



**UNHCR's Observations on
the European Commission's Proposal for a Council Regulation
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 (COM (2001) 447 final)**

Introduction

1. Following the entry into force of the Amsterdam Treaty and as part of the establishment of a common asylum system called for by the Tampere Council Conclusions, the European Commission started in March 2000 the preparation of a proposal for a Regulation aimed at replacing the mechanism established under the Dublin Convention for the allocation of responsibility for asylum-seekers. To this end, the Commission issued on 21 March 2000 a Working Document entitled "Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States".¹ The Working Document offers a critical analysis of the objectives and of the functioning of the Dublin system, and presents possible alternatives for its replacement.

2. The Commission also conducted an evaluation of the practical implementation of the Dublin Convention, the conclusions of which were published in a document entitled "Evaluation of the Dublin Convention".² Finally, further to extensive consultations with Member States, UNHCR and several non-governmental organisations, the Commission issued on 26 July 2001 a Proposal for a Council Regulation 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.

3. UNHCR considers that, in the light of the experience accumulated by States Parties to the Dublin Convention during the time that it has been in operation, a re-assessment of the objectives that the Convention sought to

¹ SEC(2000) 522 final of 21 March 2000.

² SEC(2001) 756 final of 13 June 2001.

attain and of the criteria that it set out for distributing responsibilities among Member States is not only amply justified, but is also necessary and timely. UNHCR, therefore, welcomes that this re-assessment is now being undertaken and, in this connection, it wishes to offer some general observations concerning the protection principles involved, as well as some specific comments on the proposed Regulation.

General observations

4. UNHCR notes that, in the Working Document referred to above as well as in the Explanatory Memorandum attached to the current proposal for a Regulation, the Commission acknowledges that the system for apportioning responsibilities established by the Dublin Convention presents many inadequacies and drawbacks. The Commission further notes that a system in which responsibility would depend solely on where the application is lodged, would be “the most credible alternative scenario”, as it “would probably make it possible to set up a clear, viable system that meets a number of objectives: rapidity and certainty; no “refugees in orbit”; resolution of the problem of multiple asylum applications; and a guarantee of family unity”.³ While UNHCR would have been very interested in a more thorough exploration of this alternative, the Commission's proposed Regulation is basically shaped along the same lines as those of the Dublin Convention.

5. It is generally accepted that the primary responsibility for considering an asylum application lies in principle with the State to which it has been submitted. Such State may be able to transfer that responsibility to another State if it ensures that that other State is safe and that it will receive and examine the application in accordance with generally agreed international standards of refugee protection.

6. Within this understanding, UNHCR considers that bilateral or multilateral agreements on the transfer of responsibility for examining asylum applications may play an important role in the proper management of population flows. At the same time, such agreements on transfer of responsibility should not be conceived solely as instruments of migration control, but should be seen as an integral part of the panoply of tools that States have at their disposal for addressing refugee situations in a fair and equitable manner.

7. It is, therefore, crucial that any arrangements for apportioning responsibility for the examination of asylum requests adequately ensure that the protection needs of the persons concerned are met and a suitable durable solution achieved. In this connection, the fact that the applicant has already meaningful links with the State to which the transfer is intended, is a relevant

³ Explanatory Memorandum to the Commission's proposal, paragraph 2.2.

consideration. In UNHCR's view, family connections, cultural ties, knowledge of the language, the possession of a residence permit and the applicant's previous periods of residence in the other State would constitute meaningful links for this purpose.

Specific comments on the Commission's proposal

8. The general principle informing the Commission's proposed Regulation is that, with few exceptions, responsibility for examining an asylum application lies with the Member State which played the most significant role regarding the applicant's entry into or residence on the territories of the Member States. Thus, according to the proposal, the Member State that has issued a visa to a third country national will be responsible for examining an asylum application that such person may subsequently submit.⁴ The proposed Regulation further provides that if a third country national has managed to enter irregularly the territory of a Member State, that Member State will be responsible for examining an asylum application that such person may submit subsequently.⁵ This provision may -- unless it is complemented by additional, corrective measures -- create serious imbalances in the distribution of asylum applicants among Member States. Such imbalances would not only pose serious problems to those States that are situated on the periphery of the Union's territory, but it may also have negative consequences for the protection of asylum-seekers and refugees. One of those consequences may be the delay in the processing of claims which almost inevitably results when States are confronted with transfers of significant numbers of applications. More worrisome, though, is the risk that States that are likely to be affected by a disproportionate number of applicants as a result of the control-oriented criteria on the apportioning of responsibility, may be tempted to adopt policies aimed at further restricting access to their territory and perhaps even to their asylum procedure.

