of duplicate or successive visa applications.

Substantive criteria for granting/refusing visas

In so far as the requirements for issuing visas are concerned, while the Schengen minimum requirements[4] have harmonised the law in this area to some degree, a number of National Reports indicate that other requirements are also imposed[5]. Of these, the most common concerns appears to be those of ensuring that the applicant does not overstay the period for which the visa is granted[6] and has health insurance[7].

[1] See the Latvian National Report.

[2] Estonia has a common visa register which avoids the possibility of duplicate or successive visa applications at different Estonian missions.

[3] Hungary has regional consular checking sections to prevent duplicate or successive visa applications. Hungary's N-VIS is able to check attempts at national level.

[4] Article 5

1. For visits not exceeding three months entry into the territories of the Contracting Parties may be granted to an alien who fulfils the following conditions:
   (a) in possession of a valid document or documents permitting them to cross the border, as determined by the Executive Committee;
   (b) in possession of a valid visa if required;
   (c) if applicable, submits documents substantiating the purpose and the conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to their country of origin or to travel in transit in a Third State, into which their admission is guaranteed, or is in a position to acquire such means legally;
   (d) has not been reported as a person not to be permitted entry;
   (e) is not considered to be a threat to public policy, national security or The international relations of any of the Contracting Parties.

[5] See e.g. the Netherlands Report, the Luxembourg Report, the Spanish Report, the Danish Report, and the Austrian Report.

[6] See e.g. the Netherlands Report; the Luxembourg Report, the Spanish Report, the Danish Report.

[7] See e.g. the Austrian Report, the Latvian Report.

Visa tracking procedures

In contrast to the situation with regard to the issuing of visas, which appears to be subject to systematic rules and procedures in all countries, few countries have any systematic procedure for identifying visa overstayers. Consequently, staying in a country illegally appears to be much easier than entering that country illegally in the first place. In this respect, it appears from the National Reports that most countries depend on adhoc procedures for identifying visa overstayers such as: random identify checks; inspection of premises; information received from the general public; checks on applications for renewal or at exit controls. However, some countries are making attempts to improve the identification of visa overstayers, particularly through the construction of centralised data banks[8].

Collection of Biometric Data

To date[9] it appears that no country ordinarily[10] collects biometric data from visa applicants, such as fingerprints[11].

Schengen Blacklisting

The National Reports contain very little information on the issue of the refusal of Schengen Visas due to blacklisting by other Schengen Member States: only the Spanish report indicates the existence of such a decision. The absence of information on this point would appear to indicate that such refusals are not common, although the dearth of information may be

[8] See e.g. the Maltese Report.

[9] The Netherlands is currently investigating the collection of biometrical data to identify incoming travellers.

[10] Poland, under the Alien Act 1997, may collect finger prints in the following circumstances: illegal entry, save in situations where an alien entered unintentionally and subsequently was immediately escorted to the border; issuing an expulsion order; and detaining an alien who does not comply with an expulsion order or who is a situation justifying expulsion. In addition, fingerprints are collected from aliens seeking protection under the Aliens Act 2003.

[11] According to the UK Report, while applicants for British visas or entry clearance are not ordinarily required to provide biometric data, s. 126 of the Nationality Immigration and Asylum Act 2002 empowered the Secretary of State to provide "specified information" about their "external physical characteristics". Relying on that power, a trial of compulsory fingerprinting of visa applicants began in Sri Lanka in July 2003, and the Government indicated in August 2003 its desire to extend the principle to other states.

due to the fact that decisions on this issue are not being published. Clearly, the successful prevention of duplicate or successive visa applications is dependent on the various member states respecting decisions taken by other Member States on visa applications. The alternative is wide spread visa shopping and a wasteful use of resources as investigations carried out in one Member State are repeated by another.

Action programme for administrative co-operation in the field of external borders, visa, asylum and immigration

The action program of administrative co-operation in the field of external borders, visa, asylum and immigration (Argo) essentially offers the Member States the possibility of having co-operation programmes co-financed by the Community. Programmes between Member States and between Member States, accession countries and third countries are all eligible. In so far as Member States are concerned, neither Italy nor Luxembourg appear to have taken advantage of the Argo programme. However, Germany, Greece, Austria and Spain all have programmes in place which are financed by Argo[12].

