BRIEFING NOTE

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Policy Department C
Citizens' Rights and Constitutional Affairs

TOWARDS A COMMON EUROPEAN ASYLUM SYSTEM – ASSESSMENT AND PROPOSALS – ELEMENTS TO BE IMPLEMENTED FOR THE ESTABLISHMENT OF AN EFFICIENT AND COHERENT SYSTEM

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Abstract:
The note gives an assessment of the disposition and objectives of the Lisbon Treaty. It underlines 6 specific issues which should be addressed in view of the establishment of an efficient and coherent European asylum system, notably the question of mutual recognition of asylum decisions, the future of the Dublin system and the question of burden sharing between Member States.

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BRIEFING NOTE NO. 4

Towards a Common European Asylum System – Assessment and Proposals – Elements to be Implemented for the Establishment of an Efficient and Coherent System

I. General Remarks

1. The Lisbon Treaty – Objectives and Competences – The Meaning of a Uniform Status Throughout the EU

The Lisbon Treaty entrusts the Union with the task to develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non-refoulement. For the purposes of this task the Treaty uses the term "common European asylum system" comprising

- a uniform status of asylum
- a uniform status of subsidiary protection
- a common system of temporary protection
- common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status
- criteria and mechanisms for determining the responsible state
- standards concerning the conditions for the reception of applicants for asylum or subsidiary protection
- partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

Although the term "common European asylum system" as well as the term "uniform status" leave a certain margin of interpretation, it follows from the enumeration in Art. 78 para. 2 that a common European asylum system does not imply as yet a transfer of responsibility for receiving asylum seekers and processing claims to the European Union. This, however, should not be considered as a legal impediment to the conclusion of arrangements between Member States to establish common institutions for processing asylum seekers and/or specialised boards deciding on appeals against negative asylum decisions. In addition, the basic responsibility of Member States for the reception and examination of asylum seekers on their territories does not exclude neither forms of particular inter-governmental cooperation nor experimentation with "Europeanized asylum procedures" with the aim to identify advantages and disadvantages of transferring responsibility in asylum matters to European organs.

The European Commission has made clear that its perception of a common European asylum system is a progressive legislation, leading to a shift from voluntary to mandatory, and an abolition of opt-out clauses and finally to a "full" harmonization of procedures, criteria and mechanisms as well as standards mentioned in the new Art. 78. The instrument to achieve that objective would be a second set of directives respectively regulations replacing the existing directives by a fully harmonized procedure and substantive asylum law.

Neither the term "common European asylum system" nor the objective of a uniform status do necessarily exclude the maintenance of a certain flexibility and discretion in the application of common procedural rules and standards. A "common" European asylum system" undoubtedly includes further harmonization. It is, however, necessary to reflect about the objectives to be achieved by harmonizing national laws and the techniques available to achieve a higher degree of consensus among EU Member States, particularly in issues which constitute the core elements of a common European asylum system. It seems unlikely that EU Member States by adopting the Lisbon Treaty were prepared to completely give up their specific concepts of accommodating protection needs. It should not be ignored that divergent national standards and concepts are not simply the result of bad or good will but a reflection of different experiences, traditions and social and geographical conditions. This does not mean that there is no need to eliminate some of the discrepancies and divergences in national standards and practices as indicated in the previous notes.

Further legislative harmonization should be based upon an in-depth analysis of the objectives to be achieved by a common European asylum system and its core elements. Evaluation of the transposition of the directives in the EU Member States' legal system should be followed by an examination of the impact of the first generation of directives upon national practice and judicial review.

The directives as well as the Lisbon Treaty refer to a large extent upon the Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties (Art. 78). The European Court will probably be faced with a large number of unsolved issues relating to the interpretation of the Geneva Convention which may have a considerable impact upon the further legislative harmonization process. In addition, with the accession of the European Union to the European Convention of Human Rights, the European

Court of Human Rights will be competent to exercise judicial review on issues relating to the interpretation of the European Convention of Human Rights.

