THE COMMON EUROPEAN ASYLUM SYSTEM

TEMPORARY PROTECTION, RECEPTION CONDITIONS, DUBLIN II.

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Temporary Protection Directive, 2001

2001/55 EC Directive on 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 July 20, OJ L 212/12

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TEMPROARY PORTECTION DIRECTIVE

- Goal:
  - minimum standards for giving temporary protection in the event of a mass influx of displaced persons
    +
  - to promote a balance of effort between Member States
- Basic principles:
  - Neither replaces nor excludes recognition as Convention refugee
  - Any discrimination among persons with temporary protection is forbidden

Temporary Protection Directive

Beneficiaries = ‘displaced persons’

who

- have had to leave their country or region of origin,
- or have been evacuated,
- and are unable to return in safe and durable conditions

in particular:

(i) persons who have fled areas of armed conflict or endemic violence;

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;

Temporary Protection Directive

- **Mass influx'** means arrival in the Community
  of a large number of displaced persons,
  who come from a specific country or geographical area
- The Council decides by qualified majority the start and end of T.P.
- Duration
  - 1 year + max two times 6 months
    = total max: **2 years**
- Council may end it earlier, but must not exceed two years'

Not applied until 2013 February

Temporary Protection Directive

- Rights of beneficiaries:
  - Entry visa for free
  - Residence permit, identity paper,
  - Employment, self employment under the same conditions as recognized refugees
  - Suitable accommodation or the means to obtain housing.
  - Social welfare and means of subsistence, if they do not have sufficient resources
  - Medical care in emergency cases and illness
  - Specific assistance to vulnerable groups

Temporary Protection Directive

- Further rights:
  - if minor aged: schooling like the nationals
  - family unification (partner also, broader family) if
    - if they had lived together
    - parted due to circumstances surrounding the mass influx
    - extends to spouse (partner) , dependent non-married child, exceptionally to other traumatized close relative.

Temporary Protection Directive

Relation to Convention status

Temporarily protected may qualify as Convention Refugees

Access to determination procedure must be guaranteed

The decision on status may be suspended for the time of T.P.

Non-recognition of Conv. status does not affect T.P.

Reception conditions directive

COUNCIL DIRECTIVE 2003/9/EC

of 27 January 2003

laying down minimum standards for the reception of asylum seekers

(OJ 2003 L 31/18)

Reception Conditions Directive

Scheme:

I. Purpose, definitions, scope

II. General provisions on reception conditions

III. Reduction or withdrawal of reception conditions

IV Persons with special needs

V Appeals

VI-VII Administrative cooperation and final provisions

Reception Conditions Directive

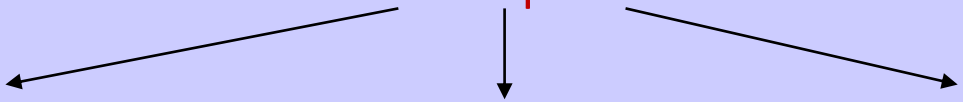
Purpose:

- To ensure asylum seekers a dignified standard of living and comparable living conditions in all Member States during the refugee status determination procedure

and

- by the similarity of treatment across the EU limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception

Scope:



Obligatory	Optional	Not-applicable
Geneva Convention applications	Applications for subsidiary protection	Temporary protection
↓ (This is presumed of all applications)		

Only the minimum is prescribed – states may overperform!

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Reception Conditions Directive
General provisions

Information 15 days, in writing, language!

Documentation 3 days, permit to stay ↔ detention, border

Freedom of movement/detention the state may

assign an area / decide on the residence / confine to a particular place or make the material conditions only available in a specific place

Family unity maintain as far as possible

Medical screening optional

Schooling minors: compulsory, (after 3 months) but may in accommodation centre

Employment optional exclusion from labour market; after 1 year: compulsory access, if no 1st instance dec. yet. Ranking after EU/EEA citizens

Reception Conditions Directive
General provisions (Cont'd)

Vocational training optional (States may grant access)

Material conditions: standard + asylum seekers' contribution

„to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence" (§ 13)

The State may require the applicant to contribute to mat. cond. and health care if A. has sufficient resources. If A. had – refund
Provision: in kind – money – vouchers or mix.

Housing/accommodation and its modalities shall ensure: family life, access to lawyer, UNHCR and /recognized/ NGO-s /except: security reason/, prevention of assault, may transfer.

Deviation possible: specific needs, geographic area, housing exhausted detention, border procedure =„shall be as short as possible" (§14 (8))

Health care minimum: „emergency care and essential treatment of illness" (§ 15)

Reception Conditions Directive
Reduction, withdrawal

- Reduction/withdrawal always optional
- No reduction/withdrawal before (first) negative decision on status
- Decisions „shall be taken individually, objectively and impartially and reasons shall be given" (§16 (4))
- Cases of reduction/withdrawal: conditions may be reduced or withdrawn when an asylum seeker:
  - ❖ abandons the determined place of residence w/out permit
  - ❖ does not report as prescribed or does not appear for interview
  - ❖ has already lodged an application in the same Member State.
  - ❖ has concealed financial resources and has therefore unduly benefited
  - ❖ has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

As a sanction for serious breach of the rules of the accommodation centres or for seriously violent behaviour.

