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## EU asylum procedures and the right to an effective remedy

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## 2 | The Common European Asylum System and the applicability of EU procedural standards

In order to be able to interpret the Procedures Directive and to test the legality of its provisions it is necessary to know more about the context in which the directive was adopted, its purposes, its system and the minimum character of its norms. Therefore this chapter will introduce the Common European Asylum System of which the Procedures Directive is part (section 2.1) as well as the Procedures Directive itself (section) 2.2.

### *Relevance of the Qualification Directive*

When assessing the procedural guarantees applying to the asylum procedures one cannot ignore the importance of the Qualification Directive. This directive defines the content of the right to asylum and the prohibition of *refoulement*, the substantive EU rights usually claimed by asylum applicants during the asylum procedure. National procedural rules should not undermine the effective exercise of these rights. These substantive rights also determine to a certain extent the level of procedural protection which should be offered.<sup>1</sup> Furthermore the Qualification Directive contains minimum standards regarding the evidentiary issues discussed in Chapter 8.<sup>2</sup> Therefore this directive will be introduced in section 2.3.

### *Potential impact and scope of application of EU fundamental rights*

The Procedures Directive contains minimum standards and leaves wide discretion to the Member States in designing their asylum procedure. This raises two important questions relating to the potential impact and scope of application of EU fundamental rights. These questions should be answered in order to be able to define the meaning and content of EU procedural rights for the themes which will be addressed in Chapters 6 to 10.

### *Testing the legality of the Procedures Directive's provisions*

First of all it should be examined whether the minimum standards included in the Procedures Directive are capable of infringing EU fundamental rights. Member States are allowed to introduce or maintain more favourable provisions than those minimum standards, provided that those provisions are

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1 See further section 4.5.3.

2 See also section 1.5 above.

compatible with the directive. Arguably the Member States are therefore never forced by those minimum standards to violate EU fundamental rights. Section 2.4.1 explains that the Court of Justice is competent to test the legality of the minimum standards included in the Procedures Directive against EU fundamental rights and sets out in which circumstances these standards should be considered invalid.

*Applying EU fundamental rights to national asylum procedures*

Secondly questions arise with regard to the *scope of application* of EU fundamental rights in the context of the Procedures Directive. The Procedures Directive allows numerous exceptions to the procedural safeguards which should be offered to asylum applicants and many vague terms are used.<sup>3</sup> Member States may argue that they are not bound by EU fundamental rights when making use of their discretionary power, because the national measures implementing this discretionary power fall outside the scope of EU law. It is contended in section 2.4.2 that this line of reasoning is not compatible with the Court of Justice's case-law. According to the Court of Justice Member States are bound by EU fundamental rights when making use of the discretion allowed by EU legislation.

*The role of the national courts and the Court of Justice*

Finally it is relevant to examine how questions regarding the interpretation and legality of the provisions of the Procedures Directive may be brought before the national courts and the Court of Justice. This issue is addressed in section 2.5.

## 2.1 THE COMMON EUROPEAN ASYLUM SYSTEM AND ITS LEGAL BASIS

### 2.1.1 Legal basis of EU asylum legislation

With the Treaty of Amsterdam which was concluded in 1997, asylum and immigration was moved from the third pillar to the first pillar of the European Union. The relevant provisions with regard to this area were laid down in Title IV of Part Three of the former EC-Treaty (Articles 61-69). Article 63 of the former EC-Treaty required the Council to adopt within a period of five years after the entry into force of the Treaty of Amsterdam<sup>4</sup>:

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<sup>3</sup> See further section 2.3.3

<sup>4</sup> Measures to be adopted pursuant to points 2(b), 3(a) and 4 of Art 63 were not subject to this five-year period. According to Art 67 of the former EC-Treaty during the initial period of five years after the entry into force of the Treaty of Amsterdam, these measures had to be adopted according to the consultation procedure. After this period measures based on Art 63 EC-Treaty had to be adopted according to the co-decision procedure.

- measures on asylum
- measures on refugees and displaced persons
- measures on immigration policy
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States

The Procedures Directive together with the Qualification Directive is based on Article 63 (1) of the former EC-Treaty.

Since the entry into force of the Treaty of Lisbon the legal basis for EU policies on border checks, asylum and immigration is laid down in Chapter 2 of Title V TFEU (Articles 77-80). Article 78 TFEU states that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. Like Article 63 of the former EC-Treaty, this provision states that EU asylum policy must be in accordance with the Refugee Convention and other relevant treaties.

### 2.1.2 Policy framework: the Common European Asylum System

The Procedures Directive, together with the Qualification Directive, Dublin Regulation, the Reception Conditions Directive (RCD)<sup>5</sup> and arguably the Temporary Protection Directive (TPD)<sup>6</sup> are part of the Common European Asylum System (CEAS).<sup>7</sup> It was decided to work towards establishing CEAS during a special meeting held on 15 and 16 October 1999 in Tampere. CEAS was to be established as part of the European Council's objective to develop the European Union as an area of freedom, security and justice.<sup>8</sup> It was agreed that this system should include a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum applicants, and the approximation of rules on the recogni-

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5 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18 (Reception Conditions Directive or RCD), based on Art 63 (1)(b) EC Treaty.

6 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12 (Temporary Protection Directive or TPD), based on Art 63 (2)(a) EC Treaty. Recital 1 Preamble TPD refers to a 'common policy on asylum, including common European arrangements for asylum'.