As was to be expected, the type of programmes carried out within the Argo framework varies widely. Germany has established a central border within its' Ministry for the Interior in which common action on the part of border police is co-ordinated. For example, mixed nationality teams may inspect busses in Germany, Austria, and Italy. At the beginning of 2003, there were in total 17 projects with the aim of harmonising the working procedures of border police. Greece has been the leader country for two projects. These projects concerned, respectively, an operation on migration pressure at the Eastern external land borders of the EU and an operation on sea border control in the South-eastern Mediterranean. Greece has also participated in a series of other projects led by other Member States. Moreover, Greece has submitted a proposal for the establishment of a Joint Sea Borders Co-ordination Centre in Greece. Spain has organised "Ulysses", which is a joint operation for co-ordinating the control of maritime external borders in the Mediterranean area in the first half of 2003, and in the Canary Islands in the second half of 2003.

While neither Portugal nor the Netherlands have any on-going cooperation programmes under ARGO, both those countries together with the

[12] The Swiss Report also refers to co-operation programmes but it is not altogether clear to what extent, if any this co-operation takes place within the context of Argo.

UK have organised a seminar which will took place in March 2004 and which was financed by ARGO.

With regard to the non-Member States, Malta is involved in a Twinning project between the Maltese, Spanish and UK immigration authorities which has as one of its objectives, the creation and maintenance of a computerised system of data collection and preservation to make it easier to track visa overstayers.

From some of the responses given in the National Reports it appears that at least some countries appear to believe that Argo is only of relevance to Schengen Member States[13].

Carrier Sanctions

Directive 2001/51 EC concerns the imposition of obligations on carriers and sanctions for breach of such obligations and extends the obligations imposed on Member States pursuant to Article 26(1)(a) of the Schengen Convention. The date for implementation of that Directive was the 11 February 2003. The Directive was to have been implemented by each of the Schengen member states, Denmark, the UK, Ireland and Norway. The Directive is also of relevance to accession countries. In so far as the member states are concerned, the Directive has been implemented by Austria, Denmark, Germany, Greece, Spain, Italy, Ireland, Portugal[14], the UK and Norway. However, neither Norway nor Denmark have adopted any specific implementation measures as they consider that their existing legislation already complies with the provisions of the Directive. Sweden has adopted legislation which will come into force on 1 July, 2004. Neither Luxembourg nor the Netherlands have implemented the Directive as of yet. In so far as the Accession countries are concerned, Estonia, Poland, and Latvia have all taken measures to implement the Directive. Hungary also imposes carrier sanctions, as does Croatia.

There appears to be little information regarding the application of the Directive. However, a number of countries already applied carrier sanctions under national law and these countries appear to have achieved some success in the implementation of the same[15].

[13] See e.g. the following National Reports: Ireland, Latvia, and Hungary.

[14] Although there appear to be some disparities between the Directive and the implementing legislation.

[15] See e.g. the Polish Report, the Danish Report, the Lithuanian Report and the German Report.

Compatibility of National law and policy regarding Visas with EU Standards

No National Report identifies any significant degree of incompatibility between national law and policy and EU standards. Moreover, all National Rapporteurs appear to consider that there is a clear need for further harmonisation of visa obligations. Regarding the establishment of the European Visa Identification System (VIS and SIS II), while most Rapporteurs were enthusiastic some adopted a more cautious approach. Thus, the German Report identifies certain difficulties such a system may present for data protection law. Similarly, the Italian Report emphasises the need to ensure transparency, the right of access to and information about personal data stored in the data base and the right to ask for the removal of data from the database.

Impact of Enlargement

The extent to which the EU enlargement process is considered as positive or negative seems to turn largely on whether or not the respondent considers that it will be possible to institute effective control over the new external borders. Thus many National Rapporteurs welcome enlargement as a means of strengthening controls in areas which are perceived as currently vulnerable (FN). On the other hand, some consider that enlargement will increase rather than eliminate the impact of this vulnerability on the Schengen area (FN).

