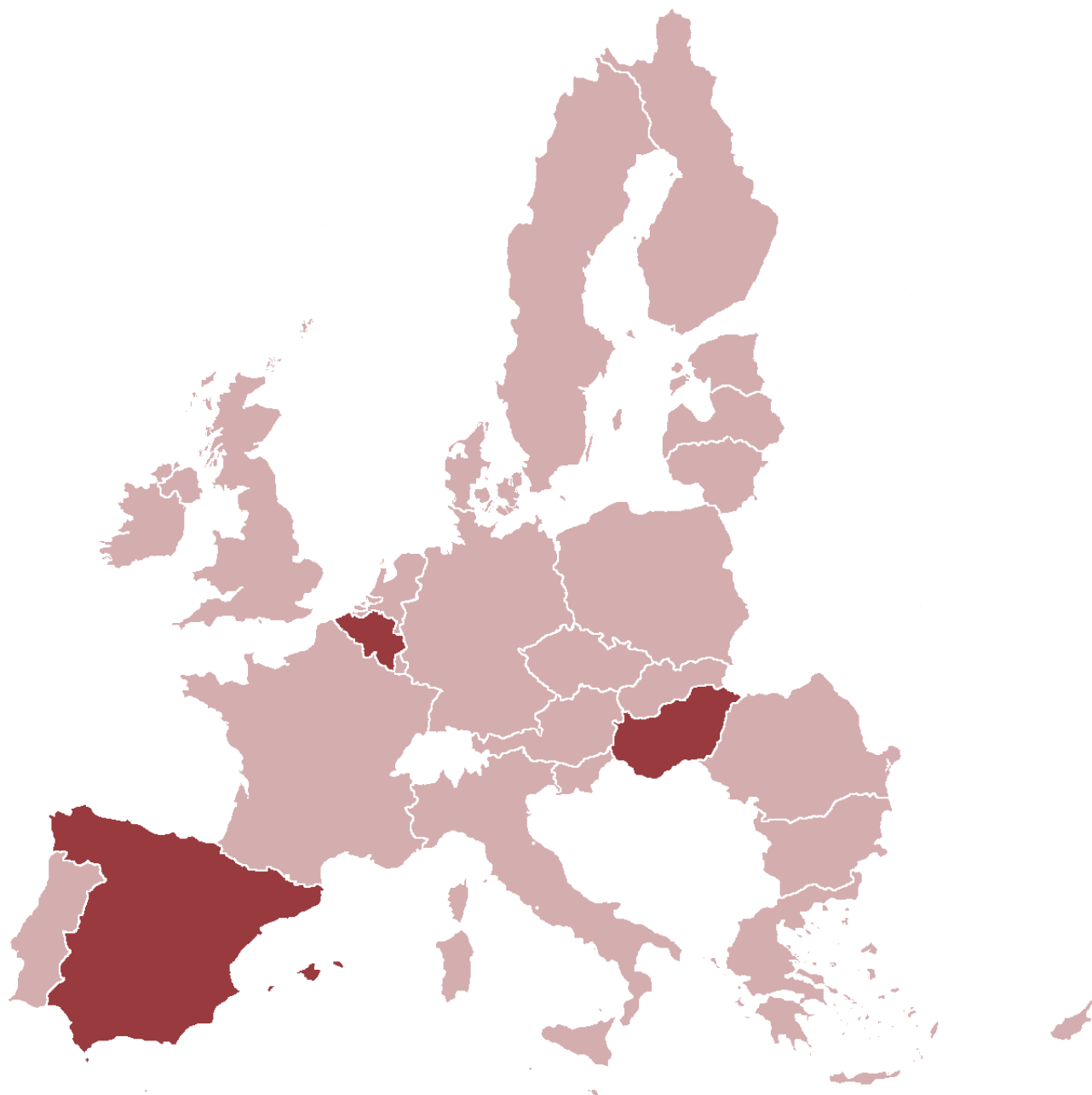


GOOD PRACTICES FOR A EUROPE OF PROTECTION

a memorandum for the Trio of Spain, Belgium and Hungary

December 2009



*Comisión Española de Ayuda al Refugiado
-Spanish Commission for Refugees-*



WHY THIS MEMORANDUM?

