

# ASYLUM AND IMMIGRATION: BALANCE OF COMPETENCES REVIEW

## LEGAL ANNEX

### SECTION 1: BACKGROUND

1. Until the 1990s, asylum and immigration matters fell largely outside the competence of the European Union. However, a number of international instruments were concluded outside the scope of the EU: for example, the Dublin Convention in 1990, which determined the State responsible for examining applications for asylum lodged in the EU Member States.
2. The Maastricht Treaty (signed 1992, into force 1993) extended the EU's competence in these areas. The new 'third pillar' (entitled 'Justice and Home Affairs') established a structure for inter-governmental co-operation on a number of matters, including, for the first time, asylum and migration of non-EU nationals ('third country nationals'). These provisions were based on the principle that for the purposes of achieving the objectives of the Union (in particular the free movement of persons), asylum and immigration policy are matters of common interest for the Member States (Article K.1).
3. Under the Treaty of Amsterdam (signed 1997, into force 1999) certain policies in relation to the 'free movement of persons' (including asylum, immigration and external border control) were transferred from the third pillar to the first pillar in a new Title IV. The European Court of Justice ("ECJ") was given jurisdiction to hear Title IV cases, subject to certain limitations and conditions (Article 68(1) TEC).
4. The UK secured a special status in relation to this new title by virtue of the so-called 'Opt-In Protocol', enshrined in Article 69 TEC. This Protocol exempts the UK from provisions made under Title IV. However, Article 3 of the Protocol enables the UK to 'opt in' to particular measures taken under Title IV, if it chooses to do so.
5. The revised Treaty required the Council to adopt certain measures in relation to asylum, immigration and external border controls, including measures establishing the criteria and mechanisms for determining which Member State was responsible for considering an application for asylum, and standards on grants of refugee status and the reception of asylum seekers in Member States. These requirements imposed significantly more detailed obligations than the old third pillar provisions. However, most of the obligations sought to establish minimum standards, rather than to harmonise immigration and asylum policy throughout the Member States.
6. The Treaty of Amsterdam also incorporated into EU law the original Schengen Protocol or 'Schengen acquis' (comprising the 1985 Schengen Agreement and other instruments including the Schengen Convention). The principal aim of the Schengen acquis is to abolish checks at the internal borders between the participating Member States, which together form the 'Schengen area'.

However, pursuant to Articles 1 & 2 of the Schengen Protocol, the UK is not automatically bound by the Schengen acquis. Rather, Article 4 provides that it is entitled to request to take part in some or all of the provisions of the acquis if it chooses to do so. In accordance with Article 4, the UK 'opted in' to some elements of the acquis by way of Council Decision 2000/365/EC. (Broadly, those areas concern police and judicial cooperation. The UK has *not* opted in to areas concerning visas and border control). Where the UK has 'opted in' to an element of the acquis, it is also deemed to opt in to any subsequent measure 'building on' that element (although it retains the right to 'opt out' of such a measure if it indicates its wish to do so within 3 months of the relevant proposal being made). Conversely, where the UK has not opted into an element of the acquis, it is not permitted to participate in any such 'building measure'.

7. European Councils held in Tampere (in 1999) and the Hague (in 2004) built on the Treaty of Amsterdam, envisaging the development of a broader common European policy or 'system' on asylum (the "CEAS") and (to a slightly lesser extent) on migration of third country nationals generally.
8. The Lisbon Treaty (signed 2007, into force 2009) collapsed the pillar structure and moved Title IV into the new Title V: the "Area of Freedom, Security and Justice" of the Treaty on the Functioning of the European Union (TFEU). This incorporates, as Chapter 2 of Title V, "Policies on Border Checks, Asylum and Immigration". This is an area of shared competence between the EU and its Member States (Article 4(2)(j) TFEU).
9. The ECJ has full jurisdiction over the interpretation and application of legislation adopted under these elements of Title V TFEU, as it does for other EU legislation. (Previous limitations on referrals under the old Title IV were repealed by Lisbon).
10. Lisbon reflected the Tampere and Hague programmes, insofar as it envisaged the development of common Union policies on asylum, subsidiary protection and temporary protection (Article 78 TFEU) and on the immigration of third country nationals generally (Article 79 TFEU). It constituted a significant widening of the EU's competencies in this area. It is particularly notable that the 'common policies' require the setting of *uniform* standards rather than the establishment of *minimum* standards (as envisaged previously).
11. In 2010, the Stockholm Programme, the EU's five-year plan in the field of justice and home affairs, was signed. This envisaged the establishment of the second phase of the Common European Asylum System by the end of 2012.