7 See the second recitals of the preambles to the PD, the QD, the RCD and the Dublin Regulation, which refer to CEAS.

8 See the first recitals of the preambles to the PD, QD and the Dublin Regulation.

tion and content of the refugee status. These measures had to be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. It was agreed that in the longer term, EU rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.<sup>9</sup> This aim was reaffirmed in the 'The Hague Programme' of 2004<sup>10</sup> and 'The Stockholm Programme of 2009'.<sup>11</sup>

In 2009 and 2011 the European Commission (henceforth: the Commission) issued proposals for a recast of the Procedures Directive. At the time of conclusion of this study the amended proposal for the recast was still being discussed.<sup>12</sup> This also applies to the recast proposals for the Reception Conditions Directive<sup>13</sup> and the Dublin Regulation<sup>14</sup> were introduced in 2008, 2009 and 2011.<sup>15</sup> A recast of the Qualification Directive was adopted in 2011.<sup>16</sup>

### *Objectives*

The main objective of the measures constituting CEAS was simply to lay down minimum standards regarding the subject matter they address.<sup>17</sup> The preambles of all the measures of CEAS furthermore mention that they aim to preclude secondary movements of third country nationals.<sup>18</sup> Differences in protection or reception standards between Member States may encourage

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9 See also recital 3 Preamble PD.

10 Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005], OJ C 53/1.

11 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizen [2010] OJ C 115/1, para 6.2.1.

12 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM (2009) 554 and Amended proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection status (Recast) COM(2011) 319 final.

13 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815.

14 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 815.

15 See further section 11.5.

16 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

17 Recital 5 Preamble and Art 1 PD.

18 See Preambles recital 6 PD, recital 7 QD, recital 8 RCD and recital 9 TPD. Battjes remarks that the preamble to the Dublin Regulation refers to the Dublin Convention, which aimed to preclude secondary movements in recital 5. Battjes 2006, p 200.

persons to move from one Member State to another. Therefore harmonisation of those standards is deemed necessary.

Another main objective of CEAS is to ensure respect for the fundamental rights of third country nationals.<sup>19</sup> In the Presidency conclusions of the Tampere summit the European Council reaffirmed the importance the Union and Member States attach to absolute respect of the right to seek asylum.<sup>20</sup> The conclusions moreover state that CEAS should be based on the full and inclusive application of the Refugee Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*.<sup>21</sup> This is reflected in Article 63 (1) of the former EC-Treaty and Article 78 TFEU and the preambles of the measures adopted under CEAS, which refer to the fact that CEAS is based on respect for the Refugee Convention.<sup>22</sup> Finally the preambles of all these measures except the Temporary Protection Directive state that they respect fundamental rights and observe the principles recognised in particular by the Charter.<sup>23</sup>

#### *Applicability to third country nationals only*

The EU measures adopted under CEAS are only applicable to asylum applications lodged by third country nationals.<sup>24</sup> Asylum applications submitted by EU nationals thus fall outside the scope of CEAS.

#### *Character of the norms*

The level of harmonisation achieved by the directives adopted under CEAS is rather limited, because the standards laid down in those directives are minimum standards.<sup>25</sup> This means that the Member States are allowed to introduce or maintain more favourable standards, in so far as these standards are compatible with the directive.<sup>26</sup> Section 2.4.1 examines whether and if so in which circumstances these minimum standards are capable of infringing EU fundamental rights. Article 78 TFEU requires the European Parliament and the Council, to adopt measures for a Common European Asylum System which no longer contain minimum standards, but instead comprise among others a uniform status of asylum and subsidiary protection for third country nationals and common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.

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19 See also Battjes 2006, p 201.

20 See also recital 10 Preamble QD and recital 5 Preamble RCD.

21 Tampere European Council (15 and 16 October 1999) Presidency Conclusions, para 13.

22 See Preambles recital 2 PD, recital 2 QD, recital 2 RCD, recital 10 TPD.

23 See Preambles recital 8 PD, recital 10 QD, recital 5 RCD, recital 15 DR.

24 Artt 1 and 2 (c) Directive 2001/55/EC, Art 3 (1) RCD, Art 1 Dublin Regulation, Art 1 QD, Art 2 (b) and (c) PD.

25 See Art 63 (1) and (2)(a) of the former EC-Treaty.

26 Art 5 PD, Art 3 QD, Art 4 RCD, Art 5 TPD.

*Relation between the measures adopted under CEAS*

The fact that the measures adopted under CEAS are constituents of a system implies that their provisions must be read in conjunction.<sup>27</sup> In these measures common definitions are used. An important example is the term ‘application for asylum’, which can be found in the Procedures Directive, Dublin Regulation and the Reception Conditions Directive.<sup>28</sup> Furthermore several cross-references can be found in the measures of CEAS. The Procedures Directive refers several times to provisions of the Qualification Directive. Article 10 (1) (a) PD for example, which includes the duty to inform the asylum applicant of his obligations refers to Article 4 QD. Article 4 QD imposes a duty upon the asylum applicant to submit all elements needed to substantiate the application for international protection.