_____

Emergency health care must not be withdrawn in any case!

Reception Conditions Directive
Persons with special needs

- Compulsory specific attention to vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (§ 17)
- Minors: best interest of the child guides
- Unaccompanied minors: representation as soon as possible + housing with adults (relatives) or specific centers + siblings together + tracing family without jeopardizing them) + appropriate training employees
- Victims of torture and violence: MS must ensure necessary treatment

Reception Conditions Directive

Appeals

- Against
  - a negative decisions relating to the granting of benefits (including reduction or withdrawal decisions) or
  - decisions on residence and freedom of movement (§ 7) which individually affect asylum
- Affecting individual asylum seekers
- Procedure: laid down in the national law.
- At least in the last instance: appeal or a review before a judicial body

Provisions on cooperation and transposition

MS: must allocate necessary resources, provide the necessary basic training and inform the Commission

Commission: report to Parliament by 6 August 2006

Transposition deadline 6 February 2005

Commission evaluation, 2007 November

„Contrary to what was predicted following adoption of the Directive, it appears that Member States have not lowered their previous standards of assistance to asylum seekers. However, the present report has clearly shown that the wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, undermines the objective of creating a level playing field in the area of reception conditions."

COM(2007) 745 final, p. 10

From the background of the second recast

- „[M]any Member States opposed specific provisions of the proposal because of the particularities of their asylum and/or legal systems. In this respect it was feared that adaptations would require substantial financial efforts and administrative readjustments and would impede the effectiveness of the asylum procedure.” Com (2011) 320, p.4
- „The main objective of this modified proposal is to further clarify and provide more flexibility to the proposed reception standards so that they can be easier built into the national legal systems.” – p. 6 – **Clear surrender**

Concessions made concerning

- guarantees for detained asylum seekers,
- reception conditions in detention facilities,
- deadlines for access to the labour market,
- level of health care provided for persons with special reception needs and
- identification mechanisms for such needs,
- access to material support and
- the reporting obligations of MS

Recasting the Reception The first recast COM(2008) 815 final – major suggestions

- Scope : include applicants for subsidiary protection
- Access to the labour market : access after a period of maximum 6 months after lodging an application (not 12 as so far)
- Material reception conditions: higher standards in financial support, attention to groups with special needs in housing, limits to withdrawal of conditions
- Detention: 4 new articles trying to limit the practice, by giving possible grounds, requiring that it be shortest period possible, regularly reviewed by courts, etc.
- Persons with special needs: early identification of this group obligatory

Recasting the Reception The second recast COM(2011) 320 final - as suggested

- Scope : same
- Access to the labour market more flexibility for states to deny access to labour market (non-access for 12 months if large scale influx, or applicant delaying procedure)
- Material reception conditions:
- No common points of reference as to the standards of living
- Detention: less access to free legal aid; at borders and in transit no full guarantees, minors can be detained, exceptionally allowed in prison
- Persons with special needs: early identification of this group obligatory but the rules are less detailed

Recast after the 2012 September political agreement

Doc. 14654/12 of 14 December 2012

Major agreed changes compared to the 2003 directive

- Reference to the „principle of solidarity and fair sharing of responsibility” and to Member States which are „faced with specific and disproportionate pressures” (Preamble)
- (Verbally) no longer „minimum” standards
- Scope: extended to application for asylum. Applies at all stages and at all locations

Recast - Major agreed changes compared to the 2003 directive - Detention

The conceptualisation – a limited, exceptional tool

Preamble, para 15:

- „… a person should not be held in detention for the sole reason that he or she is seeking international protection, …
- Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.
- Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority."

- Article 8 para 2:

Member States may detain only detain an applicant, „if other less coercive alternative measures cannot be applied effectively" –individual assessment is required

Less coercive alternatives:
- regular reporting to the authorities,
- the deposit of a financial guarantee,
- obligation to stay at an assigned place

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Recast - Major agreed changes compared to the 2003 directive - Detention

- Detailed new rules: §§ 8 – 11 = Grounds – guarantees – conditions – persons with special needs

- Six grounds :
  - determine or verify his or her identity or nationality;
  - determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
  - border procedure (decision on entry);
  - when detained subject to a return procedure the application is made only in order to delay or frustrate the enforcement of the return decision
  - when protection of national security or public order so requires;
  - Dublin procedure

Recast - Major agreed changes compared to the 2003 directive - Detention

- Guarantees:
  - Detention only on the basis of a written, reasoned order by court or administrative authority
  - Info in writing on reasons and appeal possibilities
  - Detention must be as short as possible, and only as long as grounds are applicable.
  - Appeal or ex officio review of the administrative detention decision + periodic review of all detention + free legal assistance in the judicial review (but: MS may restrict access to free legal aid)

Recast - Major agreed changes compared to the 2003 directive - Detention

- Conditions

- In separate facility, or if in prison, separated from inmates
- Not together with „other third-country nationals who have not lodged an application for international protection".
- Access to open-air spaces (No specification of time or conditions)
- UNHCR or organisation working on its behalf must have access to the site and be able to communicate with the detained person
- Family members, legal advisors and (recognised) NGO-s: access and communication unless „objectively necessary for the security, public order or administrative management of the detention facility" – but even then it must not virtually wipe out the right
- Systematic provision of info which explains the rules applied in the facility in a language which the detained persons understand or are reasonably supposed to understand.