PART II ADMISSION AND RESIDENCE OF THIRD COUNTRY NATIONALS

This subject deals with the rules of admission and residence of third country nationals, in particular with regard to the following:

- entry and residence for the purpose of paid employment and self employed activities
- entry and residence for the purpose of studies, vocational training or voluntary service
- the status of third country nationals who are long term residents
- entry and residence for the purpose of family reunion.

Each of these issues is currently either the subject of a Commission proposal or of a recent directive.

Admission of third country nationals for labour purposes or self-employed activities

With regard to the admission of third country nationals for labour purposes or self-employed activities, the most important development at EU level is clearly the Proposal for a Directive on conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed activities[16]. This Proposal pursues a number of aims including the following:

1. laying down common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, based on concepts, which have already been successfully applied in Member States;
2. laying down common criteria for admitting third-country nationals to employed activities and self-employed economic activities ("economic needs test" and "beneficial effects test") and opening different options for demonstrating compliance with these criteria;
3. providing procedural and transparency safeguards, in order to assure a high level of legal certainty and information for all interested actors on Member State rules and administrative practice in the field of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities;
4. providing a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act, in order to simplify and harmonise the diverging rules currently applicable in Member States;
5. providing rights to third-country nationals whilst respecting Member States discretion to limit economic migration.

Ireland has opted in to the Proposed Directive, while the UK has opted out in order to maintain control over the procedure and content of its admission policy[17].

It is clear from the National Reports that should this Proposal be adopted, it will require a number of changes in the various national laws, particularly with regard to admission for labour purposes. In this respect, the main changes, which will be required by the Proposal, relate to the following provisions: the provision of a single application procedure for

[16] COM 2001, 386 final. [17] See the UK Report.

entry for the purpose of paid emploment: the right of the migrant to apply for the work permit him/herself; the right of the migrant to apply for a work permit from within the country concerned; the right to change employers; the ability to limit work permits to certain regional districts.

With regard to application procedures, Article 4(1) of the Proposal provides that Member States shall only authorise third-country nationals to enter and reside in their territory for the purpose of exercising activities as an employed person where a "residence permit – worker" has been issued by the competent authorities of the Member State concerned in accordance with this Directive. The Proposal therefore envisages a single permit for the purpose of entry, residence, and employment. According to the National Reports of Luxembourg, the Netherlands, Greece, Ireland, United Kingdom, and Latvia[18] these rights are currently subject to two or more separate procedures and separate application procedures are applied.

Article 5(1) of the Proposal provides that, in order to obtain a "residence permit – worker", a third-country national intending to exercise activities as an employed person in a Member State shall themselves apply to the competent authority of the Member State concerned. The future employer of a third-country national is also given the right to submit an application on behalf of the third-country national applicant. Currently, pursuant to the laws applicable in a number of countries, it appears that a third-country national does not him/herself have the right to submit the application[19].

Article 5(2) of the Proposal provides that Article 5 applications for a "residence permit – worker" may be submitted directly in the territory of the Member State concerned, if the applicant is already resident or legally present there. According to the Italian National Report, legally resident or present applicants do not have a right to submit an application directly in Italy. This is also the situation in Greece.

Pursuant to Article 8 of the Proposal, a "residence permit – worker" shall initially be restricted to the exercise of specific professional activities or fields of activities. It may also be restricted to the exercise of activities as an employed person in a specific region. Neither Italian nor Greek law currently provide for either of the latter restrictions. However a number of States only issue work permits for specified persons for a specified jobs[20].

[18] According to the Latvian National Report, sometimes the issuing of a work permit and residence permit is under a single administrative procedure while sometimes it is not.

[19] Italy, Greece, UK, Malta, Croatia.

[20] See e.g. Ireland and the UK.

In contrast, the Directive reflects the situation in most member states whereby a post can only be fulfilled by a third country national after a thorough assessment of the domestic labour market situation[21].

With regard to the entry and residence of third country nationals for self-employed activities, it appears from the National Reports that fewer changes will be required in national law in order to implement the Commission's proposals in this respect.

