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Comments on the proposed recasts of Directive 2004/83/EC (Qualification Directive) and Directive 2005/85/EC (Asylum Procedures Directive)

Introduction

Our organisations represent Churches throughout Europe – Anglican, Orthodox, Protestant and Roman Catholic – as well as Christian agencies particularly concerned with migrants, refugees, and asylum seekers. As Christian organisations we are deeply committed to the inviolable dignity of the human person created in the image of God, as well as to the concepts of the common good, of global solidarity and of the promotion of a society that welcomes strangers.

Churches have on a number of occasions expressed their support for the EU to increase its contribution to a more accessible, equitable and effective international protection regime. In our comments to the 2007 Green Paper on the future Common European Asylum System, COM (2007) 301 final, we stressed our full support for efforts to achieve both, a higher common standard of protection and greater equality in protection across the EU. This alone would constitute a marked improvement as the existing asylum instruments are vague and ambiguous.

In this regard, we believe that the approach taken by the European Commission through the proposed recasts of the Qualification and Asylum Procedures Directives signifies a step in the right direction, and we appreciate the Commission's ambition to improve the coherence of the asylum instruments and to bring about more clarity to the existing Directives. Establishing a common asylum procedure and a uniform status are key elements of a Common European Asylum System (CEAS). The proposed revision of the instruments thus provides an opportunity to enhance the implementation of the 1951 Geneva Convention relating to the status of refugees.

NGOs, Churches and Church-related organisations, as well as Member States endorsed the European Commission's move to raise the standards of protection and to ensure their consistent application across the EU in the consultation on the CEAS and most recently in

the Stockholm Programme. Thus we would welcome and support a more ambitious and constructive approach in the Council negotiations. We are aware of the great difficulties of reaching political agreement in a very delicate and sensitive matter such as asylum legislation. Nevertheless, the commitment taken to create a CEAS with high standards cannot be credibly upheld unless a decisive step forward is made towards an enhanced basis for access to international protection in all EU Member States. This goal can only be achieved through sound revision of the existing legislative instruments, including the Reception Conditions Directive and the Dublin II Regulation. The Dublin system places enormous pressure on the Member States situated at the Union's external borders and in practice rarely considers the special links asylum seekers have to specific Member States, be it for family or linguistic reasons[1]. It is equally necessary to amend and revise instruments relating to carrier sanctions and Frontex in order to guarantee effective access to international protection[2].

It has been previously underlined in both the European Pact on Immigration and Asylum approved by the European Council of October 2008 and in the Conclusions of the European Council of 29 and 30 October 2009, that it is necessary to swiftly define a common policy in the matter of asylum which takes into account both the collective interest of the Union and also the specificities of each Member State. With this in mind, provision should be made for special solidarity-based mechanisms notably for those Member States whose asylum systems are subject to particular and disproportionate pressure due to their geographic or demographic situation. While the funding through the European Refugee Fund contributes to internal solidarity within the Union itself, more determination - and perhaps also more generosity - on the part of some Member States is required to improve access to protection.

Some Member States have claimed that it is not possible to seriously consider and discuss the revision of the EU asylum legislation without first proceeding to a thorough evaluation of the existing Directives. We also argued in favour of a fully-fledged evaluation regarding the implementation of the Directives, and agree that it is crucial to assess the manner in which they are applied in practice. It is the responsibility of the Commission to intervene and address Member States that are systematically unwilling or unable to apply the existing minimum standards. Both the experience of mixed arrivals at the external borders and the precarious situation (in Member States like Greece) of asylum seekers often subjected to substandard levels of protection and provision of services illustrate the urgent need to enhance the level of protection afforded throughout the EU. In the meantime two independent assessments have been carried out, proving that amendments to both the Qualification[3] and Asylum Procedures Directives[4] are needed to establish a credible CEAS. The arguments used to counter the Commission's proposals based on the heavy financial implications and costs which would be incurred, are not entirely convincing. The legal clarity which would derive from the Commission's proposed amendments would in fact facilitate clear understanding and interpretation of the provision. This in turn would prevent later litigation procedures and could even reduce costs.

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[1] In this regard we would like to refer to our joint comments to the Commission's proposal for the recast of the Dublin II Regulation, available e.g. on the Internet at http://www.caritas-europa.org/module/FileLib/ChrGrp_CommonpaperonECproposalsforDublinII_FINALd.pdf.