## **SECTION 2: CURRENT STATE OF COMPETENCE**

### **GENERAL PROVISIONS**

12. As set out above, Chapter 2 of Title V (Area of Freedom, Security and Justice) TFEU is entitled "Policies on Border Checks, Asylum and Immigration". Measures adopted under this Chapter are subject to the ordinary legislative procedure, whereby the Commission submits proposed legislation for approval

and ratification to the European Parliament and the Council. The voting procedure in the Council is usually (but not always) Qualified Majority Voting.

13. Article 77 TFEU encourages the Union to develop a policy to minimise internal border controls and introduce an 'integrated management system' for external borders. For these purposes, the European Parliament and the Council are encouraged to develop measures on the common visa policy, checks on persons crossing external borders, conditions under which third country nationals have the freedom to travel within the Union, the gradual establishment of an integrated management system for external borders and the absence of any controls on persons crossing internal borders. If it is necessary for the Council to adopt measures on passports, identity cards or other documentation, it may do so acting unanimously after consultation with the European Parliament.
14. However, Protocol No. 20 TFEU safeguards the right of the UK to exercise checks on persons crossing its borders (the Frontiers Protocol). It also allows other Member States to impose checks on persons travelling from the UK into their territories.
15. Article 78 TFEU encourages the Union to 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*. To that end, the European Parliament and the Council have adopted measures for a common European asylum system, including establishing uniformity of protection status, common procedures for the granting and withdrawing of such status, criteria and mechanisms for determining which Member State is responsible for considering an application for international protection, and standards concerning reception conditions for applicants. Article 78(3) enables the Council, on a proposal from the Commission, to adopt measures to assist Member States confronted by an emergency situation due to sudden inflows of third-country nationals.
16. Article 79 TFEU encourages the Union to develop a common immigration policy aimed at ensuring the efficient management of migration flows, the fair treatment of third-country nationals residing legally in Member States and the prevention of illegal immigration and trafficking in human beings. For those purposes the European Parliament and the Council have adopted measures relating to conditions of entry and residence, the rights of third-country nationals residing legally in Member States, combating illegal immigration and unauthorised residence including removal and repatriation, and combating people-trafficking. In particular:
  - i) Article 79(2)(b) TFEU enables the Union to enact measures in relation to social security rights for non-EU nationals resident in the EU;
  - ii) Article 79(3) enables the Union to conclude agreements with third countries for the readmission to their countries of origin of

persons who do not fulfil the conditions for lawful presence in the territory of a Member State; and

- iii) Article 79(4) enables the European Parliament and the Council to establish measures to assist and support Member States in promoting the integration of third-country nationals residing legally in their territories.

17. In relation to all these areas, the EU and Member States share competence.
18. These provisions are all contained within Title V of the TFEU. As such, the Opt-In Protocols enable the UK to choose whether or not it wishes to participate in the measures proposed. The UK has three months from the date of the proposal of a measure to notify the Council of its intention to participate. If the UK 'opts in' to a measure, it is bound by it thereafter and cannot subsequently 'opt out'. The European Court of Justice will have jurisdiction over it in relation to the measure, and the Commission will have the power to impose sanctions in respect of any failure to properly implement the measure. If the UK does not 'opt in' within 3 months, it remains entitled to be party to negotiations on the matter. However, it has no vote and, as a result, its power to shape the proposal is likely to be significantly reduced. Thereafter, the UK may, at any stage after a measure has been adopted, indicate its wish to participate (albeit this is subject to Commission approval and conditions may be imposed upon participation).