*Relation with other measures adopted on the basis of Article 63 of the former EC-Treaty*

The measures adopted under the Common Asylum System are not only linked to each other, but also to other measures adopted on the basis of Article 63 EC-Treaty. These include EU measures constituting the EU removal and repatriation policy,<sup>29</sup> such as the Return Directive (RD) adopted in 2008.<sup>30</sup> Other measures which have been adopted on the basis of Article 63 EC-Treaty, which are also relevant for asylum applicants are amongst others the directives regarding family reunification<sup>31</sup> and human trafficking.<sup>32</sup>

## 2.2 THE PROCEDURES DIRECTIVE

The Procedures Directive introduces a minimum framework in the EU on procedures for granting and withdrawing refugee status. According to the Tampere conclusions these procedures need to be fair and efficient.<sup>33</sup> The

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27 Battjes 2006, p 211.

28 Battjes 2006, pp 206-207.

29 The ‘The Hague Programme’ of 2004 called for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity. Brussels European Council, Presidency Conclusions, Annex 1, para 1.6.4, 14292/1/04 REV 1.

30 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 [2008] OJ L 348/98. An example is Art 13 (4) RD which refers to Art 15 PD.

31 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12, based on Art 63 (3) (a) EC-Treaty.

32 Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19, based on Art 63 (3) EC-Treaty.

33 Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99), para 14.



legal basis for the directive was Article 63 (1)(d) of the former EC-Treaty. The directive was adopted by the Council on 13 December 2005 as the last asylum measure of the legislative programme.

The directive was the result of lengthy and difficult negotiations.<sup>34</sup> Those with regard to the first proposal for the directive came to a standstill and the proposal was withdrawn. The Commission issued a new proposal in June 2002. The process progressed slowly, as Member States wanted to adhere to the special characteristics of their asylum procedures. Article 39 on appeal procedures and suspensive effect for example, was extensively discussed, because the national procedures greatly differed on this point. Furthermore in several countries national asylum policy was revised and the relation of these changes to the proposal of the directive had to be analysed.

On 29 April 2004 a political agreement on the Directive was reached.<sup>35</sup> After the political agreement the negotiations on the minimum common list of safe countries of origin were continued. The directive was published on 15 December 2005 and had to be transposed in the Member States before 1 December 2007.<sup>36</sup> Article 15 on the right to legal aid and representation had to be transposed by 1 December 2008.

The proposal for the directive was subjected to heavy criticism. The European Parliament had proposed a list of 102 amendments to the directive.<sup>37</sup> None of these amendments was taken into account by the Council.<sup>38</sup> The amendments regarded amongst others a right to remain in the Member State during the appeals procedure, the right to free legal aid, detention and a duty for the Member States to give notice of the decision on the asylum application within a time-limit of 6 months.

Also UNHCR and several NGO's expressed fundamental criticism on the proposal. Just before political agreement on the proposed directive was reached, ten NGO's asked EU Commissioner for Justice and Home Affairs, Vitorino to withdraw the proposal. The organisations were concerned that proposals to designate certain countries as 'safe countries of origin' or 'safe third countries' and the absence of a guaranteed right for all asylum applicants to remain in a country of asylum pending an appeal, violated EU Member States' international obligations.<sup>39</sup>

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34 According to Michelogiannaki the negotiations 'were proved to be the most intense, lengthy and difficult negotiations compared to any other that had taken place in the past, regarding the asylum agenda'. Michelogiannaki 2008, p 21.

35 See for the negotiation process: Ackers 2005 and Michelogiannaki 2008.

36 Art 43 PD.

37 European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238(CNS)) of 27 September 2005.

38 Michelogiannaki 2008, p 21.

39 Press release 29 April 2004, European Council for Refugees and Exiles, Amnesty International and Human Rights Watch, available at [www.ecre.org](http://www.ecre.org).

The European Parliament challenged the legality of several provisions of the Procedures Directive before the Court of Justice. It asked for the annulment of Articles 29 (1) and (2) and 36 (3) of the directive, which lay down the procedures for adopting and amending common minimum lists of safe countries of origin (Article 29) and European safe countries (Article 36). The Parliament argued that, according to Article 67 (5) of the EC-Treaty, those lists should be adopted and amended according to the co-decision procedure of Article 251 of the former EC-Treaty. The challenged provisions only envisaged a consultative role for the European Parliament in adopting the lists. The Court of Justice deemed the Parliament's appeal well-founded and annulled the challenged provisions in a judgment of 6 May 2008.<sup>40</sup>

### 2.2.1 Scope of application

The Procedures Directive applies to applications for asylum made in the territory of the Member States and to the withdrawal of refugee status.<sup>41</sup> This includes asylum applications made at the border or in transit zones. The Procedures Directive does not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.<sup>42</sup> It also does not apply to procedures which are governed by the Dublin Regulation.<sup>43</sup> The United Kingdom and Ireland take part in the application of the Procedures Directive. The directive does not apply to Denmark.<sup>44</sup>

In principle the directive is only applicable to procedures in which a person's right to a refugee status is assessed. This follows from the definition of the term 'application for asylum' laid down in Article 2 (b) PD. This term means 'an application by a third country national or stateless person, which can be understood as a request for international protection from a Member State under the Geneva Convention'. In practice almost all requests for international protection need to be assessed according to the minimum standards of the Procedures Directive for two reasons. First of all asylum applicants are not expected to mention which form of protection they seek. Any application for international protection is presumed to be an application for asylum in the meaning of the Procedures Directive, unless the asylum applicant explicitly requests another kind of protection (such as subsidiary protection), that can be applied for separately. Secondly where Member States have one procedure, in which both a person's right to a refugee status and to a subsidiary protection status is assessed, the Member State shall apply the Procedure Directive

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40 Case C-133/06, *Parliament v Council* [2008].