Admission of third country nationals for study and vocational training

In so far as the Commission's proposal on the admission of third country nationals for study and vocational training is concerned, Ireland has also opted in to that Proposal while the UK has again opted out so as to retain freedom of action in its approach to third country students. According to the UK National Report, Britain attracts considerably more third country students than other Member States of comparative size. Britain had specific reservations concerning the proposed right of students admitted in other countries. A second reservation was that Britain did not wish to allow in-country applications for admission to student status. On the other hand, in common with the proposal, Britain does permit third country students to engage in paid employment for up to 20 hours a week during term and without limit outside term time.

From the National Reports, it appears that the most significant difference between the Commission's Proposal and national legislation lie in the following factors:

– permitting students to engage in limited employment (Luxembourg, Germany, Greece, Malta)
– entry as a volunteer (Italy, Portugal, Spain, Estonia)
– mobility provisions for third country nationals studying in other Member States.

Legal status of third country nationals in possession of a long term residence permit of another Member State

With regard to the legal status of third country nationals in possession of a long term residence of another Member State, the proposal for a Directive focuses on two central issues. Firstly, the terms for conferring

[21] See e.g. Luxembourg, Denmark, Portugal, Sweden, Austria, Spain, Greece, the Netherlands.

and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto. Secondly, the terms of residence for third country nationals enjoying that status in Member States other than the one which conferred long-term status on them. Both the UK and Ireland have opted out of the Proposal.

It appears from the National Reports that implementation of this Directive will require substantial modifications in national laws. Currently a significant proportion of countries do not accord any specific rights to third country nationals in possession of a long term residence permit of another Member State[22].

The Right to Family Reunion

In contrast, it appears that the standards contained in the Proposal for a directive on the right to family reunion agreed by the Council in February 2003 are either similar[23] to or lower[24] than those which currently apply in many countries. Nevertheless it appears that the Directive may have a positive impact on some aspects of national law regarding e.g. the minimum age of sponsors and spouses, the spouse's right to work[25], spouses access to vocational education and training[26]; limitation on the administration's discretionary powers[27], period of lawful residence of sponsor.

With regard to the higher standards of protection provide under national law, the following issues were mentioned in the National Reports:

- Scope of application of the right to family reunion is broader in national law than under the Directive (UK, Portugal, Croatia)
- The Directive permits countries to retain minimum age requirements of up to 21, under national law the minimum age is 18 for the sponsor and 16 for the spouse (UK)
- No possibility under national law to apply an integration test for children over 12 who arrive independently of the rest of the family: States have the option of applying such a test under the Directive (UK, Italy, Portugal, the Netherlands)

[22] Austria, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, Norway, Hungary, Latvia, Estonia, Malta, Ireland.
[23] Austria, Germany (?), Luxembourg, Greece, Spain, Poland, Hungary, Latvia, Estonia.
[24] Sweden, Netherlands, Portugal, Italy, UK, Croatia.
[25] Luxembourg. [26] Greece. [27] Greece.

– No restriction on the admission of children over 15 (UK, the Netherlands)
– Period of lawful residence under national law less than the maximum permitted by the Directive (Portugal, Croatia)
– Directive permits Member States to subject the right of a spouse to an autonomous residence period to a longer waiting period than that envisaged under national law (Portugal)
– Under Article 5(5) of the Directive, Member States are required to have 'due regard' to the best interests of minor children whereas national law requires their interests to be a 'primary consideration' (the Netherlands).

Of those countries whose national law applies a higher standard protection for families, it appears that the majority do not envisage that the Directive will result in a lowering of these standards[28]. However, the position is not yet clear in some countries[29] and some National Reports do reflect the concern that the Directive may lead to such a lowering of standards[30]. Moreover, some National Reports raise concerns regarding the compatibility of the Directive with established international standards of family protection such as Article 8 of the European Convention on Human Rights[31].

Both the UK and Irish National Reports indicate that those countries do not intend to implement the Directive. In this respect, it appears that the UK government feared that participation in the Directive might have "removed the UK's ability to formulate and adjust policies in relation to family reunification as a matter of domestic law". The Directive is also subject to the Danish reservation under the 1997 Protocol. Were Denmark to participate in the Directive a number of amendments in Danish law would be required.