## **BORDER CONTROL**

19. The main part of the EU's general competence in relation to border control is derived from the Schengen acquis. Under the acquis, a number of schemes have been implemented in order to limit internal border controls (for EU nationals) whilst simultaneously strengthening external border controls (in relation to the entry of third country nationals). However, as set out above, the UK is not bound by the Schengen acquis, although it may participate in certain measures if it chooses to do so.
20. Broadly, the UK participates in many of the elements of the Schengen acquis relating to cross-border police and judicial co-operation. However, it does not generally participate in those elements relating to border controls and immigration.
21. For this reason, the UK does **not** participate in the following EU border control schemes:
  - i) The Schengen Borders Code: Regulation (EC) No 562/2006 establishes rules governing the movement of persons across borders (including common external border checks and entry requirements). Additionally, the EU has recently published proposals for the 'Smart Borders' programme, which proposes to use state-of-the-art technology to speed-up, facilitate and reinforce border check procedures for foreigners travelling to the EU. This envisages the establishment of a

Registered Traveller Programme offering simplified, automated border checks to non-EU nationals complying with certain criteria, and an Entry/Exit System that would make it possible to identify overstayers;

- ii) The Visa Information System (VIS): **Council Decision 2004/512/EC** enables Schengen States to exchange visa data in order to facilitate checks and the issuing of visas, to combat abuse and to enhance security. Significantly, the UK is not able to participate in **Decision 2008/633/JHA** which enables Member States and Europol to consult VIS in order to prevent crime<sup>1</sup>;
- iii) The Schengen Information System (SIS), used by police, border guards, customs, visa and judicial authorities throughout the Schengen Area. It holds information and alerts on missing persons (particularly children), on persons involved in serious crime, persons without rights of entry or stay in the EU, and information on stolen or lost property (eg. banknotes, cars, firearms and identity documents). **Council Decision 2001/886/JHA** and **Council Regulation (EC) No 2424/2001**<sup>2</sup> have initiated work on a new, more advanced version of the system ("SIS II"). The UK participates in SIS and SIS II insofar as they relate to police and judicial cooperation, but not insofar as they relate to borders and immigration;

22. The UK **does** participate fully in some Schengen measures relating to border control, and is therefore bound by them. These include:

- i) The Advance Passenger Information Directive (Council Directive 2004/82/EC), which aims to improve border controls and combat illegal immigration by establishing requirements for the transmission of passenger data by carriers to competent national authorities on flights into the Schengen area from third countries. Under Article 3, Member States must take the necessary steps to establish an obligation for air carriers to transmit information (at the request of the border authorities) concerning the passengers they will carry. Article 3(2) sets out the data which must be provided. Article 4 sets out sanctions to be imposed where carriers fail to transmit the necessary data.
- ii) Carrier's liability: Under Article 26 of the **Schengen Agreement**, Schengen states are required to ensure that under their national law: (i) where a third country national is refused entry into the Schengen area, the carrier that brought them assumes responsibility for them and returns them/ transports them onwards; (ii) carriers are required to ensure that a third country national arriving by air or sea into the Schengen area has the documents required for entry into the relevant country. This requirement also applies to international carriers transporting groups overland by coach (excepting border traffic). **Directive 2001/51/EC** makes further provision about third country

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<sup>1</sup> C-482/08, decision of 28 October 2010.

<sup>2</sup> **Council Regulation (EC) No 1104/2008** and **Council Decision 2008/839/JHA** provide for the migration from SIS to SIS II.

nationals who are refused entry to the Schengen area and sets out the penalties that must be available where a carrier does not comply with its obligations.