41 Art 3 (1) PD.

42 Art 3 (2) PD.

43 Recital 29 Preamble PD.

44 Recitals 32-34 Preamble PD.

throughout the procedure.<sup>45</sup> In 2010 all Member States but one (Ireland) employed such a single asylum procedure. Therefore the Procedures Directive in practice also applies to the assessment of the right to subsidiary protection status in 26 Member States.<sup>46</sup>

## 2.2.2 Overview of the directive's provisions

The Procedures Directive consists of six chapters. Chapter I contains some general provisions on the purpose and scope of the directive and definitions. Chapter II consists of a list of basic principles and guarantees. First of all the right to access to the asylum procedure is guaranteed.<sup>47</sup> Furthermore this chapter grants some important rights to asylum applicants, such as: the right to remain in the territory of the Member State pending the examination of the asylum application,<sup>48</sup> the right to be informed of the procedure to be followed, of rights and obligations and of the result of the decision on the application,<sup>49</sup> the right to interpretation services<sup>50</sup> and legal aid and assistance,<sup>51</sup> the right to a personal interview<sup>52</sup> and the right to contact UNHCR.<sup>53</sup> Special guarantees are provided for unaccompanied minors.<sup>54</sup> Chapter II also sets out requirements for the examination of and decisions on asylum applications.<sup>55</sup> It furthermore states which obligations may be imposed on asylum applicants, such as the obligation to hand over documents in their possession relevant to the examination of the asylum application.<sup>56</sup> Finally this chapter contains provisions regarding detention,<sup>57</sup> (implicit) withdrawal of the asylum application,<sup>58</sup> the role of UNHCR<sup>59</sup> and a provision, which seeks to prevent that actors of persecution are informed of the asylum application of an asylum applicant.<sup>60</sup>

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45 Art 3 (3) PD.

46 Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 3. Art 3 (4) PD states that Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.

47 Art 6 PD.

48 Art 7 PD.

49 Art 10 (1) (a) and (d) PD.

50 Art (1) (b) PD.

51 Art 15 and 16 PD.

52 Art 12 PD.

53 Art 10 (1) (c) PD.

54 Art 17 PD.

55 Artt 8 and 9 PD.

56 Art 11 PD.

57 Art 18 PD.

58 Art 19 PD.

59 Art 21 PD.

60 Art 22 PD.

Chapter III sets out standards for procedures at first instance. Member States are obliged to process asylum applications in a procedure which is in accordance with the principles and guarantees laid down in Chapter II.<sup>61</sup> Article 24 however mentions three kinds of situations in which Member States may derogate from those principles and guarantees: subsequent asylum applications, applications submitted at the border and cases in which the asylum applicant seeks to enter or has entered the territory illegally from a European safe third country. Special standards for the examination of subsequent applications and applications submitted at the border are laid down in sections IV and V. Chapter III furthermore covers the prioritisation and acceleration of the examination procedure. It also sets out the conditions on which applications may be declared inadmissible<sup>62</sup> or unfounded.<sup>63</sup> Chapter III finally contains minimum standards as regards four concepts of safe countries: first country of asylum, safe third country, safe country of origin and European safe third country.<sup>64</sup>

Chapter IV contains rules regarding the withdrawal of refugee status. Chapter V consists of one provision, Article 39, which grants asylum applicants the right to an effective remedy before a court or tribunal against a negative decision on his asylum application. Article 39 PD leaves discretion to the Member States as to the question whether this remedy should have suspensive effect. Finally Chapter VI contains some general and final provisions.

### 2.2.3 Low level of harmonisation and wide discretion

The minimum standards included in the directive allow the Member States wide discretion. First of all, as was mentioned in the previous section, the directive provides for a possibility to employ specific procedures may derogate from the basic principles and guarantees of Chapter II of the directive. Secondly the basic principles and guarantees themselves contain many options for derogation. Examples are Article 12 which allows for exceptions to the right to a personal interview and Article 15, which provides for several possibilities to limit the right to free legal aid in the event of a negative decision on the asylum application. Finally the derogation provisions included in the directive contain many vague terms, which need to be interpreted by the Member States. Article 12 (3) PD states for example that a personal interview may be omitted amongst others where it is *not reasonably practicable*, in particular where the

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61 Art 23 PD.

62 Art 25 PD.

63 Art 28 PD.

64 Artt 26, 27, 29-31 and 36 PD. The application of asylum applicants who came from a first country of asylum, a safe third country or a European safe third country does not need to be examined on the merits. See Artt 25 (2) and 36 (1) PD.

competent authority is of the opinion that the applicant *is unfit or unable to be interviewed* owing to *enduring circumstances beyond his/her control*.

The fact that the directive leaves wide discretion for the Member States may have consequences for the application of EU fundamental rights. As was set out in section 1.2.1 these EU fundamental rights and general principles of EU law only apply to issues falling within the scope of EU law. The question whether Member States are acting within the scope of EU law when they are making use of the possibilities for derogation offered by the directive will be addressed in section 2.4.2.

### 2.3 THE QUALIFICATION DIRECTIVE

The Qualification Directive was based on Article 63 (1) (c) of the former EC Treaty. The directive has been described as the heart of CEAS, because of its subject matter.<sup>65</sup> It lays down the criteria for the qualification for two statuses: the refugee status and the subsidiary protection status. Furthermore the directive sets out which rights should be granted to persons eligible for these statuses. The Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.<sup>66</sup>

The Qualification Directive was adopted by the Council on 27 April 2004 and published on 30 September 2004. It was the result of 'intense and protracted negotiations'.<sup>67</sup> The level of protection offered by the directive has been criticised<sup>68</sup> and it has been argued that some of the provisions of the directive infringe the international obligations of the Member States.<sup>69</sup> The provisions of the directive had to be implemented in the Member States by 10 October 2006.

