UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Members of the Committee on Civil Liberties (LIBE),
European Parliament

Dear Madam, dear Sir,

Recently UNHCR has been made aware of a proposal by the European Stability Initiative (ESI) to amend EU legislation on asylum and visas.

This proposal suggests that countries that have completed a visa liberalization dialogue and for which the visa requirement was lifted should be considered as **safe countries of origin**.[1] The same proposal also suggests modifying the proposed amendments to Council Regulation 539/201[2] ('Visa Regulation'). It recommends including **accelerated asylum procedures** amongst the preliminary measures that Member States would be required to take in order to respond to a sudden increase in the number of asylum applications.

According to Council Directive 2005/85/EC (the 'Asylum Procedures Directive'), the assessment of whether a country is a 'safe country of origin' should be based on specific, objective sources of information, including from UNHCR.[3] Thus, the Asylum Procedures Directive, along with other provisions of EU primary and secondary law, place UNHCR in a privileged position to comment on the EU *acquis* on asylum, including on the safe country of origin concept and accelerated asylum procedures.

UNHCR is concerned by these proposals and takes the view that such amendments are legally problematic. If adopted and applied in practice, they could mean that people in need of international protection might be denied an effective examination of their asylum claims, and thereby face the risk of removal to persecution or serious harm.

1. The proposal and its purpose

According to ESI's proposal, the recast Asylum Procedure Directive (hereafter APD) should be amended to include a paragraph stating that "*Countries that have successfully completed a visa liberalization dialogue with the European Commission, having met all the requirements and benchmarks under such a dialogue, including those related to fundamental rights under block 4, and for which the visa requirement was lifted subsequently, shall be regarded as constituting safe countries of origin for the purposes of this Directive*."

[1] European Stability Initiative, *Open letter to LIBE committee concerning Balkan asylum issues*, at: http://www.esiweb.org/index.php?lang=en&id=67&newsletter_ID=64

[2] European Union, *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, COM(2011) 290 final, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= COM:2011:0290:FIN:EN:PDF

[3] European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, Article 30 (5), pp. 13-34, at: http://www.unhcr.org/refworld/docid/4394203c4.html

It is also suggested that the proposed amendment to Council Regulation 539/201 be modified to include **accelerated asylum procedures** amongst the preliminary measures that Member States would be required to take with a view to addressing a sudden increase in the number of asylum application.

The explicit **purpose** of ESI's proposed amendments is to avoid "*restoring the visa requirements for the Western Balkans"*.

2. The EU legislation on asylum should not be used to regulate issues unrelated to its purposes

UNHCR considers that the EU *acquis* on asylum should not be used to try to solve visa or/and migration challenges. These issues would more effectively be addressed through appropriately-targeted migration policy and legislation, with a sound legal basis.

The purpose of the APD, according to its title, is to "*establish common procedures in Member States for granting and withdrawing international protection.*" The APD, its operative provisions, preamble and initial Explanations do **not** list among its purposes the avoidance of restored "*visa requirements for Western Balkans*". Using the APD for such purpose would disregard the correct application of the *acquis* on asylum.

The Asylum Procedures Directive is already an overly complex legislative act. In UNHCR's view, further modifications are not required to solve issues unrelated to its purpose.

3. Provisions on asylum should not be contained in unrelated EU secondary law

Provisions regulating asylum procedures should not be contained in unrelated legislative acts such as *Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*. To insert provisions on asylum, and potentially with a substantive impact on asylum claim outcomes, would create a dangerous precedent and modify the complex system of checks and balances required to maintain a fair asylum procedure.

It could also create the risk of insufficient attention to, or even failure to observe, a key Treaty provision, namely Article 78 TFEU. Article 78 requiring that measures on asylum be "in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." If provisions on asylum and international protection were to be inserted into instruments falling outside of the asylum *acquis*, and specifically those instruments listed in Article 78, the danger may arise that the scope and significance of international refugee law is not fully taken into account in the negotiation of such provisions. This could provide grounds for challenging such provisions for potential incompatibility with the Treaties.

As recalled below, UNHCR acknowledges generally the validity of accelerated procedures as a means for dealing with asylum claims. However, in the course of its recent research on the application of the Asylum Procedures Directive,[4] UNHCR identified the following adverse factors resulting from the application of accelerated procedures:

• less time to submit an application form to the determining authority;

[4] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, page 55, at: http://www.unhcr.org/refworld/docid/4bab55752.html

• less time to prepare for the interview;
• less time within which to contact and consult a legal adviser;
• more difficulty in conducting a gender-appropriate interview;
• less time for the applicant to gather and submit additional evidence;
• difficulty in ensuring an effective opportunity to disclose traumatic experiences;
• less time for the determining authority to gather and assess the evidence; and
• less time for the determining authority to draft the decision.

Given the above, accelerated procedures should, in UNHCR's view, only be resorted to in a limited set of circumstances and subject to appropriate safeguards. Article 31 (6) of the recast Asylum Procedures Directive[5] is expected to establish an exhaustive list of grounds in which accelerated procedures can be applied. Extending this list and providing for additional cases in which accelerated procedures could be applied, through another legislative act on visa, could render meaningless the exhaustive list in the Asylum Procedures Directive, and create a dangerous precedent. This could create the risk that attempts be made to modify asylum *acquis* instruments by any other law of the Union in future, rendering void the guarantees they contain.