23. Finally, the UK, whilst not being a participant, is still capable of having limited involvement in certain other Schengen schemes, including:

- i) **FRONTEX: Commission Regulation (EC) No 2007/2004** established a European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX). The Agency ensures the coordination of Member States' actions in order to contribute to 'an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States'. The UK is not bound by the terms of this Regulation (Council Decision C-77/05). However, there is provision for its limited involvement: for example, it may provide operational cooperation to the participating Member States (Article 12) and exchange any information acquired with the same (Article 11). Engagement is limited to that which has been defined in the Regulation (Article 12(1)) and agreed by the Agency (Article 20(5)).
- ii) **EUROSUR** (European Border Surveillance System). The terms of this draft regulation, which is currently in trilogue discussions, will provide the Schengen States with a common framework to assist in countering cross-border crime and unauthorised border crossings, and in reducing the death tolls of migrants at sea. Although, again, the UK will not participate in this Regulation, it is anticipated that a degree of limited involvement will be permitted, in order to effect information exchange.

### **Biometric Residence Permits**

24. **Regulation EC/1030/2002** (as amended by **Regulation EC/380/2008**) establishes a uniform format for residence permits for third country nationals throughout the EU. It provides that permits evidencing leave for a period of longer than six months must be in a discrete document containing the holder's fingerprints and a facial image. The UK has opted into this Regulation, and has implemented it through the UK Borders Act 2007 (ss. 5-15) and the Immigration Biometric Registration Regulations 2008.

25. **Regulation EC/1683/95** establishes a uniform format for short term visas for third country nationals visiting the Member States. The UK is bound by this Regulation (which pre-dates the Opt In Protocols and the Schengen Opt Out).

### **Rail**

26. More broadly, certain European transportation measures have an impact on border control. In particular, Directive 2007/58/EC initiated the liberalisation of international rail passenger services within the EU. The Directive was implemented in the UK through an amendment to the Railways Infrastructure (Access & Management) Regulations 2005 made by the Railways Infrastructure (Access & Management) (Amendment) Regulations 2009, and

by an amendment to the Channel Tunnel (International Arrangements) Order 2005, made by the Channel Tunnel (International Arrangements) (Amendment) Order 2009. The recent Directive 2012/34/EU (which has not yet been implemented into UK law) consolidates the earlier measures. This legislation establishes an economic framework for increasingly extensive cross border rail links, by allowing all railway undertakings with a European licence to run passenger services between EU member states. It will enable the development of international rail routes going significantly beyond those already in place. Such routes may, in due course, necessitate the formulation of alternative border control models.

## **ASYLUM**

27. Between 1999 and 2005, several measures harmonising common minimum standards for asylum were adopted. These constituted 'the first phase' towards establishing the Common European Asylum System ("CEAS"). The six measures were the Dublin II Regulation, the EURODAC Regulation, the Temporary Protection Directive, the Receptions Conditions Directive, the Qualification Directive and the Asylum Procedures Directive. The UK opted in to all of these Directives.

### **Dublin II Regulation (Council Regulation (EC) No 343/2003) and Eurodac Regulation (Council Regulation (EC) No 2725/2000)**

28. Prior to the Treaty of Amsterdam, the UK entered into a number of agreements with other European countries that were not instruments of the European Community or the European Union. Perhaps the most significant of these was the Dublin Convention, which set out the criteria and mechanisms for establishing which state was responsible for examining an asylum claim brought by a third country national. Following the expansion of the EU's competence into this area, the Dublin Convention was replaced by **Regulation EC No 343/2003 (the "Dublin II" Regulation)**. Its operations were facilitated by the creation of the EURODAC fingerprint database, which was established by Regulation EC No 2725/2000 (the EURODAC Regulation).
29. The central principle of the Dublin System founded upon these Regulations is that an asylum application should be examined by a single Member State, identified by the criteria and principles set out in the Dublin II Regulation. The basic objectives of the Regulation are to prevent abuse of the asylum system (by way of multiple applications for asylum submitted simultaneously or successively by the same person in several Member States - so-called 'forum shopping'), and to enable the Member State responsible for examining an asylum claim to be identified as quickly as possible.
30. The Dublin System provides that asylum applicants who have previously claimed asylum or been issued with a visa or residence permit in another participating State, or have entered such a State illegally, or have family or humanitarian connections with such a State, may be transferred to that State, which will then be responsible for assessment of the merits of the asylum claim. Article 3(2) of the Regulation provides that any State may decide to

examine an asylum claim itself, even if not responsible (the so-called “sovereignty clause”).