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<sup>65</sup> Battjes 2006, p 197.

<sup>66</sup> See recital 10 Preamble QD.

<sup>67</sup> Controversial issues were the inclusion of non-state agents of persecution, the definition of subsidiary protection and the exclusion clauses. Peers & Rogers 2006, p 323. See for more information on the background and legislative history of the directive Peers & Rogers 2006, pp 326-333.

<sup>68</sup> McAdam 2007, p 9.

<sup>69</sup> See Peers pp 334-340 and Battjes 2006, p 275. Battjes argues that Art 7 (2) suggests an overly wide scope of agents of protection, Art 8 (3) proposes an overly wide application of the internal flight alternative and Art 9 (3) states overly restrictive rules on the causal nexus with the Convention grounds for well-founded fear of persecution.

### 2.3.1 Scope of application

The Qualification Directive is silent on its territorial scope of application. Battjes argues that it is hardly likely that the Community legislator intended to harmonise the criteria for dealing with asylum applications lodged outside the territory of the Member States of the European Union.<sup>70</sup> The Qualification Directive does not apply to Denmark, Ireland and the United Kingdom do take part in the directive.<sup>71</sup>

### 2.3.2 Overview of the directive's provisions

The directive consists of nine chapters. The first chapter contains provisions regarding the subject and scope of the directive, definitions, and more favourable standards. The second chapter regards the assessment of applications for international protection. This chapter applies to the examination of both the right to a refugee status and to subsidiary protection. Of specific relevance for the purpose of the study is Article 4 on the assessment of facts and circumstances in applications for international protection. It contains important rules of evidence, amongst others concerning the burden of proof, evidentiary assessment and the granting of the benefit of the doubt.<sup>72</sup>

Chapter III lays down the criteria for the qualification for being a refugee, while Chapter V sets out the criteria for subsidiary protection. It is of crucial importance that Articles 13 and 18 QD provide that a person who qualifies as a refugee or is eligible for subsidiary protection in accordance with the directive, should be granted a refugee status or a subsidiary protection status. Arguably these provisions reflect the EU fundamental right to asylum laid down in Article 18 of the Charter. Usually persons applying for asylum in the EU Member States will claim the EU right to an asylum status. According to the EU principle of effectiveness hurdles in national asylum procedures which render the exercise of these rights practically impossible or excessively difficult are not allowed.

The right to an asylum status is absolute nor permanent. Chapters III and V contain provisions regarding cessation of and exclusion from international protection. Chapters IV and VI provide rules for granting and withdrawing the refugee and the subsidiary protection status. Chapter VII lists the rights which should be granted to persons eligible for international protection.<sup>73</sup>

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70 Battjes 2006, pp 209-210 and 474. See also Den Heijer 2012, pp 203-204.

71 Recitals 38-40 preamble QD.

72 Art 4 plays a crucial role in Chapter 8 on the standard and burden of proof and evidentiary assessment.

73 It includes a right to a residence permit and to travel documents and contains rules concerning access to employment, education, social welfare, health care, accommodation and integration facilities.

The obligation for Member States to respect the principle of *non-refoulement*, laid down in Article 21 QD, which arguably reflects Article 19 of the Charter, is of particular importance for this study. Finally Chapter VIII and XIV contain rules regarding administrative cooperation and final provisions.

## 2.4 APPLICABILITY OF EU FUNDAMENTAL RIGHTS

In this section the following two questions are answered:

- 1 Is the Court of Justice competent to test the legality of the provisions of the Procedures Directive against EU fundamental rights and if so, what could be the result of this legality test (section 2.4.1)?
- 2 Are Member States bound by EU fundamental rights when making use of the discretionary powers offered by the Procedures Directive to make exceptions to rights included in that directive (section 2.4.2)?

### 2.4.1 Testing the legality of minimum standards

According to Article 263 TFEU the Court of Justice is competent to review the legality of acts of EU Institutions, including EU legislation, such as directives and regulations. This provision also mentions the grounds on which such an act may be deemed illegal: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The Court of Justice also has the power to test the legality of provisions of EU legislation against EU fundamental rights and general principles of EU law.<sup>74</sup> If the Court of Justice concludes that an action on grounds of illegality is well-founded, Article 264 TFEU requires it to declare the act concerned to be void.

It should be examined whether the Court of Justice is also competent to review the legality of minimum standards or provisions affording the Member States wide discretion to derogate from the rights included in the Procedures Directive against the EU right to an effective remedy. It may be argued that the directive enables Member States to retain or adopt national provisions compatible with respect for fundamental rights and thus cannot infringe EU fundamental rights. At the same time provisions adopted and applied by Member States which might be contrary to EU fundamental rights do not constitute acts of EU Institutions of which the legality can, according to Articles 263 and 267 TFEU, be reviewed by the Court of Justice.<sup>75</sup>

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<sup>74</sup> Artt 51 (1) and 52 (5) of the Charter. See also Battjes 2006, p 85.

<sup>75</sup> This was argued by the Council with regard to the Court of Justice's competence to review the legality of the provisions of the Family Reunification Directive in Case C-540/03, *Parliament v Council* [2006], para 16.