Vulnerable persons and persons with special needs

- Detention – possible (unaccompanied minors: „only in exceptional circumstances", never in prison, separately from adults)
- Health and mental health – primary concern
  - Monitoring and „adequate support"
- Families: „shall be provided" with separate accommodation „guaranteeing adequate privacy"
- Females separate from males (unless consenting family)
- Derogations at border detention possible

•vulnerable persons **such as** minors,
•unaccompanied minors,
•disabled people,
• elderly people,
• pregnant women,
• single parents with minor children,
•victims of human trafficking,
•persons with serious illnesses,
• persons with mental disorders
•persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation

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Special needs identification

Assessment of the special reception needs of vulnerable persons

Member States **shall assess** whether the person has special needs and what they are

Within a reasonable period of time after an application

If they become apparent at a later stage in the asylum procedure still to be addressed

The support provided to applicants with special reception needs must last throughout the duration of the asylum procedure and be monitored

No prescribed form for the assessment (no formal procedure – no appeal)

Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs

The Dublin Convention and the Dublin II regulation (1990 and 2003)

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990) OJ 1997 C 254/1

and

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ 2003 L 50/1

Implementing regulation

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 222 of 5 September 2003, p. 1);

Basic data of the Dublin Convention and the regulation replacing it

- Convention:
  - Signature: 15 June 1990.
  - Entry into force:1 September 1997.
  - Parties: A 15 EU member states, Iceland and Norway
- Regulation:
  - EC Council reg. **343/2003** (18 February 2003), **OJ** (2003) **L 50/1 2003. 02.25**
  - **Start of application: 1 September 2003**. (In respect of applications submitted after the date and requests for readmission)
  - Participants: EU member states except for Denmark plus Norway and Iceland
  - Denmark has a special link to it,

see 2006/188/EC: Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003

Purpose and philosophy of Dublin

- Every asylum seeker should gain access to the procedure. There must be a MS to determine the case

- Only one procedure should be conducted within the Union. A decision by any MS be taken in the name of others = no parallel or subsequent application should take place

The philosophy of Dublin: under what conditions is taking charge by another state – without investigation of the merits in the first state fair

- If the substantive law (the refugee definition) is identical
- If procedural rules guarantee equal level of protection at least in terms of
  - legal remedies (appeals)
  - access to legal representation
  - physical conditions (support) during the procedure

The Dublin system as seen by the CJEU (*NS and ME*, para 79)

Based on mutual confidence of MS

Principal aim

To **speed up the handling of claims**

in the interests both of asylum seekers and the

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NOT BURDEN SHARING !

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Problems with the Dublin Convention

Five important cases:

- **T.I. V. United Kingdom** ECtHR Appl. 43844/98
  2000. March 7. (IJRL vol. 12 (2000) 244 - 268.pp)
- **Adan and Aitseguer** (House of Lords) **19 December** 2000.

  Regina v. Secretary of State for the Home Department (appellant) ex parte Adan (respondent)

  Regina v. Secretary of State for the Home Department (appellant) ex parte Aitseguer
  (respondent)

  [2001] 2 WLR 143 (ld. www.refugeecaselaw.org)
- **K.R.S. v. the United Kingdom** Appl. no. 32733/08, ECtHR judgment of 2 December 2008
- **M.S.S v Belgium, and Greece**, appl. no. 30696/09, ECtHR Judgment of 21 January 2011 – return to Greece and treatment of a.s. in Greece violates Art 3.
- **NS contra Secretary of State** /UK/ C-411/10 CJEU reference for preliminary ruling: is the decision to apply the sovereignty clause regulated by EU law? Joined with **M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform** (Ireland) - CJEU judgment of 21 December 2011

EC Regulation 343/2003 (DUBLIN II)

- Material scope: : „ application for asylum" = a request for international protection from a Member State, under the Geneva Convention //Not: for subsidiary protection!!//

Criteria of identifying the responsible state (this is the hierarchy)

- Unaccompanied minor: where family member lives legally or where minor submitted
- recognized refugee family member
- asylum seeker family member if not decided yet
- residence permit
- visa issued
- visa free entry
- airport transit area
- external border crossed illegally
  unless a year passed, or unless lived in another country
  for 5 months
- if none of the above: where lodged