Rights of long-term third country nationals

With regard to the proposal for a Directive on the rights of long-term third country nationals, agreed upon by the Council on 5 June 2003, while the national legislation of some countries is largely compatible[32], others have indicated that implementation of the proposal will require significant changes in national law as some or all of the principles underlying the

[28] Germany, Austria, Estonia, Latvia, Hungary.
[29] According to the Italian National Report there is of yet no government position on this issue.
[30] Portugal, the Netherlands, Poland. [31] Netherlands, Poland.
[32] Portugal, Netherlands, Latvia, Estonia, Poland.

Directive are new[33]. In so far as changes required in national law by the Directive are concerned, the Reports refer, in particular to the following

– Reasons for which expulsion may be ordered (Luxembourg, Greece)
– factors taken into account with regard to expulsion (Luxembourg, Greece)
– right of residence in another EU Member State (the vast majority of countries)
– the concept of civic citizenship and the integration of third country nationals (Italy, Greece).

The Latvian National Report raises significant concerns regarding the issue of whether or not Latvian "non-citizens" are covered by the Directive. While the Directive refers to third country nationals, the Commission pointed out in a specific letter that, as regards Latvia, the term "third country national" includes persons who do not have citizenship. This is a very sensitive and political issue in Latvia, and it is feared that the inclusion of non citizens within the scope of the Directive could hamper the process of naturalisation be removing the incentive for such persons to acquire Latvian citizenship.

Denmark, Ireland and the UK are not participating in this Directive.

Role of Community Organs in determining a European Migration Policy

With regard to the role of the Community organs in determining a European migration policy in terms of competencies of the Member States to decide on residence rights and admission to the labour market and integration, most National Reports adopt a very cautious approach to this issue. In this respect, questions were raised regarding the legal basis for such a role: the Portugese Report points out that the competencies of the Community are limited by Article 63 of the Treaty of Amsterdam and by the principles of proportionality and subsidiarity. Moreover there appears to be a lack of political will towards making progress in harmonisation in this area with much emphasis on the need for countries to retain competence[34]. However, some enthusiasm for further harmonisation in specific areas is evident[35]. In particular, according to the Luxembourgish Report, some level of harmonisation is necessary to deter migrants from country shopping[36].

[33] Sweden, Luxembourg, Italy, Denmark, Greece, Spain, Hungary.
[34] Italy, Germany, Latvia, Hungary, Greece.
[35] Portugal, Italy, Sweden.
[36] Luxembourg.

PART III ASYLUM AND REFUGEE LAW

This Part primarily concerns the impact of EU asylum legislation upon national laws and practices. Three major topics arise from the directives that have been adopted or are pending, namely: reception of asylum seekers; asylum procedures; and exclusive competence and burden sharing.

The Dublin Rules

In so far as the Dublin Rules are concerned the following problems were identified

- the procedures to establish the Member State responsible for assessing an asylum application are too long (Germany, Sweden, Denmark, Norway, Portugal, Netherlands)
- the time limits set out in the Convention are too long (Germany, Sweden, Denmark)
- the proofs for establishing competence (Germany, UK)
- the Rules do not assist in preventing multiple applications (Netherlands)
- Interpretative difficulties (Germany, Luxembourg, Spain).

The following expectations exist with regard to the Dublin II Regulation No 343/2004,

- faster decision making procedures (Germany, Sweden, Norway, Greece)
- stricter time limits (Italy)
- clarification regarding several interpretative issues (Germany, Luxembourg)
- improved burden sharing (Luxembourg)
- relaxation of proofs required (UK).

Some National Reports mention that the new procedure is regarded as being too complicated[37], that it does not introduce any qualitative change in the Convention procedure and leaves administrative authorities too much discretion[38]. However, most expect that it will be an improvement compared to the Convention. National Reports from the Accession countries indicate that they expect that implementation of the Dublin rules will lead to an increase in asylum applications[39].

[37] Germany. [38] Portugal. [39] Poland, Estonia, Hungary.