[2] See also Thomas Hammarberg, *Criminalisation of Migration in Europe: Human Rights Implications*, pp 18-19. The document is available on the Internet at https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1518757&SecMode=1&DocId=1535524&Usage=2.

[3] See *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*. The document is available on the Internet at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=473050632&skip=0&query=qualification directive.

[4] See *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practic,* March 2010. The document is available on the Internet at http://www.unhcr.org/refworld/docid/4bab55752.html.

With this in mind, we are commenting on the recent proposals of the European Commission concerning Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

1. Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast), COM (2009) 551 final

We appreciate the fact that the aim of increasing the standards of protection clearly emerges throughout the proposed recast.

First and foremost we fully support the effort of the Commission's proposal to eliminate all unjustifiable differences in the treatment between refugees and beneficiaries of subsidiary protection and to propose an approximation of rights. In our contribution to the 2007 consultation we had advocated for such amendments with particular regard to the provisions concerning access to employment, social welfare, health care and access to integration facilities. We are pleased to see that our concerns are reflected in the Commission's recast, especially considering the link existing between the extension of the rights and a more effective integration of beneficiaries of international protection. We are convinced that this significant proposal is not only in the interest of the beneficiaries of international protection, but also in the interest of Member States, as it will simplify and streamline procedures and contribute to reducing administrative costs. Furthermore such approximation of rights will contribute to creating a cohesive society. There is much evidence to suggest that swift access to the labour market during the examination of the application for international protection itself benefits asylum applicants significantly in their integration process.

The level of protection granted will also benefit from the strengthened and stricter formulation adopted for Article 7 (exhaustive list of actors of protection, reference to the willingness to provide effective and durable protection). The improvement of the legal text will contribute to avoiding diverging interpretations in the Member States. The same applies to the clarifications concerning Article 8 (internal protection), now made coherent with the principles affirmed by the European Court of Human Rights in the Salah Sheekh v. Netherlands case (conditions for internal protection, deletion of the possibility to apply the internal flight alternative despite technical obstacles, obligation of the authorities to obtain precise and up-to-date information on the general situation in the country)[5]. A presumption should however, be introduced in Article 8 to prevent the application of the 'internal flight alternative' when State agents or persons associated with the State are in fact actors of persecution.

We endorse the amendments concerning the "causal link" requirement in Article 9.3 and the clarifications to Article 10.1 (d). Article 9, however should also contain an explicit reference to the recognition of persecution stemming from conscientious objection to military service. Regarding the definition of a 'particular social group', the existence of one of the two requirements foreseen by Article 10.1(d) - either 'innate characteristic' or 'social perception' - should be considered as sufficient to the purposes of this provision.

[5] The ECHR Salah Sheekh v. Netherlands case of 11 January 2007 is available at the link http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=salah&sessionid=51069013&skin=hudoc-fr.

We also appreciate the proposal's attention for vulnerable people. In this regard, the addition of trafficked persons and people with mental problems in Article 20.3 (with regard to those whose specific situation should be taken into account in the implementation of the Directive) and the focus on children, with particular regard to the tracing procedures for unaccompanied minors' families, should be particularly welcomed.

The amendments to Articles 11 and 16 (Cessation) are equally important, as the inclusion of the "ceased circumstances" cessation clauses from Articles 1C(5) and 1C(6) of the Geneva Convention increases the coherence of Directive 2004/83/EC with international law.

With reference to the comments of the Meijiers Committee on the recast of the Qualification Directive, we would like to underline the necessity of including beneficiaries of international protection in the Long-Term Residence Directive. We feel that the recast could have been a novel opportunity to address this issue, after the 2007 proposal of the Commission to amend Directive 2003/109/EC, in order to extend the possibility to obtain a long-term residence status (subject to the same conditions applicable to any other third-country nationals) to beneficiaries of international protection[6].

We appreciate that the distinction with regard to protection of family members of persons granted refugee status and persons granted subsidiary forms of protection shall be lifted and we deem it important that the Commission's proposal concerning the definition of 'family members' should be interpreted in the light of the principle of the best interest of the child.

2. Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM (2009) 554 final

Churches have underlined that the final version of the Asylum Procedures Directive was founded on the lowest possible level of common agreement. The Commission's proposed recast, in its current form, contributes to a marked improvement in the standards of asylum procedures, even though some reservations persist in parts of the text. We are however happy to note that some important procedural safeguards have been introduced in the Commission's proposal such as the right to a personal interview, the right to free legal aid in the first instance, the obligatory suspensive effect to the remedy against a negative asylum decision and specific guarantees for applicants with special needs.

We therefore welcome the attention devoted to the efficiency and the quality of decision-making. Similarly to the Qualification Directive's recast, we appreciate that the specificity of the situation of vulnerable persons (minors, unaccompanied or not, persons who have been subjected to torture, rape or any other serious act of violence, disabled persons) is taken into account - even though the relevant formulations leave room for improvement - and welcome that particular care is required in the case of applicants with special needs (Art. 20). We particularly appreciate the fact that minors are one of the central elements of the Commission's proposal, as the best interest of the child is now to be of primary consideration in the implementation of the Directive as a whole (Recital 23). Minors would have a right to apply for international protection either on their own behalf or through their parents or other adult family members (Art. 6.5) and the particular situation of unaccompanied minors is also addressed (Art. 6.6). More targeted interviewing methods foreseen by Art. 14.3(c) are also advantageous.

[6] See also: Christian Organisations' Comments on the European Commission's Proposal for a Council Directive concerning the status of third country nationals who are long-term residents, (COM (2001) 127 final), available at http://www.ccme.be/fileadmin/filer/ccme/70_DOWNLOADS/95_ARCHIVE/2001/2001-10-22_CCME_Press-rel_-_status_of_3rd_country_nationals_who_are_long-term_residents.pdf.

The new Article 9.3(d) should contribute to a better assessment of applications (personnel responsible for their examination can seek advice from experts in various fields). While we acknowledge the insertion of the obligation foreseen by Article 12.1 for applicants to cooperate with the competent authorities in establishing their identity (and the other elements referred to in Art. 4.2), we nevertheless believe that significant efforts should be made by the competent authorities and/or bodies to assist persons seeking asylum to fulfil this obligation, recognising that in some cases proving an identity or age limit can be extremely difficult if not impossible.

The special attention devoted to procedural safeguards is unquestionably a positive element of the proposal: it is paramount that the relevant provisions, essential for a fair access to international protection, are preserved in the context of the forthcoming negotiations. Among them we would like to stress the importance of the introduction of free legal aid in first instance procedures (which should also be extended to the appeal stages, due to the increased technical nature of such procedures) and the suspensive effect deriving from recourse against a negative asylum decision. Churches have previously advocated in favour of these two stipulations in their response to the Green Paper on the future Common European Asylum System. Article 27.3, (which refers to a maximum duration of the procedure) is also a further step in rendering asylum procedures more efficient and more respectful of the rights of the applicants. Another possible improvement to be considered concerns the prioritisation of professional transcriptions of translations to ensure accurate records are kept (Art. 16) while Article 26 on the collection of information on individual cases should ensure that asylum seekers are informed in a language they can understand.

The costs entailed by some of the procedural guarantees proposed (e.g.: free legal assistance in first instance procedures) could be compensated with a corresponding allocation of EU funding through the European Refugee Fund, and, in the future, by technical assistance through the European Asylum Support Office.

The extension of the right to communicate with other advisory/counselling actors (Art. 11(c)) is a positive addition. Given the current situation at the external borders it is even more relevant that provisions provide for the access of such organisations' to border crossing points, including transit zones and detention facilities (Art. 7.3).

In our comments concerning the Stockholm Programme we underlined the need for the effective training of border guards on the rights and obligations pertaining to international protection. We are very glad to find this approach reflected in the Commission's proposal, which refers to clear instructions for and training of border guards, as well as of police and immigration authorities and personnel in detention facilities, on how best to deal with applications for international protection (Recital 19, Art. 6.8). This is particularly relevant to mixed arrivals of persons in need of international protection and other migrants. More generally, border points should be provided not just with personnel in charge of surveillance and border checks, but also with 'social' services, which would contribute to the fast recognition of cases.

In principle we are in favour of the establishment of a single procedure for refugees and beneficiaries of subsidiary protection, as this could allow for an easier, faster and more transparent access to protection. Guarantees however, ought to be included so that this does not entail a more superficial examination or a reduction of international protection. We are convinced that fast, fair, efficient and transparent procedures for asylum or other forms of international protection will also prevent any kind of abuse.