Cases of the non-responsible state examining the application

- any other MS may proceed where submitted

- MS have the freedom to send to safe third country

Appeal: not necessarily suspensive

Regulation 343/2003 (Dublin II)
Procedure - deadlines

- The responsible state has to be requested as soon as possible but not later than 3 months after the submission of the application.
  - If not: loss of right to transfer
- Reply: within 2 months. Silence = agreement
  - In urgent cases: 1 month for reply
- Transfer: within 6 month
  - from acceptance to take charge or
  - from the end of procedure in which transfer was challenged

  = taking charge

Regulation 343/2003 (Dublin II) Procedure - deadlines

Taking back:

- In case the applicants leaves the state's territory during the procedure of
  - determining the responsible state
  - determining whether she qualifies for status (merits)
  - or after a negative decision

  that state has to *take* her *back.*

  Reply: within 1 month (if Eurodac based request: 2 weeks)

  Taking back: within 6 months from acceptance

Regulation 343/2003-as (Dublin II)
Procedure - appeal

There is appeal against (or review of) the decision to

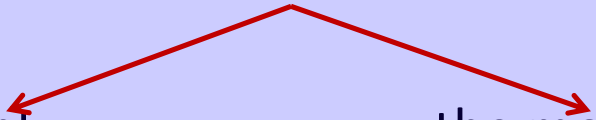
- transfer in order to take charge (other state being responsible)
- transfer in order to take back (return to the

Suspensive effect?

Usually not, unless court or competent body so decides

The Petrosian case C-19/08, decided on 29 January 2009

- Facts: Armenian family in Sweden, after having applied in several countries. Sweden assumes France is responsible, France first silent – Sweden decides to transfer (France confirms), P challenges transfer – in Sweden appeal has suspensive effect
- Preliminary question raised by Stockholm court: what is the starting point of the 6 months period after which the requesting state becomes responsible



the moment of suspension

the moment of decision on the merits

- Judgment: *„where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation"*

What if a Dublin state does not exercise its responsibility properly? Must a state apply the sovereignty clause (3§ 2.)

Problems with Greece since 2008, at least – no decent access to procedure, inhuman circumstances during procedure

K.R.S v. UK (ECtHR, 2008 December) it is not a violation of Art 3 to return asylum seekers to Greece. If Art. 3 is breached, application from Greece is possible

M.S.S v. Belgium and Greece (ECtHR, 2011 January) total reversal : return to Greece violates Art. 3 as well as treatment in Greece violates it. Both states are in breach of the European Convention

M.S.S v. Belgium and Greece – main points

Facts:

- The applicant is M.S.S. is an Afghan man, who worked as an interpreter in Afghanistan and chose Belgium as the destination country because of his contacts with Belgian troops in Kabul
- He travelled through Iran, Turkey Greece and France. He was caught in Greece in December 2008 but did not apply for asylum. On 10 February 2009 he arrived in Belgium, presented himself to the Aliens office and applied for asylum.
- Feared persecution: reprisal by the Taliban for his having worked as an interpreter for the international air force troops stationed in Kabul. He produced certificates confirming that he had worked as an interpreter.
- Belgian authorities denied appeal against transfer, ECtHR did not grant Rule 39 relief (provisional measure to halt transfer)
- 15 June 2009: M.S.S. was returned to Greece which was obliged to take charge (as it had remained silent for two months)

M.S.S v. Belgium and Greece – main points

Facts continued

15-18 June 2009 detention of M.S.S. in Greece under harsh conditions

> §34: „locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor."

After living in the park (and not reporting to the police) on 1 August 2009: attempt to leave Greece with a false Bulgarian passport → second detention, expulsion order, later revoked due to the pending asylum procedure. The applicant contacted the police, had his residence card renewed twice for 6 months, but no accommodation was provided to him.

August 2010: another attempt to leave Greece, towards Italy – caught again, almost expelled to Turkey

His family back in Afghanistan, strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse

The case was pending in the Court since 11 June 2009

Facts as to Greece:

88 % of illegal arrivals into Europe through Greece (in 2009)

Recognition rates 0,04 % Convention status, 0,06 Subsid protection = 1 out of 10 000 at first instance

Appeal: 25 Convention status and 11 subsid prot out of 12 905

M.S.S v. Belgium and Greece – Claims against Greece

M. S. S. – the applicant

A) Both periods of detention amounted to inhuman and degrading treatment.

B) The state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment

C) He had no effective remedy concerning the above claims

The issue of the detention (A)

The Government

The rooms were suitable equipped for a short stay + (in August 2009) on 110 m^2 there were 9 rooms and two toilets +public phone and water fountain

The Court

General principles to be applied (as to detention) – the meaning of Article 3.