Eurodac

It appears that Eurodac is now effective in most Member States[40] and some EEA countries[41]. While some national reports indicate a marked increase in Dublin cases as a result[42], others do not see any clear link[43]. Eurodac will become effective in the Accession countries after accession and according to the National Reports, preparations are already under way in Estonia, Lativa, and Poland. Croatia is in the process of making its system compatible with Eurodac.

Minimum Standards on Procedures for Granting and Withdrawing Refugee Status

With regard to the amended proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, while many countries already, for the most part, comply with the Directive it appears that implementation will nevertheless require a number of changes[44]. In particular, the following areas of national legislation may be affected: rights of applicants in the procedure; administrative and judicial appeal procedures; the use of safe third country and safe country of origin concepts; detainment of asylum seekers; airport and border procedures.

the rights of applicants in the procedure:

- ensuring the asylum seeker's right to be informed regarding his rights and duties in a language known to him (Germany, Malta)
- Linguistic assistance (Ireland)
- the implementation of procedural time limits (Germany)
- Introduction of normal and accelerated procedures or amendments to legislation providing for such procedures (Luxembourg, Netherlands)
- Application of the principle of the benefit of the doubt contained in Article 16 of the Proposal (Norway, Estonia)
- Income (Malta)
- Right to work (U.K.).

[40] With the exception of Denmark. [41] Norway.
[42] Norway, Luxembourg, Sweden, Germany, Austria, Greece.
[43] The Netherlands, Portugal, Italy, Spain. [44] Germany, Sweden.

Administrative and judicial appeal procedures

– elimination of the possibility of referring a case to the Government[45]
– introduction of the possibility of staying in the country pending determination of an appeal (Italy, Estonia)[46]
– No express recognition of the right to a legal advisor (Italy, Austria)
– Right of access to national courts (Denmark, Malta, Greece).

use of safe third country and safe country of origin concepts

The vast majority of countries already apply these concepts. However, according to the Luxembourgish National Report, the concept of a safe third country is not often applied due to difficulties relating to proof and the question of re-admission agreements. The Directive will not change this. Nevertheless, the fact that the Directive includes a list of safe countries of origin will enable countries to apply the accelerated procedure to applicants from those countries[47].

Detainment of Asylum seekers

– restraints on the government's right to detain asylum seekers – Malta

Airport and Border procedures

It appears that the vast majority of countries do not provide for the application of specific procedures at airports and borders

Reception of Asylum Seekers

With regard to the implementation of Directive 2003/9, a substantial majority of countries have not yet implemented the Directive or have only partially done so, namely: Austria, Greece, Portugal, the Netherlands, Italy, Luxembourg, Spain, and Sweden. National Reports from these countries indicate the following areas of incompatibility:

– asylum seekers submitting a second application are excluded from reception facilities without any individual examination of their circumstances: this appears contrary to Article 16(4) of the Directive (Netherlands)
– no right of access to the labour market (Italy, Luxembourg)

[45] Sweden.
[46] Member States are permitted to keep their national rules if adopted before the Directive.
[47] Luxembourg.

Norway, Denmark, and Ireland do not intend to implement the Directive. Norwegian law generally corresponds with the Directive. In so far as Denmark and Ireland are concerned the main point of difference seems to relate to access to the labour market.

In so far as the accession countries are concerned, while many National Reports[48] indicate that national law is generally compatible with the Directive there are some differences, principally concerning the issue of access to the labour market[49]. Some National Reports indicate that implementation of the Directive will necessitate major changes[50] in National law.

Temporary Protection

The Directive on temporary protection has been implemented in a number of countries[51]. However, even those Member States which have not implemented the Directive yet or which do not intend to implement the Directive have national provisions for temporary protection[52]. None of the National Reports identified the existence of provisions relating to burdensharing either in existing or in pending legislation.

With regard to the accession countries, a number intend to implement the Directive by the time of accession or shortly thereafter[53]. As is the case with EU/EEA Member States, many accession countries already have provisions relating to temporary protection[54]. However, the establishment of temporary protection measures has also been identified as a priority area in a number of countries[55].