The judgment in *Parliament v Council*,<sup>76</sup> which concerned the Family Reunification Directive,<sup>77</sup> shows that the Court of Justice is indeed competent to test the legality of the minimum standards or provisions allowing for derogation. In this procedure, which was brought by the European Parliament, annulment was sought of provisions which are derogating from the obligations imposed on the Member States by the Family Reunification Directive. The Court of Justice decided that it is competent to review the legality of provisions in the Family Reunification Directive which allow Member States to derogate from basic rules laid down in that directive:

[T]he fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.<sup>78</sup>

It should be observed that in *Parliament v Council* the Court of Justice took into account that the provisions concerned derogated from a *basic rule*.<sup>79</sup> The Court of Justice did not give a definition of the term 'basic rule'. Arguably the provisions in the Procedures Directive which reflect the right to access to asylum procedures and the right to an effective remedy, such as the procedural standards laid down in Chapter II of the directive, should be considered *basic rules*.<sup>80</sup> The right to effective access to asylum procedures<sup>81</sup> and the right to an effective remedy<sup>82</sup> lie at the basis of the Procedures Directive. The observance of these rights is necessary in the interest of a correct recognition of those persons in need of protection as refugees within the meaning

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76 Case C-540/03, *Parliament v Council* [2006].

77 Directive 2003/86/EC.

78 Case C-540/03, *Parliament v Council* [2006], para 22. Art 230 of the former EC-Treaty is now replaced by Art 263 TFEU.

79 In this case the provisions concerned derogated from the right of family reunification, which is the basis of the Family Reunification Directive.

80 Recital 13 Preamble PD mentions amongst others the right to stay pending a decision by the determining authority, access to the services of an interpreter during an interview, the opportunity to communicate with a representative of UNHCR, the right to appropriate notification of a decision, a motivation of that decision in fact and in law, the opportunity to consult a legal adviser or other counsellor and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

81 Recital 13 Preamble PD.

82 Recital 27 Preamble PD states: 'It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.'



of the Refugee Convention and the Qualification Directive.<sup>83</sup> It is thus conceivable that the Court of Justice is, according to Article 263 TFEU, competent to review the legality of the provisions in the Procedures Directive that derogate from the standards reflecting the right to access to asylum procedures and the right to an effective remedy.

Like the Procedures Directive the Family Reunification Directive allows Member States to adopt or maintain more favourable provisions than those laid down in the directive.<sup>84</sup> In *Parliament v Council* the Court of Justice tested some of these provisions against EU fundamental Rights. It should therefore be derived from this judgment that the Court of Justice is also competent to test the legality of the minimum standards included in the Procedures Directive.

#### *Potential results of the legality test*

The next question, which should be answered is whether minimum standards or provisions allowing for derogation can be at odds with EU fundamental rights. It may be argued that such standards or provisions are not capable of infringing fundamental rights. Minimum standards allow Member States to maintain or introduce more favourable standards, insofar as those standards are compatible with the Directive.<sup>85</sup> Member States may make use of this possibility where the minimum standard offers a level of protection which is lower than the level required by EU fundamental rights, in order to avoid acting in violation with EU fundamental rights. In the same vein, Member States are free not to make use of provisions allowing for derogation in order to prevent that a violation EU fundamental rights occurs.

The Court of Justice in *Parliament v Council* indicated that it is not excluded that minimum standards or provisions allowing for derogation infringe fundamental rights and should thus be considered invalid. It considered that a provision of an EU act could in itself fall short of respecting fundamental rights 'if it required, or expressly or impliedly authorised' the Member States to adopt or retain national legislation not respecting those rights.<sup>86</sup>

The minimum standards of the Procedures Directive do not require Member States to violate fundamental rights.<sup>87</sup> However it may be argued that minimum standards which offer less protection than the standards required by EU fundamental rights 'expressly or impliedly authorise' Member States to act in violation with those fundamental rights. The same applies to provisions that allow for derogation by the Member States of basic rights of a directive.

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83 Recital 13 Preamble PD.

84 Art 3 (5) of Council Directive 2003/86/EC.

85 See Art 5 PD.

86 Case C-540/03, *Parliament v Council* [2006], para 23.

87 See Battjes 2006, p 556. He concludes that for that reason minimum standards cannot be at variance with international law.

A reading of the minimum standards and provisions allowing for derogation, which authorises the Member States to disrespect fundamental rights would however be in contradiction with one of the main objectives of CEAS: ensuring the fundamental rights of third country nationals.<sup>88</sup> This objective is also reflected in the TFEU and the preamble and provisions of the Procedures Directive.<sup>89</sup> The references to international human rights treaties and the fundamental rights laid down in the Charter show that the EU legislator did not envisage to authorise the Member States to disrespect fundamental rights.<sup>90</sup>

It is therefore submitted here that it is likely that the Court of Justice will interpret minimum standards and provisions allowing for derogation in the light of fundamental rights, thus avoiding violations of those rights. This is what the Court of Justice actually did in *Parliament v Council*. The acts of the Member States may subsequently be tested against this interpretation of EU legislation. However if no interpretation in conformity with EU fundamental rights is possible the Court of Justice should declare a provision void.<sup>91</sup>

#### 2.4.2 Interpreting and filling in gaps in EU asylum legislation

In this section it is argued that Member States are bound by EU fundamental rights when making use of the discretionary power offered by in particular the Procedures Directive to make exceptions to rights included in that Directive.<sup>92</sup> National legislation which is based on such discretionary power falls within the scope of EU law and can therefore be tested against EU law by national courts and the Court of Justice. This follows from the *Parliament v Council* judgment mentioned above.<sup>93</sup> In this judgment the Court of Justice made clear that Member States are not allowed to infringe general principles of EU law by making use of the possibility to derogate from the right to family reunification. This also applies if the derogation provision contains terms which

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88 See also Battjes 2006, p 201.