„confinement of aliens, .. is acceptable only in order to enable States to prevent unlawful immigration while complying …. the 1951 Geneva Convention …. and the European Convention on Human Rights." (§ 216)

„ **Article 3** of the Convention, … enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct" (§218)

Ill treatment „must attain a certain level of severity"

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health

M.S.S v. Belgium and Greece – Claims against Greece

Ill treatment „must attain a certain level of severity"

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health (§ 219)

Inhuman treatment = when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering" (§ 220)

„Treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance". (ibid)

„It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities." The purpose f the treatment need not be humiliation.

M.S.S v. Belgium and Greece – Claims against Greece

„Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured" (§ 221)

Application of the principle to the present case – the Court's dictum

He Court acknowledges the increased hardship of external border states because of Dublin, but Art. 3 is absolute

After return to Greece the authorities new, that M.S.S. did not „have the profile of an 'illegal migrant'"

145 persons on 110 m^2 usually locked up, without hygienic tools

+ the asylum seeker especially vulnerable -->

„taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention.

In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker." (§ 233)

VIOLATION of Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Greece

The issue of the living (reception) conditions during the procedure (B)

The government

The applicant has not visited the police station as advised.

After December 2009 when he showed up, efforts were made to find an accommodation bit M.S.S. had no address where to inform him.

Homelessness is widespread in States, parties to the ECHR – it is not contrary to the Convention.

The Court

General principles: as above +

There is no duty under Article 3 to provide home or financial assistance.

Application to the present case

The reception conditions directive bounds Greece

Asylum seekers constitute a special group in need of special protection

The reception capacity of Greece is clearly inadequate, „an adult male asylum seeker has virtually no chance of getting a place in a reception centre"(§ 258) none of the Dublin returnees between February and April 2010 got one.

The authorities have not informed M.S.S. of the available accommodation even when they saw him in June 2010

There was no realistic access to the job market due to administrative riddles

M.S.S v. Belgium and Greece – Claims against Greece

. ”..the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.

The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.” (§ 263)
= VIOLATION OF ARTICLE 3. HELD 16 : 1

M.S.S v. Belgium and Greece – Claims against Greece

The issue of effective remedies with respect to Articles 2 and 3 - claim (C)

(Only protected from refoulement because of ECtHR interim measure, no serious examination of the merits of the asylum claim. The appeal to the Supreme Court would not have suspensive effect, practically nobody is recognised by the Greek authorities)

The Government

The applicant

failed to cooperate,

assumed different identities (when trying to leave Greece),

had access to interpreter.

The review by the Supreme Court is effective remedy,

Asylum seekers were not entitled to a right to appeal under the ECHR and Article 6 (Right to a fair hearing) of the Convention did not apply to asylum cases,

No danger to transfer to Turkey as the readmission agreement with Turkey does not cover returnees from other EU MS.

The applicant did not appear at the hearing planned for 2 July - = did not exhaust local remedies

M.S.S v. Belgium and Greece – Claims against Greece

The Court

General principles

The remedy must be linked to a Convention right and must deal with the substance of an arguable complaint

It must be available in law and in practice

It must grant appropriate relief and must not be of excessive duration

„In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires …, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 .., as well as a particularly prompt response

In cases of Article 3 threat the remedy must have automatic suspensive effect

M.S.S v. Belgium and Greece – Claims against Greece

Application to the present case

The gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties - arguable claim (but the Court does not rule on the possible consequences of return only on whether there was an effective remedy against removal within Greece) (§§ 296 – 298)

M.S.S. had not enough information and his non-appearance is the result of lack of reliable communication.

Uncertainty about the hearing on 2 July – perhaps only told in Greek.

„The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court" (314)

His efforts to escape from Greece can not be held against him as he tried to escape Art 3 treatment.

Conclusion: violation of Art 13 in conjunction with Article 3: „…because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

VIOLATION of Article 13 in conjunction with Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Belgium

M. S. S. – the applicant

Sending him by Belgium to Greece exposes him to the risk of violating Article 2 and 3 by way *of refoulement*

The application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against *refoulement* existed in Greece (and they were insufficient)

Belgium

When needed Belgium applied the sovereignty clause (§3 (2)) of the Dublin regulation

M.S.S did not complain about Greece, nor had he told that he had abandoned an asylum claim in Greece

Greece assured that it would investigate the merits of the case

In the *K.R.S v. UK* case Greece gave assurances that no refoulement would occur

M.S.S v. Belgium and Greece – Claims against Belgium

Interveners

The Netherlands: „It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards."(§ 330)

„In keeping with the Court's decision in *K.R.S.* (cited above), it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based…" (§ 330)

UK: Dublin is to speed up the process – calling to account under § 3 ECHR would slow it down

UNHCR: each Contracting State remained responsible under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

AIRE Center and AI: transferring to a state violating Art 3 entails the responsibility of the transferring state

M.S.S v. Belgium and Greece – Claims against Belgium

The Court

Difference from the Bosphorus case: there sovereign powers were transferred to an organsiation which entailed protection of fundamental rights equivalent with the Convention protection. (Namely the EU legal order and the CJEU) and the state was obliged to act.