In the past we criticised the concept of "safe third countries" and "safe countries of origin" as particularly problematic, as applicants had no opportunity to challenge the presumptions underlying the concept and a thorough and substantial examination of each individual case

was prevented. We therefore appreciate that these concerns have been taken into account by the Commission, with particular reference to the amendment allowing the applicant to challenge the presumption of safety (Art. 32.2(c)). Some of the major problems deriving from this concept have been addressed with the proposed recast, as reflected by the amendments to Articles 32, 33, 34 and 38. Our organisations wish to endorse UNHCR´s recommendation resulting from the study *Improving Asylum Procedures - Comparative Analysis and recommendations for law and practice*, underlining that Member States must ensure that *"…if the concept is applied, case-by-case consideration of the safety of a particular country for a particular applicant is always assured, even where there has been national designation of the country as safe. Any Member State which provides for the national designation of countries considered to be generally safe should have a clear, transparent and accountable process for such national designation and any lists of safe third countries should be made publicly available along with the sources of information used in designating a particular country as safe".*

However, regardless of the amendments proposed, the safe country concept remains unpredictable and unreliable, and increasingly influenced by diplomatic or political interests rather than based on concrete information. Lists vary hugely between Member States, and this can endanger any potential EU-wide harmonisation. It can also lead to the infringement of Article 3 of the Geneva Convention, which aims at preventing discrimination of the refugee, inter alia, as to his/her country of origin. As the concept is in any case rarely applied in the Member States, we argue that it has proven to be rather superfluous and should be deleted. This is especially valid for the European Safe Third Countries Concept (Art. 38), which is not applied in practice and should therefore be eliminated.

Article 27 on accelerated procedures still lacks appropriate safeguards. We would support this provision only if precise, binding guarantees are put in place so as to ensure that this does not create possibilities for the national administrations to downgrade the quality of asylum procedures or the examination of the relevant applications. Likewise, the amended Article 37 still provides for border procedures, and this may be problematic as it could create imbalances in the access to international protection.

The fact that the principle of Article 4.1 (Member States' designation for all procedures of a determining authority responsible for an appropriate examination of the applications in accordance with the Directive) can be derogated in the case of Dublin cases is of grave concern, even though we note that the list of exceptions has been reduced in comparison with the previous text.

Article 22 on detention proves how essential it is that swift progress is made in the negotiations on the Reception Conditions recast, as the proposal concerning the Asylum Procedures Directive refers directly to what is provided in the former text with regard to detention. In the case of stalemate with regard to the Reception Conditions dossier, we call for the inclusion of the relevant guarantees at least in the Asylum Procedures Directive. It should be added that the rest of the provision is vaguely worded and may allow for excessive discretion on the part of Member States. References to alternatives to detention are also lacking. We would like to reiterate once again that detention should be avoided and only be used in exceptional cases. Neither seeking international protection nor 'illegal' entry justify detention if the asylum seeker has duly presented a claim for international protection.

Finally we would like to underline that Article 19.2 (access to closed areas for consultations purposes) would benefit from the insertion of a reference to friends, relatives and religious counsel as foreseen by the UNHCR Guidelines on the matter.

Conclusion

Churches and Christian organisations welcome the consistency and determination shown by the European Commission in insisting on a firm improvement of the current wording of the relevant Directives and to rid them of those elements which have to date contributed to generally unsatisfactory levels of access to international protection in the European Union's Member States. We also call upon the European Commission to remain vigilant in so far as the application of the first phase asylum instruments is concerned and to constructively facilitate the negotiations between the EU Council of Ministers and the European Parliament, so as to reach an agreement on significantly improved (and not impoverished) texts. We especially call on the European Ministers for Home Affairs to take constructive action in order to create a real Common European Asylum System, of which the European Union can be proud.

Each party involved in the process of negotiation should bear in mind that a detrimental compromise, or the outright failure of the proposals, is in no one's interest, be they the national administrations, the societies hosting beneficiaries of international protection, or the persons seeking protection. Article 18 of the EU Charter of Fundamental Rights provides that *"The right to asylum shall be guaranteed"* and Article 19, guarantees: *"No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"*. These fundamental rights have to guide the difficult negotiations and to improve Europe's role in international protection.

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