Spain, Belgium and Hungary form the new Trio of States that will hold the Presidency of the European Union from January 2010 until June 2011, a crucial moment for the development of the EU policy and legislation in the field of asylum. The Stockholm Programme should in fact be adopted at the European Council of December 2009 and the Trio will therefore play a key role in its implementation.

These three countries perfectly represent the diversity existing among EU Member States with regard to the needs and expectations of a Common European Asylum System. The different geographical positions, size and differently developed asylum systems naturally lead to different priorities in asylum policies but also to different expertise and good practices. This varied expertise can ensure that during the 18 months of the Trio, considerable steps are made towards a Common European Asylum System that guarantees higher protection standards throughout the EU.

CEAR (Spanish Refugee Council), the Flemish Refugee Action, CIRE (Coordination and Initiatives for refugees and migrants) and the Hungarian Helsinki Committee are non-governmental organisations that work in Spain, Belgium and Hungary for the promotion and protection of the rights of asylum seekers and refugees. We are all active members of ECRE (European Council on Refugees and Exiles).

This memorandum outlines the issues that we suggest need to be prioritised during the 18 months of the Trio's presidency. We will not discuss here the process currently taking place to amend the existing EU legislation. The creation of the "second phase" of instruments remains undoubtedly the first priority concerning the creation of a Common European Asylum System. ECRE has already extensively commented on it and we fully support their conclusions and recommendations. The aim of this text is rather to complement ECRE's positions and identify, from a more national perspective, those issues where the often diverse experiences of Spain, Belgium and Hungary can be employed to effectively address some of the main shortcomings of asylum systems in Europe. After a short overview of the current state of play concerning the ongoing legislative process, we will focus on the issues of access to protection, non-harmonised protection statuses, alternatives to detention, sustainable return, resettlement and integration. For each issue we will identify national 'good practices' and formulate concrete recommendations on how they can be translated on a EU level.

Common European Asylum System: current developments

The past year has witnessed some important developments towards the establishment of a Common European Asylum system: the European Commission has presented proposals for amendments of the Regulation determining the Member State competent for the examination of an asylum application (Dublin II Regulation) and for the Directive on minimum standards for the Reception of asylum seekers (Reception Directive), together with the proposals for a regulation establishing the European Support Office. These three proposals have been already examined and voted on by the European Parliament and now need to be examined by the Council. At the time of writing it is still not possible to foresee how far the Council will be able to proceed under the Swedish Presidency on these matters.

ECRE presented its Comments on the European Commission Proposal to recast the Dublin Regulation and on the European Commission Proposal to recast the Reception Conditions Directive in April 2009¹.

At the time of writing, the European Commission has just published two more proposals concerning the recasts of the Directive on minimum standards on procedures for granting and withdrawing refugee status

¹ ECRE, Comments on the European Commission Proposal to recast the Dublin Regulation, http://www.ecre.org/resources/policy_papers/1342, April 2009; ECRE, Comments on the European Commission Proposal to recast the Reception Conditions Directive, http://www.ecre.org/resources/Policy_papers/1343, April 2009.

(Asylum Procedures Directive) and of the Directive 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 (Qualification Directive).

On these proposals the Parliament and the Council will express themselves according to the co-decision procedure and it is reasonable to assume that this work will take place during the 18 months of the three-Presidencies team.

As stated we are not going to discuss these issues in detail. The detailed analysis that ECRE published after the adoption of these directives² should be used as a basis for the amendments as well as the more recent study on the implementation of the Qualification Directive by the ELENA network (ECRE's lawyers network)³.

As a general recommendation we urge the Trio of States to join their efforts in **ensuring that the second phase of the Common European Asylum System will translate the best practices and highest protection standards of the Member States' national laws into EU legislation. The harmonisation on minimum standards, too often resulted in the lowest common denominators, should not be repeated.**

Finally it must also be noted that in recent years a worrisome tendency has developed towards the **externalisation of responsibility** for asylum claims outside the EU to neighbouring third countries. In this respect we **recommend the Trio of States to support cooperation with third countries aimed at reinforcing their protection system.** At the same time we urge the Trio of States to **take a strong and clear position** to make sure such **cooperation does not become a way for the EU to escape its responsibility to protect** under international and EU law.