Minimum Standards for the qualification and status of third country nationals as refugees or persons otherwise in need of international protection

In so far as the principles for a directive on minimum standards for the qualification and status of third country nationals as refugees or persons who otherwise need international protection, a number of National Reports indicate that as they now stand, these principles will require few changes in national law[56]. Other National Reports indicate that the

[48] Poland, Latvia, Estonia. [49] Poland, Latvia, Malta, Hungary, Estonia.
[50] Malta. [51] Sweden, Italy, Portugal, Austria, Spain (?).
[52] Norway, Luxembourg, Denmark, Germany, Greece, Ireland.
[53] Estonia, Hungary. [54] Hungary, Latvia, Poland. [55] Estonia, Malta.
[56] The Netherlands, Portugal, Latvia, Hungary.

following differences exist between the situation under national law and the Proposal

– the definition of refugee (Italy, Luxembourg, Norway, Sweden, Spain)
– the concept and definition of persecution and particularly the issue of non-state persecution (Italy, Germany, Estonia)
– the existence and scope of the status of subsidiary protection (Luxembourg, Sweden, Greece, Ireland, Denmark, Spain, Malta, Estonia, Croatia)
– the recognition of refugee status to family members (Italy)
– the length of the permit of stay issued to refugees and beneficiaries of subsidiary protection (Italy)
– exclusion clauses (Luxembourg, Sweden (?))
– the question of internal flight (Spain)
– recognition of refugee status to a person benefiting from temporary protection (Switzerland).

Common European Asylum Procedure and Uniform Status for Asylum Seekers

The Commission's concept of a common European asylum procedure and uniform status for those who are granted asylum valid throughout the Union seems to be regarded with a certain degree of enthusiasm by Member States[57] provided it does not lead to a relaxing of Member State laws in this field[58]. Few national governments appear to share the concerns of refugee organisations that such a policy would lead to an undermining of the international regime for refugee protection[59]. However, in this respect, the Portuguese National Rapporteur points out that the tendency of the European Union to-date has been to confine itself to establishing minimum standards in this area. This has to some degree legitimises the protective approach adopted by some Member States. Moreover, it also encourages Member States who have previously adopted a more generous approach to harmonise down the level of protection afforded to asylum seekers. Consequently, the fears of refugee organisations appear justified with regard to current EU policy.

[57] Germany, Sweden, Luxembourg, Portugal, Greece, Latvia, Poland.
[58] Germany.
[59] The Green party in Germany has such concerns as does the Dutch government.

Open Co-ordination Mechanism

With regard to the open coordination-mechanism suggested by the Commission, providing for first stage and second stage legislation ultimately leading to full harmonisation, there appears to be little discussion of this suggestion. The Portugese Report indicates that, in any event, the Union currently lacks the legal basis necessary for moving towards full harmonisation. Moreover, along with requiring an amendment of the Treaty, full harmonisation would require the revision of the Geneva Convention and the New York Protocol as these only permit states to be contracting parties.

Development of an accessible, equitable and managed asylum system

The reaction to the UK paper also appears somewhat muted. In those countries in which the paper was discussed, the response seems to have been largely unfavorable[60], although the proposals contained in the paper have not all been rejected out of hand[61]. In addition, as might be expected the enthusiasm with which concepts such as e.g. burden sharing are welcomed by a country depends to a large extent on its popularity as a destination for asylum seekers[62]. The Greek National Report reports concerns that the proposal will lead to the disappearance of the notion of territoriality in asylum matters and the non application of the Geneva Convention.

PART IV TERMINATION OF ILLEGAL RESIDENCE, RETURN AND REPATRIATION

This Part of the questionnaire focuses on the national measures concerning sanctions against illegal entry, other measures against illegal trafficking, problems related to the termination of residence of third country nationals not disposing of a valid residence permit, and co-operation with other EU Member States in return and expulsion issues.

Third Country nationals without a valid residence permit

With regard to the existence of third country nationals without a valid residence permit in the national territory, all National Reports indicate

[60] Germany, Sweden, Luxembourg, Portugal, Italy, Greece.

[61] It does appear, however, that Germany is completely against the idea of externally located asylum camps.