31. The **“Dublin II” Implementing Regulation (Commission Regulation (EC) No 1560/2003)** contains detailed rules for the application of the Dublin II Regulation, including standard forms for requests to acknowledge responsibility, practical arrangements for transfers between States, and the operation of the secure electronic communication system “DubliNet” for communication between States.
32. **Council Regulation EC No 2725/2000** established the ‘EURODAC’ system: a biometric fingerprint database, which enables Member States to verify whether an asylum applicant or illegal entrant has previously entered or claimed asylum in another Member State. It aims to make it easier for Member States to determine responsibility for examining an asylum application.
33. The **EURODAC Implementing Regulation (Council Regulation (EC) No 407/2002)** contains technical and operational rules in relation to the operation of the database.
34. The Evaluation Report prepared by the Commission<sup>3</sup> on the Dublin System found that the Regulation is generally applied in a satisfactory manner, and provides a workable system for determining responsibility for the examination of asylum applications. Nevertheless, the Commission has proposed a recast Dublin Regulation (known as ‘Dublin III’) in order to extend the scope of the Dublin Regulation to include subsidiary protection, to better specify the circumstances and procedures for applying both the sovereignty and humanitarian clauses and to clarify the applicability of the rules to unaccompanied minors.
35. Similarly, the Commission has proposed a recast EURODAC Regulation to more closely define deadlines for transmitting data to EURODAC, and to enhance provisions on data protection. The recast Regulation also includes new provisions to permit national law enforcement authorities and EUROPOL to access the database in defined circumstances.
36. The UK has opted into the proposals to recast both the Dublin and EURODAC Regulations. It is expected that the new Regulations will be adopted in early 2013.
37. Perhaps the most significant cases on Dublin II are the decisions of the ECJ in *NS v Secretary of State for the Home Department C-411/10 & C-493/10* and that of the European Court of Human Rights in *MSS v Belgium [2011] ECHR 108*. Both cases concerned the return of asylum seekers from Member States to Greece under Dublin II. The Courts confirmed that there is a presumption that Member States are safe countries who will not breach the human rights of an asylum seeker (either by refoulement or other means). However, this presumption can be rebutted. The Courts concluded that the procedures for

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<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0299:FIN:EN:HTML>.

processing and resolving claims, and the reception conditions for asylum seekers in Greece were such that to return asylum seekers there would risk breaching their human rights. For this reason, the UK does not currently return asylum seekers to Greece under Dublin II.

### **Reception Conditions Directive (Council Directive 2003/9/EC)**

38. The Receptions Conditions Directive establishes minimum standards for reception conditions for asylum seekers throughout the EU. It sets out the minimum rights of asylum seekers on arrival in a Member State, including rights of access to welfare, education, employment and services.
39. An evaluation report by the Commission to the European Parliament and the Council<sup>4</sup> found that the discretion allowed by the Directive undermined the objective of 'harmonising' (or creating a 'level playing field' in relation to) reception conditions. To address this, the Commission has published proposals to recast (amend) the Directive in key particulars, including guaranteeing certain material reception conditions. It is anticipated that the new Directive will be formally adopted in early 2013. The UK has not opted into the recast Directive and therefore will continue to remain bound by the original Receptions Conditions Directive.
40. Implementation: Many elements of the Directive did not require implementation as equivalent provision already existed. Where implementation was required this was done by way of three instruments: (1) a new part 11B in the Immigration Rules (HC 395), (2) the Asylum Support (Amendment) Regulations 2005 (S.I. 2005/11), and (3) the Asylum Seekers (Reception Conditions) Regulations 2005 (S.I. 2005/7). Part 11B of the Immigration Rules took effect on 4th February 2005. The Regulations came into force on 5th February 2005.<sup>5</sup>