Here Belgium could refrain fro the transfer so it was not an international obligation (§ 340)

Lessons from T.I and K.R.S.:

„When they apply the Dublin Regulation, … the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention."

„the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker" (ibid) → rejection was based on the fact that Germany had an adequate asylum procedure.

In K.R.S the Court could assume that Greece was complying with the reception conditions directive and the asylum procedures directive , nor was a danger that a rule 39 intervention by the Court would not be observed.

M.S.S v. Belgium and Greece – Claims against Belgium

- The Court had to consider whether the Belgian authorities ought to have regarded as rebutted the presumption that the Greek authorities would respect their international obligations.
- The situation changed since December 2008 (K.R.S v UK decision)
  - more and more reports about the conditions in Greece
  - UNHCR's letter to Belgium to suspend transfers
  - Commissions proposal for Dublin recast – entailing a rule on suspension of transfers
  - The Belgian Aliens Office Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece
- Adequate protection: existence of domestic laws and accession to treaties not enough when reliable sources report contrary practices
- Guarantee by the Greek Government was too general, not about the person
- „the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory" (§ 357)

M.S.S v. Belgium and Greece – Claims against Belgium

The Courts conclusion on the application of Dublin

- The „Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him." (§ 358)
- „…it was in fact up to the Belgian authorities, …to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable." (§ 359)
- VIOLATION OF ARTICLE 3. by the transfer and exposing him to the deficiencies of the asylum procedure (threat of refoulement) HELD 16 : 1
- VIOLATION OF ARTICLE 3. by returning him to the Greek the detention and living conditions HELD 15 : 2

N. S. (C-411/10) v Secretary of State for the Home Department (UK)

and

M. E. and others (C-493/10) v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, (Ireland)

CJEU judgment, 21 December 2011

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

- N. S. (C-411/10) v Secretary of State for the Home Department (UK) and M. E. and others (C-493/10) v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, (Ireland) CJEU judgment, 21 December 2011
- Importance of the case: The Commission, UNHCR, Amnesty International (+other NGOs) and Austria, Belgium, the Czech Republic, Finland, Germany, Greece, France, Italy, The Netherlands, Poland, Slovenia and Switzerland submitted observations.

- **Facts**
- **C-411/10**

- **NS** Afghan national arrested in Greece, Sept, 2008 - does not apply for asylum - order to leave – later expelled to Turkey (2 month in prison there) – 12 January arrival in **UK** – Request to Greece to take charge – silence- 18 June Greece deemed to have accepted responsibility – 30 July removal order without an appeal with suspensive effect as Greece „safe" according to the 2004 British Act on Asylum – NS seeks judicial review – granted – March 2010 High Court dismisses application but allows further appeal –Court of Appeal raises preliminary questions to the Court of the European Union

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

- Facts continued
- C-493/10

- Five unconnected individuals from Afghanistan, Iran and Algeria – none apply for asylum in Greece – application in Ireland – Eurodac shows hit – no argument based on Art 3 ECHR – resistance to return based on claim that reception conditions and the asylum procedures in Greece are inadequate

- Questions, as grouped by the Court

- A) Does a decision adopted by a Member State to apply the „sovereignty clause" (Article 3(2) of The Dublin II regulation /343/2003/) fall within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

- B) Whether the transferring Member State
- Ba) is obliged to assess the compliance of the other Member State, with EU law
- Bb) may operate on the basis of a conclusive presumption that the responsible State will observe the claimant's fundamental rights and the minimum standards imposed by the directives
- Bc) may maintain a provision of national law which requires a court to treat the responsible Member State as a 'safe country' as compatible with the rights set out in Article 47 of the Charter.
- Bd) is obliged to accept responsibility (must apply the sovereignty clause) if the responsible state is found not to be in compliance with fundamental rights

- C) Is the extent of protection offered by the Charter articles 1 (human dignity), 18 8Right to asylum), 47 (effective remedy) wider than that of Art 3 of the ECHR?

- D) Whether Protocol 30 to the Treaties on the application of the Charter to the UK (and Poland) qualifies the answers on the duty to assess the destination country's circumstances and the on the applicability of the safe country presumption

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

- Ad A) Exercising discretion – still within the Dublin system („becoming responsible") – part of CEAS – applying EU law – Charter is applicable (51 (1)).

- Ad B) Combined answers:
- „*The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted*." (§ 75)
- secondary rules must be interpreted as not in being conflict with fundamental rights
- the Dublin system is based on mutual confidence, it must be assumed that asylum seekers are treated according to the Charter, GC51 and ECHR – that is the raison d'être of creating the CEAS
- slight infringements do not prevent transfer
- by contrast systemic flaws in the procedure or in reception conditions do (see next slide!)