4. The absence of any logical link between the visa liberalization policy and criteria on the one hand, and the asylum *acquis* on the other

Visa liberalization criteria look at the situation in the subject country relating to "*document security, border management, asylum, migration, fight against organised crime and corruption, and protection of fundamental rights*".[6] However, these criteria **do not precisely match** the requirement of the APD to declare a country as a safe country of origin. Criteria foreseen under Block 4 of the roadmaps for visa liberalization[7] do not look at the question of whether fundamental rights are observed and ensured according to the standards required by the APD (Annex II) [8] as a precondition to declaring a country as safe.

In addition, according to the Commission, there has been uneven progress – especially for minorities - in the field of fundamental rights for those countries that have completed the visa liberalization dialogue.[9] This raises significant questions as to whether it is legally sound and appropriate to consider such countries effectively as safe countries of origin, and handle protection claims from their citizens in accelerated procedures.

5. The Safe country of Origin Concept already exists and may be applied

The APD currently includes a provision related to the safe country of origin concept. According to Article 29 APD, Member States may "*introduce legislation that allows, in accordance with Annex II, for the national designation of third countries […] as safe countries of origin*".[10] The same provision has been included in the recast proposal for that Directive.[11]

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[5] European Union: European Commission, *Amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final , available at: http://www.unhcr.org/refworld/docid/4e3941c22.html

[6] See for instance European Commission, *Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010, COM(2012) 472 final*, 28 August 2012, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0472: FIN: EN:PDF

[7] See for instance *Visa Liberalisation with Albania Roadmap*, at: http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Albania.pdf

[8] Asylum Procedure Directive, *infra.*

[9] Third Report on the Post-Visa Liberalisation Monitoring, *infra.*

[10] Article 30 APD, *infra*.

[11] Article 36, *Amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast), infra.*

In line with the above, Member States have the possibility – at any time – to include a given country in the national list of safe countries of origin, provided that the criteria listed in Annex II APD are fulfilled. Consequently, there is no need to create a special provision for specific countries.

6. A safe country of origin designation can and should not be made in EU legislation

The consequence of applying the safe country of origin concept is, *inter alia*, that a claim can be channeled into accelerated procedures.[12]

UNHCR acknowledges generally the validity of accelerated procedures, with appropriate safeguards, as a means of managing asylum claims fairly and efficiently. This includes use of '*safe country of origin'* concepts, appropriately applied.[13] However, UNHCR would question the appropriateness of any discussion about possible designation of new safe countries of origin within the scope of EU legislative instruments such as the APD and its recast.

Under the terms of the present Directive, as well as the recast proposals now under discussion**,** a safe country of origin designation can and should not be made in EU legislation. This is because that designation is based on an assessment that leads to a general presumption of safety that should be capable of swift review and reassessment in case of a change of circumstances, which could occur at any time.

In in this connection, it should be noted that in Member States applying the safe country of origin concept, courts have the power to review and remove from national lists designated safe countries as and if needed.

The 2005 Directive foresaw EU and national lists of 'Safe Countries of Origin[14], which could be amended through administrative or judicial decision as facts change in countries of origin. It was not foreseen that there should be a need for a legislative amendment to designate countries (or reverse that designation) as safe. That scheme should be seen as confirmation that the EU legislature considered the Safe Country of Origin notion should be applied carefully, with scope to revoke that designation at any time in case of changed circumstances.

UNHCR notes also in this connection generally information and reports[15] which raise questions about the situation of some groups among the populations of some South Eastern European states. This suggests that the treatment of such people – and particularly, whether they are free from any risk of persecution, including based on cumulative discrimination – could be called into question. The issue would need very careful consideration, which the EU legislature is not currently in a position to do through the legislative negotiation process.

[12] Article 23 (4)(c)(i) APD and Article 31(6)(b) recast proposal, *infra*.
[13] See for instance: UNHCR, *UNHCR comments on the European Commission's 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 (COM(2009)554, 21 October 2009)*, August 2010, available at: http://www.unhcr.org/refworld/docid/ 4c63ebd32.html
[14] Article 29 and 30 APD, *infra*.
[15] See for instance Third Report on the Post-Visa Liberalisation Monitoring, *infra*

7. Conclusion

UNHCR is concerned by the proposal to include in the Asylum Procedure Directive a provision to define as 'safe countries of origin' those states that have completed a visa liberalization dialogue, and for which the visa requirement was lifted.

UNHCR takes the view that such an amendment would fall outside the purpose of the Directive and would generate a dangerous presumption of safety that could be amended only through the long process of the ordinary legislative procedure. In addition it would add a further, unnecessary layer of complexity to a legislative act that is already very complicated.

UNHCR is also seriously concerned by the proposal to regulate asylum issues in another unrelated legislative act such as "*Regulation No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement"*. This would create a dangerous precedent and modify the complex system of checks and balances required to maintain a fair asylum procedure.

UNHCR is at your disposal to discuss this matter further, should you require additional information.

Sincerely,

Madeline Garlick
Head of Unit
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Bureau for Europe