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2 ECRE Information Note on Directive on minimum standards on procedures for granting and withdrawing refugee status, ECRE, 2006, http://www.ecre.org/resources/ECRE_actions/692; ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and others in need of international protection, ECRE, 2004, http://www.ecre.org/resources/ECRE_actions/292;

3 The Impact of the EU Qualification Directive on International Protection, ECRE- ELENA, 2008, http://www.ecre.org/resources/Policy_papers/1244.

1. ACCESS TO PROTECTION IN EUROPE

a) Background

The European Union has been in the past years increasingly investing in the controlling of its external borders in order to prevent illegal immigration. Notwithstanding the legitimate goal of border protection and the struggle against human trafficking, experience shows that asylum seekers usually have no lawful means to reach the territory of the EU and are obliged to resort to unlawful methods in order to apply for the international protection they are entitled to.

b) Good practices

Hungary has already positively experienced cooperation with the aim of promoting protection sensitive border practices. Since December 2006, the Hungarian Helsinki Committee, the UNHCR and the National Headquarters of the Border Guard (now National Police) have been implementing a tripartite border monitoring agreement, which all parties involved evaluated in positive terms.⁴ Activities conducted under the agreement include regular monitoring of border practices by independent lawyers, as well as training for border police staff.

c) Recommendations

We call on the Trio to promote protection sensitive border control systems based on Hungary's positive experiences. This includes on the one hand the promotion of similar projects, adequately adapted to the different geographical reality, throughout the EU. On the other hand, the transparency of the EU border agency FRONTEX, should be guaranteed by means of stronger parliamentary control. Its cooperation with other actors, such as the future European Asylum Support Office (EASO), UNCHR, NGO's as well as independent experts should be institutionalised

⁴ See: Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary - Report on the Border Monitoring Program's First Year, Hungarian Helsinki Committee, 2008, http://helsinki.webdialog.hu/dokumentum/Border_Monitoring_Report_2007_ENG_FINAL.pdf

2. NON-HARMONISED PROTECTION STATUSES

a) Background

Beyond the EU harmonisation of the refugee status and subsidiary protection several other forms of protection, found in national legislations, have so far not been the focus of harmonisation efforts. These non-EU-harmonised status often already existed before the establishment of the common subsidiary protection regime and are sometimes based on clear obligations under international law, such as the protection of stateless people. They differ from one Member State to another in their name (tolerated status, humanitarian status, etc), grounds (non-refoulement, statelessness, humanitarian reasons, etc), as well as the rights and legal status granted. Generally they afford less rights and protection than refugee status or subsidiary protection and are more limited in time. Statistics show that these "residual" status play an increasingly important role in today's European asylum system.

b) Good practices

Spain and **Hungary** are the two states in Europe that have a statelessness determination procedure and a separate stateless status based on detailed regulation in national law. These countries show an example of how international protection obligations beyond the existing EU asylum acquis can effectively be fulfilled through a national initiative.

c) Recommendations

The current divergence of non-EU-harmonised protection status weakens protection standards embedded in international and EU refugee law. Furthermore the current EU harmonised status do not fulfil all existing obligations under international law. In this respect:

- We recommend the Trio initiate and support a **professional consultation** process, involving all relevant governmental and non-governmental actors as well as the UNHCR, aiming at the **exploration of further harmonisation needs** with regard to currently existing non-harmonised protection status.
- We urge the Trio to make all efforts, **based on Spanish and Hungarian experiences to integrate statelessness (as a ground for protection per se) into the mainstream of EU asylum policies.**

3. ALTERNATIVES TO DETENTION

a) Background

The increased efforts European States have dedicated in the last years to enforce returns has led to an increased use of detention, in some cases for indefinite periods. The Directive on minimum standards for the return of third country nationals allows for the possibility of administrative detention up to 18 months.