[62] Contrast, in this respect, the German and Portuguese Reports.

the presence of such nationals, although, as might be expected, few could give reliable figures on the numbers of such nationals. National Reports indicate the following difficulties with regard to national enforcement procedures

– lack of identification papers (Norway, Sweden)
– lack of re-admission agreements (Sweden, Luxembourg, Hungary)
– the number of persons absconding (Sweden, Ireland).

Facilitation of unauthorised entry, transit and residence

With regard to the Directive of 28 November 2002, dealing with the facilitation of unauthorised entry, transit and residence, so far, only Germany, Spain and Portugal, Lativa and Poland have fully transposed this Directive. However a number of National Reports indicate that only minor amendments will be required in national law in order to fully implement the Directive[63]. The Croatian National Report indicates that Croatian Law also substantially corresponds to the Directive.

Penalties for smuggling and trafficking

Concerning the harmonisation of penalty scales for the crime of smuggling migrants and trafficking of persons in line with the Budapest June 2003 recommendations and Council Directive 2002/90, as mentioned, only Germany, Spain, Portugal, Lativa and Poland have implemented the Directive. The following countries have signed relevant UN protocols on the smuggling of migrants: Norway, Spain, Ireland, Italy, Sweden, Portugal, Greece, Switzerland, Poland, and Latvia. A number of the National Reports indicate that although signed, the protocols have not yet been ratified: Italy, Sweden, Portugal, and Greece.

Mutual Recognition of Expulsion Decisions

Council Directive of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals has been implemented by Portugal, Denmark, Sweden, the Netherlands, Norway, Spain, and Hungary. However, the Portugese Report raises certain concerns regarding the manner in which the Directive has been transposed by that Member State.

[63] Greece, Ireland, Norway, Italy.

In particular, it appears that the implementing legislation has failed to distinguish between Portugal as the author of an expulsion decision and the state responsible for implementing such a decision.

The following suggestions were made regarding shortcomings of the Directive which should be corrected in a further directive on co-operation on the expulsion or deportation of third country nationals:

– provision of compensation for sharing of costs when implementing the Directive (Portugal)
– establishment of an obligatory framework for the mutual recognition of all decisions to return (Portugal)
– harmonisaton of the rules regarding the adoption of expulsion orders (Italy)
– setting out of minimum rights to be respected during the procedures, in conformity with the ECHR (Italy).

Re-admission Agreements

Attitudes toward re-admission agreements appear to vary. While the majority of countries have concluded such agreements some National Reports indicate that difficulties have been encountered in their conclusion[64]. On the other hand, re-admission agreements are viewed as an effective way of guaranteeing the execution of expulsion orders which in itself a critical part of a functioning immigration policy[65]. However, according to the Maltese National Report, Malta has only entered into one re-admission agreement, with Italy, but nevertheless does not encounter any particular difficulties when repatriating foreign nationals.

Influence of EU Standards and recommendations on national return policies

With regard to the influence of EU-standards and recommendations on national return policies, the following areas of influence were identified:

– raising the profile of issues (Luxembourg)
– use of the EU-prototype when signing re-admission agreements (Sweden, Hungary)
– establishing the basis of national return policy (Spain).

[64] Luxembourg, Norway.
[65] Italy, Germany, Portugal, Ireland, Spain, Portugal, Latvia, Hungary.

The following National Reports indicate that EU standards and recommendations have not influenced their national return policies either at all or substantially: Germany, Italy, Netherlands, Latvia.

Co-operation Agreements

The establishment of co-operation agreements with other countries appears to be widespread, see e.g. the following National Reports: Austria, Luxembourg, Sweden, Germany, Italy, Norway, Spain, Ireland, Portugal.

Many National Reports[66] indicated a need to establish common rules regarding, e.g.: the legal status of armed guards on board of the aircrafts, rights of the aircraft commander, legal rules in case of transit stops, applicability of national police law on board of aircraft on flight, etc. However, the Dutch National Report indicates that such rules might be of little use given that problems in these areas tend to be more practical than legal. Moreover, the German National Report raises the question as to whether the establishment of minimum standards in these areas would be compatible with the principle of subsidiarity. This issue is also raised in the Portuguese National Report.

[66] Norway, Italy, Sweden, Luxembourg, Austria, Portugal, Hungary.