9. This being said, UNHCR welcomes that the proposed Regulation introduces some valuable improvements to the regime laid down by the Dublin Convention. These include the following:

(a) The Dublin Convention provides that if the applicant for asylum has a member of his or her family who is residing in another Member State as a recognised refugee, that Member State shall be responsible for examining the application, provided that the persons concerned so desire.⁶ The proposed

⁴ Article 9(2). Detailed rules are given in connection with applicants who are in possession of a visa issued on the written authorisation of another Member State, a visa which has expired, or more than one visa issued by different Member States.

⁵ Article 10. That State shall cease to be responsible, however, if the applicant has been living at least for six months in the Member State where the application for asylum is made.

⁶ Dublin Convention, Article 4.

Regulation expands this entitlement to include also the applicant's family member who has an asylum application that is being considered under the normal procedure.⁷ UNHCR wishes to submit that it would also be appropriate to extend the same entitlement in cases where the applicant has a member of his or her family who is an ordinary resident in another Member State, as well as in cases where the member of the family is a national of another Member State;

(b) Under the Dublin Convention, the notion of “member of the family” is circumscribed to “the spouse of the applicant for asylum or his or her unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor of under eighteen years”.⁸ The proposed Regulation defines “family members” to include “an asylum seeker's spouse or unmarried partner in a stable relationship, if the legislation of the Member State responsible treats unmarried couples in the same way as married couples, provided that the couple was formed in the country of origin; his unmarried minor children under the age of eighteen, irrespective of the nature of their filiation or his ward; his father, his mother or his guardian, if the asylum seeker is himself an unmarried minor under the age of eighteen; where appropriate, other persons to whom the applicant is related and who used to live in the same home in the country of origin, if one of the persons concerned is dependent on the other”.⁹ UNHCR strongly welcomes this proposal, which is in line with the approach advocated by its Executive Committee in Conclusion No. 88 (XLX) of 1999; and,

(c) The proposed Regulation provides that the responsibility for considering an application for asylum submitted to a Member State by an unaccompanied minor shall be transferred to another Member State if there is in that Member State a member of the family of the minor who is able to take charge of him or her, provided it has been determined that the transfer of responsibility is in the best interests of the child.¹⁰ This provision, which is not found in the Dublin Convention, is most welcome from UNHCR's perspective, not least because it implements one of the key provisions of the Convention on the Rights of the Child.

10. UNHCR further appreciates that the Commission's proposal for a Regulation stipulates that the applicant shall be informed immediately – and in a language which he or she understands – of the fact that a request has

⁷ Draft Regulation, Articles 7 and 8.1.

⁸ Dublin Convention, Article 4.

⁹ Draft Regulation, Article 2(i).

¹⁰ Draft Regulation, Article 6.

been sent to another Member State to take charge of the responsibility for dealing with his or her claim.¹¹

11. UNHCR also appreciates that the proposed Regulation reaffirms the asylum-seeker's entitlement – already recognised in the Dublin Convention – to have access to any data that is processed concerning him or her, and to have corrected, erased or blocked, any part of those data which is incomplete or inaccurate.¹²

12. A retrograde development in relation to the regime of the Dublin Convention is that under the proposed Regulation, appeals against decisions on transfer of responsibility do not have suspensive effect.¹³ UNHCR considers that the suspensive effect of the appeal is not only important to avoid unnecessary hardship in the case that the appeal is successful, but it is also important for reasons of procedural efficiency. UNHCR would insist, therefore, that the principle of suspensive effect of appeals against a decision on transfer be maintained in the proposed Regulation.

Conclusion

13. UNHCR considers that, while the Commission's proposal presents a number of positive aspects, the criteria used for apportioning responsibility are likely to produce significant inequalities in terms of burden-sharing within the European Union. Such a situation will not only affect the countries concerned, but may also have adverse effects on the protection of asylum-seekers and refugees.

14. UNHCR wishes, therefore, to strongly recommend that the mechanism foreseen by the proposed Regulation be complemented by additional measures and criteria, including equitable burden-sharing arrangement within the European Union. In the absence of such complementary measures, a system where the responsibility for examining an asylum application normally remains with the State to which it has been submitted may be the most appropriate one, as initially indicated by the Commission. Within such a system, transfers of responsibility could be undertaken when the imperatives of protection or durable solution so necessitate in the individual case.

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¹¹ Draft Regulation, Article 18.4.

¹² Draft Regulation, Article 22.

¹³ Draft Regulation, Article 20.2.