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on Asylum: minimum standards on procedures for granting and withdrawing refugee status

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I. Background

The European Commission presented its first proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status already on September 2000.
On 20 September 2001, the European Parliament adopted the Watson report, approving the Commission proposal with 106 amendments. The negotiations in the Council did not produce an agreement on that draft and in December 2001 the European Council, in the Laeken declaration, requested the Commission to bring forward a modified proposal.

The new draft directive was issued on 18 June 2002. After almost two years of negotiations, on 29 April 2004 the Council agreed on a "general approach", on which,, it decided to consult again the Parliament (19 November 2004).
The Directive shall be adopted, according to article 63, (1), (d), by consultation procedure of the Parliament and by unanimity vote in the Council. After the adoption of this directive, all the legislation in this field shall be adopted by codecision procedure and majority voting in the Council.

II. Overview of the proposal

This Directive is the first legally binding instrument on procedures in the field of asylum and was expected to be an essential step towards a Common European Asylum System.

As it is said in the draft proposal,

> *"the main objective of this Directive is to introduce a minimum framework in the European Community on procedures for granting and withdrawing refugee status", done by an "approximation of rules",*

by establishing a minimum level playing field throughout the EU.

The amended proposal sets out a new structure for asylum procedures in the Member States and the “general approach” text departs from a considerable number of minimum standards originally proposed by the Commission.
The current text provides for a great number of substantial exceptions and limitations, which would even allow some Member States to lower their procedural standards.
The "level playing field" is therefore reduced to a catalogue of national practices, including many which are not in line with international best practices. Among several controversial points during the negotiations in the Council were the definition of "safe countries of origin" and the consequential list of those countries. The solution reached by the Council equals to "not deciding" and postponing the adoption of a minimum common list of safe countries of origin until after the adoption of the Directive itself.

III. Position of the Rapporteur

1. On the procedure

The Rapporteur regrets the fact that the Council reached a political agreement before receiving the opinion of the Parliament! Considering the difficulties that the Council had in agreeing on a "general approach" on this subject, it is unlikely that it will change its positions. As a consequence, the Parliament has not been asked to exercise its full powers. Therefore the Rapporteur thinks that the Council failed to respect the principle of loyal cooperation between the institutions and deems it necessary to invite the Council to refrain from taking decisions before the Parliament has had an opportunity to give its opinion.

2. On the general approach

The Rapporteur considers that the outcome of the Council negotiations is deceiving and poor in relation with a considerable number of issues.
Moreover, some of them raise serious concerns in respect of international human rights and principles of refugee law. The Directive's long and drawn-out drafting process has led to a consistent diminution in standards.

As the European Parliament noticed in 2001

> "*the Commission's intended first stage in harmonising asylum procedures is insufficient in the form presented, that is to say, it is inadequate...the aim of the proposal was to be that of creating a clear, accessible and easily understood legal structure; this has not been achieved, however".*

These remarks are still appropriate for the new proposal, as modified by the Council's "general approach". In that occasion the Parliament recommended "***to the Commission to withdraw its text and rework it thoroughly"***.

In March 2004 an NGO Alliance[1] called for the withdrawal of the directive noting

> "*with deep regret that the most contentious provisions are all intended to deny asylum seekers access to asylum procedures...we are concerned about the effect that this abdication from international law obligations will have on refugee protection within the EU and elsewhere, as well as on the EU's credibility in the international refugee and human rights debate*".

UNHCR expressed its concerns about

> "*a number of restrictive and highly controversial practices that are currently only contained in one or two member states national legislation but could be inserted in the legislation of all 25 EU Member States*"[2].

[1] ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children Europe. "Call for withdrawal of the Asylum Procedures Directive, 22 March 2004.
[2] UNCHR Press releases on 30 April 2004 ("UNCHR regrets missed opportunity to adopt high EU asylum standards".

The Rapporteur is also concerned about the clear intention of the Commission to consider this directive not as a starting point to create a common asylum system, but as a final achievement, which will not be modified in the years to come.
The lack of legal immigration channels in the EU pushes economic migrants to use the asylum path to enter the European Union and this has put a lot of pressure on the national asylum systems. For this reason EU needs a clear coherent and strong common asylum procedure. The proposed Directive does not achieve significant progress in harmonisation. Discretion is left to Member States to retain their national laws, through the many "may" provisions, exceptions and stand still clauses.