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

Answer to Bd First part

- „if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision" (§ 86)

- in Greece there are systemic deficiencies in procedure and reception conditions as acknowledged in the M.*S.S.* v. *Belgium and Greece* judgment of the ECtHR

- states must assess the situation in other member states based on available reports and judgments

Answer to Ba

„ Member States, … [must] not transfer an asylum seeker to the 'Member State responsible' …. where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. „ (§ 94)

Answer to Bd First part (con-tinued)

MGIMO 2013

N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

→ if no transfer is possible he MS must examine further (possible) criteria for transfer but: no unreasonable delay in transferring

Answer to Bb

→ an application of the Dublin II regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the responsible Member State is incompatible with the duty of the Member States to interpret and apply the Dublin II regulation in a manner consistent with fundamental rights.

Answer to Bc

→ Safety of a country must be a rebuttable presumption! (§ 104)

-

→ If criteria do not lead to finding another state responsible or if transfer would entail unreasonable delay the „Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of" the Dublin II Regulation.

Answer to Bd second part

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N.S. and M.E (UK and Ireland) CJEU preliminary judgment C 411/10 and C-493/10 joined cases

- Ad C) The Court in an obscure response states that (in light of the MSS judgment of the ECtHR) if systemic deficiencies in the procedure and in the reception conditions exist, then the Charter provisions „do not lead to a different answer" than given in the preceding paragraphs

- Ad D) The Charter applies to the UK, just it blocks the extension of the already existing powers of the courts.
- ⟹ It does not qualify the essence of this judgment

General conclusion – with relevance to Hungary

- Territorial limits are not decisive in determining whether a state is responsible for actions of its organs/staff/officials
- Acts of other states may also lead to the transferring state's responsibility if the state could not be unaware of what expects the transferred (removed) person there (*MSS, NS and ME*)
- No conclusive presumption of safety of any state may be applied (*NS and ME*)
- The principle of mutual confidence (and of mutual recognition) within the EU is subordinate to the obligation to observe fundamental rights – individual assessment is required (*NS and ME*)
- Inadequate procedures and reception conditions may amount to inhuman and degrading treatment. (*MSS, NS and ME*)

- **In sum**

- **A state may not escape its moral and legal responsibility by relying on (unfounded) presumptions about other states' respect for fundamental rights**

- These findings led a number of foreign decision makers to withhold transfer to Hungary due to procedural deficiencies and reception conditions

Questions of principle

- 1. Should the asylum seeker have a right to choose the country of asylum?
- 2. Is Dublin (the idea of one state deciding on behalf of others) compatible with the Geneva Convention?
- 3. Possible forms of responsibility sharing.
  - by allocating financial resources
  - by allocating the persons
  - by sending them to third countries
  - by using extra-EU processing and protecting centers

Dublin regulation Recast(s)

(COM(2008) 825 final) 3 December 2008

and as it stands in

Doc. No. 15605/12

of 14 December 2012

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

3 aims of the amendments:

- increase the system's efficiency
- ensure higher standards of protection
- contribute to better addressing situations of particular pressure on Member States' reception facilities and asylum systems

Unchanged rationale:

„responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity”

(COM(2008) 825 final), p. 6

Scope:

UK, Ireland, Norway, Switzerland Liechtenstein in,

Denmark out

Recasting the Dublin system – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Particular pressure or inadequate level of protection

- When a MS is „faced with *a particularly urgent situation which places an exceptionally heavy burden* on its reception capacities, asylum system or infrastructure, *and* when *the transfer* of applicants… *could add to that burden*, that [MS] State may request that such transfers be suspended+ (§ 37)
- When the Commission or another MS „is concerned that the *circumstances prevailing in another Member State may lead to a level of protection* for applicants for international protection which *is not in conformity* with Community legislation"

they can request suspension of transfers. The *Commission decides*. Suspension for *6 months*, extendable once *by 6 months*. Council may overrule Commission

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No success - replaced with an „early warning, preparedness and crisis management mechanism" - see below new article 31

The recast in its 2013 shape – the political compromise 14 December 2012 – Doc. No. 15605/12

- The suspension of Dublin mechanism not accepted by MS-s
- Instead: two moves
  - Council conclusions on „genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows" 8 March 2012
  - Introduction of a „mechanism for early warning, preparedness and crisis management" (see next slide)

Solidarity:

- No hard sums or quotas agreed
- Emphasis on prevention and co-operation with EASO and Frontex
- Voluntary relocation and joint processing: to be (further) studied
- Intensified joint returns (FRONTEX co-ordinating)
- Emergency funding from the future Asylum and Migration Fund and the future Internal Security Fund in case of „unexpected pressure" and „crises in the area of asylum, including through mixed migration flows, affecting one or more Member States"

Article 33 of the recast
A mechanism for early warning, preparedness and crisis management
Preventive action

Risk of pressure or deficiency – preventive action plan

- „Where, on the basis of, in particular, the information gathered by … the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan."
- „The Member State concerned shall inform the Council and the Commission whether it intends to present a preventive action plan" … [or] „ a Member State may, at its own discretion and initiative, draw up a preventive action plan" with the assistance of the Commission, EASO and other MSs.
- The MS will report on its implementation to the Commission and that in turn to EP and Council
- The Member State concerned shall take all appropriate measures to deal with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates.