Moreover Member States often also resort to detention during the examination of Dublin cases or in the cases of asylum seekers irregularly crossing state borders. The amendments proposed by the Commission to the Reception Directive, which only applies to asylum seekers, include a provision prohibiting the detention of unaccompanied minors and only allowing that of accompanied minors if it is in their own interest. The amended texts also foresee that Member States lay down rules dealing with alternatives to detention in national legislation. However besides presenting some non binding examples⁵ the Commission does not elaborate further on this concept.

b) Good practices

Since October 2008 **Belgium** has launched a project on alternatives to detention for families with children who are awaiting return. These families are no longer brought to detention centres but to houses made available for them. Here they are intensively assisted by "return coaches" until the moment they are returned to their home countries, or to another EU member state in application of the Dublin regulation. The better living conditions in the houses and the intensive assistance by the coaches make the awaiting of repatriation or transfer more humane and dignified. The Belgian authorities evaluated the risk of absconding as relatively low and are satisfied overall with the first results of the project, which they intend to expand.

Moreover it must be noted that in **Spain** asylum seekers are never detained, including during the Dublin examination. Also, **Spain** does not detain families with children or unaccompanied minors that illegally remain.

Finally, in **Hungary**, families with minor children and unaccompanied minors are never detained, or during the procedure, or once they are rejected.

c) Recommendations

The steps taken by the Commission in the proposed amended text of the Reception Directive go in the right direction. Nevertheless, we believe that no child should be detained, even if accompanied by his/her family. Moreover deprivation of physical freedom is detrimental not only for children but for adults as well. In this respect, merely stating that detention should be used as a last resort and that alternatives should be foreseen is not enough. In this context:

- We urge the Trio to promote a **coordinated effort at the EU level to develop effective systems of alternatives to detention**, drawing from the existing experience of countries such as Belgium.
- We call on the Trio to support the inclusion of **obligatory alternatives to detention** into EU legislation **applying both to asylum seekers and illegally staying third country nationals**.
- We recommend the Trio make sure that **detention**, when used as a last resort, is in any case strictly **subjected to systematic and regular juridical control**.

⁵ "regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at a designated place"

4. SUSTAINABLE RETURN

a) Background

The Directive on minimum standards for the return of third country nationals states in its recitals that “voluntary return should be preferred to forced return” and that Member States should provide for “enhanced return assistance and counselling in order to promote voluntary return”. However the whole directive focuses solely on forced return and its implementation. Furthermore, no mention is made of the issue of the sustainability of return - that is the successful reintegration of the returnee in the country of origin.

Projects in support of voluntary return and its sustainability have been introduced in different Member States. The presence of such initiatives however differs considerably from one EU region to another. Additionally, the kind and amount of assistance given to returnees, as well as to the providers, varies enormously among Member States. As a consequence, returnees going back to the same country but coming from different EU Member States do not have the same opportunities to reintegrate and the same chance for a truly sustainable return.

b) Good practices

Belgium has quite a long story of commitment towards the support of voluntary and sustainable return. The beginning of the cooperation of the Belgian authorities with the International Organisation for Migration on Assisted Voluntary Return dates back to 1984. Since then other initiatives have been supported by the Belgian authorities such as the Reintegration Fund, in partnership with IOM and Caritas - in supporting the returnee in starting again his/her life in the country of origin – and projects of the Flemish Refugee Action on individual help for reintegration after return and on Country of Return Information.

c) Recommendations

An EU approach on voluntary and sustainable return, drawing from existing experiences, improving and spreading them throughout all the Member States is necessary for a comprehensive EU asylum policy, making sure that returnees can benefit from the same reintegration opportunities independently from the EU host country they come from.

- We call on the Trio States **to actively work during their mandates towards a European approach to sustainable return**, drawing from the existing experiences such as in Belgium.

5. RESETTLEMENT

a) Background

The majority of refugees in the world do not arrive in Europe. They flee in fact to neighbouring countries, which are often very poor themselves and which cannot properly protect them. The resettlement of refugees from third countries to the EU offers a way to effectively give protection to those in need and to show solidarity to these countries.

The European Commission has presented on 2 September 2009 its proposal for the establishment of a joint European Resettlement Programme. The Programme foresees extra financial support for those Member States that voluntarily decide to resettle refugees belonging to pre-established categories.