89 See recital 2 Preamble PD.

90 The Court of Justice in *Parliament v Council* also took into account the objectives of the Family Reunification Directive in its ruling that its provisions did not infringe EU fundamental rights. These objectives are to promote family life and to ensure that the best interests of the child are taken into account. Case C-540/03, *Parliament v Council* [2006], see e.g. paras 73 and 87.

91 See also Butler & de Schutter 2007, p, 295, where they state that 'Community legislation will be valid as long as it can be interpreted in conformity with the general principles'.

92 See section 2.2.3.

93 See also Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], para 69, where the Court of Justice held that a Member State is implementing EU law and is therefore bound by the Charter when it makes use of the discretionary power granted by Art 3 (2) of the Dublin Regulation to examine an asylum application, which is not its responsibility according to the criteria laid down in the regulation.

are not defined. The Court's considerations concerning Article 4 of the Family Reunification Directive are most important in this regard. This provision allows Member States to derogate under certain conditions<sup>94</sup> from the parents' right to family reunification with their child, if this child does not meet a condition for integration provided for by national legislation. The Court of Justice considered:

The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation [...] in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family. Consequently, the final subparagraph of Article 4(1) of the Directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.<sup>95</sup>

The Member States are thus bound by general principles of EU law and in particular to EU fundamental rights when making use of a derogation provision and also when interpreting an undefined term included in the derogation provision.<sup>96</sup> This implies that the Member States' discretion when making use of the possibilities for derogation offered by the Procedures Directive is limited by EU fundamental rights, such as the right to an effective remedy.<sup>97</sup> Therefore it is very likely that national measures that fall within the scope of a derogation provision provided by the Procedures Directive can be tested against this right.

## 2.5 THE ROLE OF NATIONAL COURTS AND THE COURT OF JUSTICE

This section examines how questions regarding the legality and interpretation of the provisions of the Procedures Directive may be brought before and assessed by the national courts and the Court of Justice.

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94 If the child is aged over 12 years and arrives independently from the rest of his family.

95 Case C-540/03, *Parliament v Council* [2006], para 70.

96 The Court seems to attach more significance to fundamental rights (in this case the right to family life) in this regard than to general principles of EU law which are not recognised as fundamental rights by the Court.

97 Case 222/86, *UNECTEF v Heylens and others* [1987], see also Case C-340/89, *Vlassopoulou* [1991].

### 2.5.1 Legality review of EU legislation

Actions on grounds of the illegality of EU legislation may be brought before the Court of Justice by a Member State, the European Parliament, the Council or the Commission. Such action must be instituted within two months of the publication of the measure.<sup>98</sup> As was already mentioned in section 2.2, the European Parliament successfully challenged the legality of several provisions of the Procedures Directive.<sup>99</sup>

Natural or legal persons cannot challenge the legality of the Procedures Directive directly before the Court of Justice. According to Article 263 TFEU any natural or legal person may only institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court of Justice ruled in the *UPA* judgment that the principle of effective judicial protection cannot have the effect of setting aside the condition of ‘direct and individual concern’ expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the EU Courts.<sup>100</sup>

An individual should plead the illegality of the Procedures Directive before the national courts, for example in the appeal against a negative asylum decision.<sup>101</sup> He may contest the legality of the provisions of EU legislation on which the decision is based, for instance on the ground that an EU fundamental right has been violated. The following example illustrates how such a situation may occur. The asylum applicant’s asylum request is rejected on the basis of information, which is not disclosed to him or the court assessing the appeal against this rejection for national security reasons. Such practice is allowed by Article 16 (1) PD. The applicant argues before the national court that Article 16 (1) PD should be considered invalid, at least as far as it permits the determining authorities<sup>102</sup> to withhold information underlying the asylum decision to the national court, because it infringes the EU right to an effective remedy.<sup>103</sup>

National courts may consider the legality of a provision of EU legislation and reject the grounds put forward before them by the parties in support of

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98 Art 263 TFEU.

99 Case C-133/06, *Parliament v Council* [2008].

100 Case C-50/00, *Union de Pequeños* [2002], para 44.

101 Art 277 TFEU states that notwithstanding the expiry of the period laid down in Art 263 TFEU, any party may, in proceedings in which an act of general application adopted by an EU institution, body, office or agency is at issue, plead the grounds specified in Art 263 TFEU, in order to invoke before the Court of Justice the inapplicability of that act.

102 In this study ‘determining authority’ means: the quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases. This definition can be found in Article 2 (e) PD.