Article 33 of the recast (cont'd)
Crisis management

Serious risk of crisis – compulsory crisis management action plan

- If the particular pressure may jeopardise the application of this Regulation, the Commission shall seek the advice of EASO before reporting to the European Parliament and the Council.
- Where deficiencies are not remedied by the plan the or „where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan, the Commission, in cooperation with EASO as applicable, may request the Member State concerned to draw up a crisis management action plan"
- Drawing up a crisis management plan is compulsory – deadline: max three months
- Reporting as in the case of preventive action plans
- Council shall closely monitor the situation
  - and may request further information
  - provide political guidance,
  - discuss and provide guidance on any solidarity measures as they deem appropriate. (with EP)

The impact of the NS and ME case – duty not to transfer to Member State threatening with ill-treatment
New Article 3 (2)

- Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether one of the following criteria enables another Member State to be designated as responsible for the examination of the asylum application.
- Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State becomes the Member State responsible for examining the application for international protection.

Other notable changes

- „Family”, „relative” „dependence” defined more embracing
- New or more detailed rules on
  - providing information to the applicant (in writing, by EU wide leaflet) (§ 4)
  - compulsory personal interview (§ 5)
  - guarantees for minors (§ 6) and (§ 8)
  - avoiding determination of family members’ applications in different states (§ 11)
  - discretionary” (humanitarian) clause expanded (bringing together dependent persons and those on whom they depend) (§ 17)
  - taking back (completing the case on the merits or allowing a fresh procedure without considering it a repeat application) (§ 18)
  - clear rules on taking back even if the person does not apply in the requesting state (§ 24)
  - more than 3 months absence from MSs or after effective removal = new application (§ 19)

Other notable changes

- If Eurodac hit: request must be sent within two (not three) months
- Separate article on „effective remedy, in the form of an appeal or a review, in fact and in law" against a transfer decision „within reasonable time" (§ 27) MS may decide whether
  - the applicant has a right to stay or,
  - there is suspension of the transfer which is subject to „ a close and rigorous scrutiny" by a court or tribunal,
  - the applicant has the right to ask for the suspension. While deciding that request based on „close and rigorous scrutiny" suspension must be granted
- Detailed rules of exchange on data before transfer (including info on health)

Detention § 28

- Only if there is a significant risk of absconding
- Detention must be „on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.”
- „for as short a period as possible”
  - Request for transfer: 1 month
  - reply two weeks (if silence: implicit acceptance)
  - Transfer: six weeks from approval
- If deadlines not met: detention must end (normal rules apply)

Article 2 (n) "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

The Eurodac regulation(s)

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 316 of 15 December 2000, p. 1);

Implementing regulation:

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 62 of 5 March 2002, p. 1);

EURODAC

(Council Regulation 2725/2000/EC, 11 December 2000, O.J. 2000 L. 316/1)

- Goal:
  - promoting the implementation of Dublin I and II,
    i.e. the identification of the state responsible for the examination of the asylum application
  - screening out the repeated application
  - identifying the external border crossed
- Tool: Central storage of fingerprints and comparison with those submitted by MS
- Target Group (above the age of 14):
  - All asylum seekers,
  - „Aliens" who have crossed the external border illegally
  - „Aliens" found illegally present in a MS (not stored, but compared)

EURODAC

- Procedure:
  - all fingers and palm are electronically printed, sent to the Central Unit (without name just with reference number), which compares with stored one automatically and indicates in case of a hit
- Data protection: detailed in both direction
  - (as personal data, and as data of the system)
- Storage: asylum seekers: 10 years (blocked if recognized) illegal crossers: 2 years

Recasting the Eurodac regulation – the 3 December 2008 Commission proposal (COM(2008) 825 final) – major suggestions

Extend its scope to cover subsidiary protection and align the terminology

Increase efficiency: clearer deadlines for data transmission will be set.

Better data protection requirements: the Central System informs Member States of the need to delete data.

More transparency concerning recognised refugees: data on them will be deblocked (i.e. made available for searches).

MS have to indicate in EURODAC that they apply the discretionary clauses

Repeal the Implementing Regulation and include its content into the main regulation

Recasting the Eurodac regulation – after three revised suggestions by Commission (last: 30 May 2012 - COM(2012) 254 final

- The 2012 proposal allows law enforcement authorities to access Eurodac for the purposes of fighting terrorism and organised crime, subject to strict conditions on data protection.
- On 10 October 2012 Coreper endorsed a negotiating mandate for the informal trilogues on the fourth revised version of the recast of the Eurodac Regulation.
- Parliament adopted its views (A7-0432/2012) on 17 December 2012 suggesting a great number of changes, but not objecting fully the access of law enforcement agencies

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Trilogues e started in 2013

http://www.statewatch.org/news/2013/jan/eu-council-eurodac-trilogue-multicolumn-5403-13.pdf

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For history and future see
http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197714

Thanks!

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