In the Communication accompanying the proposal the Commission underlines that "global resettlement needs are much greater than the resettlement places that are available worldwide". Moreover the Commission points out that the majority of EU countries have currently no resettlement programme at all.

b) Good practices

Despite the fact that none of the Trio have a formal resettlement programme yet, all them have clearly already demonstrated interest for it. **Spain** and **Belgium** have in fact already been active on ad hoc resettlement actions. Through these actions **Spain** has received refugees from Afghanistan, Colombia and Iraq. Moreover **Belgium** has approved in February 2009 the resettlement of 50 Iraqi refugees from Jordan and Syria as a pilot project, with the intention of starting a more formal programme. The resettled Iraqi refugees successfully arrived in September 2009. Finally **Hungary** has included in its most recent asylum law the legal basis for a resettlement programme.

c) Recommendations

We strongly support the establishment of an EU Joint Resettlement Programme. Such a scheme was among the priorities of the Swedish presidency and the recent Commission proposal should be approved before the end of the Swedish mandate. In this context:

- We call on the Trio to **actively support**, already under the Swedish presidency, the **adoption of the EU Joint Resettlement Programme** proposed by the Commission.
- Furthermore, we recommend the Trio further enact all those actions needed to **make this Programme operational** during the period of their mandates and to **set an example by expressing a clear commitment for their own participation in it**.
- Moreover we call on the Trio to ensure that the eventual **system of internal relocation of refugees within the EU is not confused or substituted with resettlement from third countries**.
- Finally we urge the Trio to make sure that the participation in resettlement programmes is a **complement to and not a substitute for the protection** to be provided when needed, **to people who apply for asylum within the EU**.

6. INTEGRATION

a) Background

The integration of third country nationals is a priority for the European Union. In the past years several actions have been undertaken in this field: the adoption by the Council of the Common Principles on Integration, the publication by the Commission of a Common EU agenda for integration, the creation of the European Integration Fund, the creation of the EU website on integration and finally the creation of the European Integration Forum for civil society.

These documents and activities however do not address the integration of beneficiaries of international protection. What is more, refugees and beneficiaries of subsidiary protection are explicitly excluded by the target groups of the European Integration Fund.

Moreover despite the above mentioned initiatives integration practices in the EU continue to vary in different Member States and an EU coordination mechanism is still lacking.

b) Good practices

Some EU countries have longer experience in developing integration tools, such as integration courses, and others are totally new to it.

Within the **Belgian** Dutch speaking community, in Flanders for example, a complete policy on integration has been developed. A so-called "integration path" (Inburgeringstraject) is foreseen for all legal migrants, including refugees and asylum seekers. The "integration path" is provided by "integration offices" (Onthaalbureaus) and is funded by the Flemish government. It concentrates on three types of assistance: a Dutch language course, a course on social orientation and personal professional and educational orientation. During the course on social orientation, participants receive information about the Belgian (Flemish) society, such as the state's structure, education and health systems. For professional and educational orientation participants are assisted by personal assistants who help them overcome possible obstacles concerning employment, socio-cultural integration or studies, for example the recognition of their foreign diplomas.

Spain also invests considerably on integration policies for asylum seekers and refugees: asylum seekers can access the labour market 6 months after lodging their application and have access to all the official technical job training programs. They are also provided with language courses and are beneficiaries of programs for the facilitation of access to housing. Individual and family social assistance and orientation programmes, organised and funded by the government, are also provided.

c) Recommendations

Developing a joint coordination mechanism on integration measures is important to the sharing of information and good practices with those countries with less developed integration systems. A coordinated EU approach on integration, elaborated with the input of the civil society, will be favourable for beneficiaries of international protection as well as for the Member States societies. In this context:

- We call on the Trio to promote **further coordination on the EU level** in the work on integration of third country nationals in a way that should ultimately lead to establish **common standards on integration embedded in EU legislation**.
- We recommend the Trio make sure that the **specific needs of beneficiaries of international** protection are **properly addressed** within the broader discourse on integration. A first step in this direction would be to **extend the scope of the European Integration Fund to beneficiaries of international protection**.

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