103 See on this issue Chapter 10 on the use of secret information in asylum cases.

illegality, concluding that the measure is completely valid, if they consider those grounds unfounded. However, national courts do not have jurisdiction to declare a provision of EU law invalid. The reasons for this are set out by the Court of Justice in *Foto Frost*.<sup>104</sup> First of all this rule seeks to ensure the unity of EU law and the principle of legal certainty. If national courts were competent to declare an EU act invalid, this could lead to divergences between those courts as to the legality of such acts. Such divergences would be liable to place in jeopardy the very unity of the EU legal order and detract from the fundamental requirement of legal certainty. Moreover Article 264 TFEU gives the Court of Justice exclusive competence to declare void an act of an EU Institution. The coherence of the system therefore requires that the power to declare such an act invalid must also be reserved to the Court of Justice. Furthermore the Court of Justice is in the best position to decide on the legality of EU legislation, because the EU Institutions are entitled to participate in proceedings before the Court in order to defend the legality of the acts in question.<sup>105</sup> This implies that the individual concerned needs to ask the national court to make a reference for a preliminary ruling on the legality to the Court of Justice.<sup>106</sup> According to Article 267 TFEU the Court of Justice has jurisdiction to give preliminary rulings regarding the legality of acts of EU institutions, bodies, offices or agencies.

### 2.5.2 Interpretation of EU law

Lower national courts as well as the highest national court may interpret the provisions of the Procedures Directive when deciding on (higher) appeals against asylum decisions. They may use EU fundamental rights to find such an interpretation. The national courts decide whether national (implementing) legislation breaches an EU fundamental right. The courts will, if they deem it necessary, be guided, by the Court of Justice under the preliminary ruling proceedings.<sup>107</sup> In *Samba Diouf* the Court of Justice for the first time interpreted the Procedures Directive in the light of the EU right to an effective remedy. It decided that the absence of a remedy against the decision to process an asylum claim in an accelerated procedure does not constitute an infringement of the right to an effective remedy. However the Court of Justice held that it must be possible to subject the reasons which led the competent author-

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104 Case 314/85, *Foto-Frost* [1987], paras 17-20.

105 Ward writes that doubt remains on the practical utility of challenging the legality of EC measures. 'While the Court of Justice has developed an impressive range of substantive rules against which the legality of EC measures can be tested, they rarely result in a declaration of invalidity in cases arising from Article 234 reference from national courts'. Ward 2007, p 12.

106 Tridimas 2006, pp 31 and 35.

107 Tridimas 2006, p 38.

ity to reject the application for asylum as unfounded to a thorough review by the national court. The national court had to decide whether national procedural rules complied with this condition.<sup>108</sup>

The competence of the Court of Justice to give preliminary rulings on questions regarding the interpretation of the Treaty or EU legislation is laid down in Article 267 TFEU. This competence includes answering questions regarding the conformity with EU law of Member States' acts which fall within the scope of EU law. Such questions may arise for example if an individual argues that EU fundamental rights require a certain interpretation of a provision of EU legislation and that a national act violates this (interpretation of that) legislation. He could state for example that Article 39 PD read in the light of the EU right to an effective remedy a remedy with automatic suspensive effect. A national remedy without such suspensive effect would then violate EU law.<sup>109</sup>

### 2.5.3 The important role of the national courts as EU courts

Until the entrance into force of the Treaty of Lisbon, Article 68 of the former EC Treaty denied lower courts the opportunity to make references for preliminary rulings with regard to the measures adopted under Title IV of the former EC Treaty such as the Procedures Directive and Qualification Directive.<sup>110</sup> Potentially as a result of this limited role no questions regarding the legality and few regarding the interpretation of EU measures adopted under Title IV had been referred to the Court of Justice until 1 December 2010. The Court of Justice's role in assessing the legality of and interpreting measures adopted under Title IV of the former EC-Treaty was therefore limited.

The Treaty of Lisbon repealed Article 68.<sup>111</sup> As a result the rules laid down in Article 267 TFEU on preliminary rulings also apply to asylum measures. However, also in the post-Lisbon situation it is the national courts which play in practice the most important role in interpreting the Procedures Directive and testing its legality. Only in very few of the total number of asylum cases pending before the national courts of the Member States a reference for preliminary ruling will be made to the Court of Justice.<sup>112</sup>

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108 Case C-69/10, *Samba Diouf* [2011]. See further Chapter 9.

109 See further section 6.3.

110 This provision presumably aimed to prevent overburdening of the Court of Justice. See Battjes 2006, p 572.

111 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007/C 306/01, 17 December 2007, Art 2 sub 67.

112 The Court of Justice has recognised the importance of the role of the national courts as 'guardians' of the EU legal order and 'ordinary' courts in the EU legal order in its opinion 1/09 of 8 March 2011. See Baratta 2011.

According to the general rule any national court or tribunal of a Member State *may* request the Court of Justice to give a preliminary ruling regarding questions on the legality of an act of an EU institution, if it considers that a decision on the question is necessary to enable it to give judgment. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is *required* to bring the matter before the Court of Justice.<sup>113</sup> However it is up to the national court to decide whether it is necessary to refer a question to the Court of Justice for preliminary ruling. National courts may be hesitant to refer questions, for example because it involves a lot of work or because it takes the Court of Justice a long time to answer the questions, which may lead to considerable delay of many asylum cases in which the same question is at issue. Individuals thus always depend on the willingness of national courts to refer a question to the Court of Justice. If the national court refuses to refer a question, the individual does not have a remedy against that decision.<sup>114</sup>

It should be concluded that it depends to a large extent on the national courts whether the procedural issues addressed in this study will ever be put before the Court of Justice. The national courts have an important responsibility in guaranteeing the EU right to effective judicial protection and related procedural rights in asylum cases.<sup>115</sup>

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113 Art 267 TFEU.

114 See also De Witte 2009, p 877.

115 See also section 11.4.