### **Qualification Directive (Council Directive 2004/83/EC)**

41. The Qualification Directive sets minimum standards for the consideration and granting of refugee or subsidiary protection status to third country nationals or stateless persons, and the content of the protection to be granted to them. The Directive also provides that persons who have committed certain crimes (including war crimes or crimes against humanity) may be refused refugee or subsidiary protection status; and that holders of status may lose it in certain circumstances (e.g. on voluntary return, or following change in conditions in the country of origin).
42. The Directive further obliges Member States to guarantee certain rights for persons qualifying for refugee or subsidiary protection status. These include rights of non-refoulement, to a residence permit (of specified length), to a travel document, to employment, to education, to medical care and to access to programmes facilitating integration into the host society.

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<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:HTML>.

<sup>5</sup> The transposition note is annexed to the Explanatory Memorandum to the Receptions Conditions Regulations: [http://www.legislation.gov.uk/ukxi/2005/7/pdfs/ukxiem\\_20050007\\_en.pdf](http://www.legislation.gov.uk/ukxi/2005/7/pdfs/ukxiem_20050007_en.pdf).

43. The Commission reported to the European Parliament and the Council in June 2010<sup>6</sup> on the implementation of the Qualification Directive. The report identified ambiguities in the Directive which led to widely divergent interpretations by Member States and, consequently, significant disparities in provision. In December 2011, a revised Qualification Directive was adopted (**Directive 2011/95/EC**). The UK has not opted into the re-cast Qualification Directive and remains bound by the original Directive.
44. Implementation: Many provisions of the Directive did not require implementation as equivalent provision already existed. Where implementation was required this was done by way of two instruments: (1) amendments to Part 11 of the Immigration Rules (HC 395) and (2) the Refugee or Person in need of International Protection (Qualification) Regulations (S.I. 2006/2525). The changes to the rules and the Regulations came into force on 9th October 2006.<sup>7</sup>

### **Asylum Procedures Directive (Council Directive 2005/85/EC)**

45. The Asylum Procedures Directive establishes minimum procedures for the assessment of asylum claims. It seeks to establish basic safeguards for asylum applicants, whilst enabling EU States to preserve the particularities of their national procedures.
46. To this end, the Directive sets requirements in relation to the provision of information about procedures, opportunities for a personal interview, access to legal assistance and appeal rights. It establishes minimum requirements for the decision-making process. Finally, it defines common standards for the application of certain concepts and practices, including the “safe third country” and ‘safe country of origin’ principles.
47. The Directive also makes specific provision for derogation from these procedures in certain circumstances – for example, at borders, or when an asylum application is deemed to be inadmissible because another Member State is responsible for examining it under the Dublin II Regulation.
48. The Commission’s Evaluation Report to the European Parliament and the Council in September 2010<sup>8</sup> considers that differences between asylum legislation and practices persist in spite of the implementation of the Directive. As a result, an amended Directive has been prepared, and it is anticipated that this will be formally adopted in early 2013. The UK has not opted into the re-cast Directive and therefore will continue to be bound by the original Asylum Procedures Directive.
49. Implementation: UK practice was in line with many of the provisions of the Directive, and the majority of the changes arising from the Directive simply

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<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0314:FIN:EN:HTML>.

<sup>7</sup> The transposition note is annexed to the Explanatory Memorandum to the Qualification Directive Regulations: [http://www.legislation.gov.uk/ukxi/2006/2525/pdfs/ukxiem\\_20062525\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/2525/pdfs/ukxiem_20062525_en.pdf).