For this reason, though some Member States have no legislation on asylum, like Italy, the directive will improve only marginally the state of affairs in other Member States; as a matter of fact, it could definitely be a step back for some of them.

3. On the specific questions

The most problematic issues are the following:

a) "Effective remedy" (article 38)
The article does not guarantee that the appeal process has suspensive effect. It means that there is not an explicit right for all asylum seekers to remain in the asylum country waiting for the outcome of the appeal procedure. This question is left to the Member States' discretion. Such a provision would appear to be contrary to the Geneva Convention and does not insure the respect for the principle of "*non-refoulement*".

b) "Safe third country" (article 27)
According to the UNHCR, it is not possible to designate third countries generally as "safe", without considering the individual case[1]. There are significant concerns about the effectiveness in practice of asylum procedures in the countries of transit at the periphery of the Union, which raise questions about whether they can legitimately be considered "safe". Moreover the Directive allows Member States to remove asylum-seekers to any country willing to accept them, without any consideration of merits of their claims. It allows Member States to shift their responsibilities to third countries, regardless of whether the applicant will be protected against *refoulement* and treated on a case by case basis.

c) "safe third countries" (article 35 A, so called "super safe")
This is one of the most alarming aspects of the Directive and has been added to the safe country concept. The Directive assumes that the level of protection available in countries neighbouring the European Union is equivalent to standards in EU Member States. It provides that Member States may deny access to the procedure to all asylum seekers who come from these countries. These provisions do not require an individual assessment and appear to be against the *non-refoulement* principle.

[1] UNHCR provisional comments on the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugees status (10 February 2005).

d) "Safe country of origin" (Article 30, 30 A, 30 B)
The list of safe countries of origin gave rise to major problems in the first draft of the directive. Now the list is no longer included in the Directive; the Commission will adopt it through further legislation. Until such legislation is adopted, the Directive states that Member States would be able to maintain their own national lists. This remarkably implies that they will be able to maintain national lists even if those conflict with the criteria defined in the directive. In article 30 B the burden of proof lies entirely with the asylum-seeker and the procedure should be clarified.
The use of the "safe country of origin" concept could also result in discrimination between refugees which is not permitted under the 1951 Refugee Convention and the Charter of Fundamental Rights of the European Union.

e) "Accelerated procedures" (article 23-25)
The Directive allows fast-track procedures in a too wide range of cases. Accelerated, inadmissibility and special procedures include several exceptions from basic safeguards, especially when an application is considered ill founded. Given the extremely broad definition of "manifestly unfounded claims", Amnesty International fears that most of the applications (more than 80%) will be processed under a fast-track procedure, thus implying that lower procedural safeguards will apply[1]. Refugees might not be able to provide consistent or comprehensive answers for serious personal and human reasons, like trauma (for example war, post-traumatic stress, sexual violence, etc.).

f) "Cases of border procedures" (article 35)
The Directive permit member States to apply border procedures which entail less then minimum procedural safeguards for people requesting asylum at border or transit zones. This practices place inappropriate powers and responsibilities in the hands of border guards and confuses migration control objectives with protection of refugees.

g) "Children rights" (article 15)
The Directive states that Member States may "refrain from appointing a representative where the unaccompanied minor is 16 years old or older...".According to the Convention of the Rights of the Child, any person under age 18 should be considered as a child, without differentiation in rights for those over 16. Moreover the fact that the child is or has been married does not necessarily indicate that she/he is not in need of a representative. Marriage in some countries is not related to the maturity of the child.

IV. Conclusion

[1] Amnesty International, "Briefing to the member of the European Parliament on the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status", February 2005.

With regard to the explained critical points and given the high relevance of this directive for a common asylum policy, the Rapporteur proposes to evaluate urgently in our Committee two main options:

1.) if the Directive as modified can be amended in particularly concerning the most important points, outlined in the above mentioned paragraph.

2.) if the Committee deems it necessary to ask for an official advice of the legal service of the European Parliament and of the UNHCR, according to Declaration 17 of the Amsterdam Treaty, to see if the Directive can be challenged by the Court of Justice on procedure and the amended points.