<sup>8</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0465:FIN:EN:PDF>

codified existing practice. Where implementation was required this was done by way of two instruments: a statement of changes to the Immigration Rules (HC 395) and the Asylum (Procedures) Regulations 2007 (S.I. 2007/3187). The latter came into force on 1st December 2007.<sup>9</sup>

## **IMMIGRATION**

### **EU Migration Funding**

50. The EU has established a programme of funding to ensure the fair sharing of responsibility between Member States for the financial burdens arising from management of the Union's external borders, and from the implementation of common asylum and immigration policies. Such funds are currently managed and allocated through the General Programme "Solidarity and Management of Migration Flows". This consists of four instruments: the External Borders Fund, the European Return Fund, the European Refugee Fund and the European Fund for the Integration of Third Country Nationals - together known as the SOLID funds. In the period 2007 – 13, the SOLID funds allocated almost 4 billion Euros among the Member States.
51. The External Borders Fund (established by **Decision No 574/2007/EC**) provides financial support to Member States to assist in responding to pressures on the external EU borders. The UK has not opted into this Directive, and so does not benefit from this Fund.
52. The Return Fund, established by **Decision No 575/2007/EC**, seeks to facilitate the return of third country nationals to their country of origin by providing practical and financial support for return and reintegration, and providing specific assistance to vulnerable returnees. The Fund also provides financial assistance in cases of forced return.
53. The Refugee Fund, established by **Decision No 573/2007/EC** seeks to support Member States in receiving refugees and displaced persons. It assists in the provision of access to consistent, fair and effective asylum procedures, and supports integration into the host society. It provides for emergency measures to address sudden influxes of displaced persons.
54. The Integration Fund, established by **Council Decision 2007/435/EC** supports initiatives facilitating the integration of non-EU migrants into European societies.
55. The SOLID Funds only have effect until 2013. The Commission proposal "A budget for delivering the Europe 2020 Strategy" for the next Multi Annual Financial Framework, adopted on 29 June 2011, aims to simplify the structure of expenditure instruments in this area for the period 2014-2020. It is envisaged that the SOLID Funds (together with two other funds in the fields of

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<sup>9</sup> The transposition note is annexed to the Explanatory Memorandum to the Asylum Procedures Regulations [http://www.legislation.gov.uk/ukxi/2007/3187/pdfs/ukxiem\\_20073187\\_en.pdf](http://www.legislation.gov.uk/ukxi/2007/3187/pdfs/ukxiem_20073187_en.pdf).

'home affairs') will be replaced by two programmes: the Asylum and Migration Fund and the Internal Security Fund. The former is intended to support the development of common policy on asylum and immigration and to enhance the effective management of migration flows throughout the Union. The latter is intended to support the implementation of an Internal Security Strategy and the EU approach to law enforcement cooperation, including the management of the Union's external borders.

### **EU Readmissions agreements**

56. Under Article 79(3) TFEU the EU has competence to conclude agreements with third countries providing for the readmission of third-country nationals who do not, or no longer, have a lawful basis of residence in the Member States. The principle underpinning such agreements is that countries should take back their own nationals. Readmission Agreements are subject to the UK's 'opt-in'.
57. The UK participates in Readmission Agreements ("EURAs") with Albania, Bosnia-Herzegovina, Former Yugoslav Republic of Macedonia, Georgia, Hong Kong, Macau, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, and Ukraine. It has also opted in to the EURA with Turkey (which has not yet been concluded). The UK has not opted in to EURAs with Cape Verde and Armenia.

### **Turkish nationals**

58. Turkish nationals retain a unique legal position in the UK. This derives from the Turkish European Communities Association Agreement ("the ECAA" or "Ankara Agreement"), an agreement entered into between the Republic of Turkey and the Member States of the then European Economic Community in 1963. An "Additional Protocol" to the ECAA was signed in 1970: this contains the so-called "standstill clause" for self-establishers and service providers (in relation to which see further below). The UK became bound by this agreement when it entered the Community in 1973 (by way of the **European Communities Act 1972**).
59. The ECAA created an Association Council to oversee the implementation of the Agreement.
60. The ECAA creates certain obligations in respect of the entry and/or stay of Turkish nationals seeking to establish themselves in business in the UK, and (together with Association Council Decision 1/80) of Turkish workers' access to the labour market. Turkish citizens remain subject to UK immigration control, but the Agreement and Association Council Decision limit the restrictions which the UK is able to place on:
  - a. self-establishment or the provision of services by Turkish nationals in the UK; and,
  - b. the conditions of access to employment applicable to Turkish workers and members of their families legally resident and employed in the UK.

61. In particular, the so-called 'standstill clauses' in the ECAA and Council Decision 1/80 mean that the relevant categories of Turkish national continue to benefit from the more generous immigration provisions in place in the UK in 1973, notwithstanding more restrictive provisions established subsequently.
62. It is plain from decisions of the Association Council that the reach of the ECAA extends to provisions in relation to social security. In particular, Decision No 3/80 establishes rules on the application of the social security schemes of the Member States on Turkish workers and their families. The Court of Justice found (in Cases C-262/96 *Sürül* and C-485/07 *Akdas*) that the requirements set out in that Decision in relation to equal treatment and requirements to pay old-age, invalidity and survivor's pensions had direct effect on Member States. In broad terms, this means that Turkish workers and their family members must be given equal treatment with nationals in Member State social security schemes, and that requirements to pay the specified benefits are also binding on those States.
63. It is proposed that Decision No 3/80 be repealed and replaced by new social security provisions, currently under discussion.
64. The ECJ has jurisdiction to interpret provisions of the ECAA. In so doing, it looks to the future accession of Turkey as an underlying objective of the measures in question. It is therefore expansive in its view of entitlements under the ECAA.

#### **Directives in relation to which the UK has chosen not to Opt In**

65. The EU has implemented or is considering a number of Directives on immigration matters which the UK has *not* opted into. . These can be summarised as follows:
  - i) The Highly Qualified Persons Directive (**Council Directive 2009/50/EC**) which seeks to encourage the entry of highly qualified migrants into the EU. Among another other innovations, this Directive creates the EU Blue Card, a special residence and work permit facilitating access to the labour market and entitling holders to certain favourable socio-economic rights (including rights to social security);
  - ii) The Single Permit Directive (**Council Directive 2011/98/EU**), creating rights (including rights to social security) for non-EU workers who are legally resident in the EU but have not yet obtained long term resident status;
  - iii) The Family Reunification Directive (**Directive 2003/86/EC**), enabling family members of third-country nationals residing lawfully on the territory of the EU to join them in the Member State in which they are residing, and determining the conditions under which such reunification is granted;

- iv) **Directive 2003/109/EC**, concerning grants of status and rights to social security of non-EU nationals who are long term residents;
- v) **Council Directive 2004/114/EC**, setting out common rules of admission for non-EU nationals to the EU for the purposes of (broadly) study;
- vi) **Council Directive 2005/71/EC**, providing for a fast track procedure for the admission of non-EU nationals for the purposes of undertaking research (and conferring rights in relation to social security);
- vii) The Returns Directive (**Directive 2008/115/EC**), seeking to establish fair and transparent procedures for granting status to, or returning, irregular migrants;
- viii) **Directive 2009/52/EC**, targeting the employment of non-EU nationals illegally resident in the EU, in order to counteract illegal immigration;
- ix) The proposed **Directive for intra-corporate transfer of non-EU skilled workers** (currently under discussion), designed to assist corporations to transfer their non-EU employees to branches and subsidiaries within the EU; and;
- x) The proposed **Directive on seasonal employment** (currently under discussion), designed to encourage the entry of non-EU workers in order to take up seasonal employment, and to ensure that such workers are not subject to exploitation and sub-standard working conditions.