Member States' governments and the European Parliament in the exercise of their legislative responsibilities may wish to exert influence upon the interpretation of the Geneva Convention. Since state practice and subsequent agreements are an essential element for the interpretation of international treaties (Art. 31 para. 3a of the Vienna Convention on the Law of Treaties), it may be desirable to think about procedures in order to solve controversial issues on the interpretation of the Geneva Convention or the implications of the European Convention of Human Rights for the further development of the common European asylum system.

It is clear from the different wording of the Lisbon Treaty that further European legislation is not limited to "minimum standards". Therefore, the European Union is entitled to go beyond the "minimum" provided that the necessary majority can be achieved in the legislative process. The different wording of the Lisbon Treaty indicates that the change from minimum standards to standards would seem to indicate that standards may be distinguished from minimum standards by a medium level rather than the lowest common level of all EU Member States. However, it may be very difficult to distinguish between "standards" and "minimum standards" according to the level of treatment granted to asylum seekers.

Frequently the term "minimum standards" is used in close connection with the "more favourable standards" clause which is explicitly laid down in all directives. The concept of minimum standards and the clause of more favourable standards do not have the same meaning. The term "minimum standards" implies a legislative programme to restrict legislative activities to a set of "minimum rules" which must be observed by all EU Member States without purporting to establish a comprehensive regulatory framework while the more favourable standards clause simply authorizes Member States to go beyond the general standards established in the common European asylum system.

In spite of this difference the established clause of "more favourable standards" needs to be reconsidered with respect to the objectives of a common European asylum system and a "uniform status".

Firstly, the clause has led in effect to a frequently partial or total non-transposition of directive provisions of the first generation by Member States arguing that by maintaining more favourite national laws no transposition is needed. This can be observed with regard to the transposition of provisions relating to the refugee definition and/or the definition of persons eligible for subsidiary protection. A similar conclusion may be drawn with regard to the transposition of mandatory provisions on refusal or termination of refugee and subsidiary protection status if under national law no such provisions are foreseen.

Secondly, the purpose of the European harmonization and particularly of a uniform status may be endangered by allowing EU Member States to maintain substantially different higher standards relating to the processing of asylum seekers and the criteria on eligibility. The purpose of the European harmonization to avoid secondary movements may not be achieved if the differences will be a substantial factor for choosing a particular EU Member State whose practices or laws are more favourable than the laws and practices of another EU Member State. At the same time it will be very difficult to agree on a general system of mutual recognition of asylum decisions if third country nationals may be entitled to an international protection status under substantially easier procedural and substantive rules than are laid down in a common European asylum system.

The application of rules on enforcement of return measures based upon a general recognition of asylum decisions may also be substantially hampered. On the other hand, more favourable standards may be a useful tool in order to gain experiences on the effect of new legislative provisions on the efficiency of asylum systems and the proper treatment of asylum seekers. Therefore, model legislation (perhaps by authorization through the European Commission) should be established if Member States wish to enact or maintain more favourable standards relating to standards and criteria which are essential for granting an international protection status. In principle, however, Member States should apply common eligibility criteria. They may enact on national grounds national residence permits but should not apply more favourable rules on eligibility criteria and the content of an international protection status.

Finally, as a general question the technique of legislation (regulation instead of directives) should be briefly addressed. The principle of subsidiarity, explicitly laid down in the Lisbon Treaty for proposals within the framework of chapter 4 and 5, does not apply for the common European asylum system and the establishment of a uniform status. Therefore, in principle the

term “measures” in Art. 78 covers regulations instead of directives. Regulations do not need transposition; they would also have a substantial advantage of avoiding divergent national transposition which may be a considerable source for confusion and delays in achieving a common European asylum system and a uniform status. In spite of the need for a certain flexibility and national discretion in some matters, regulations would have a distinct advantage of establishing a more transparent or easily comparable asylum system. The very concept of a uniform status and automatic mutual recognition of asylum decisions speaks in favour of choosing at least in some parts of the new system regulations rather than directives. In addition, in the long run, a single EU asylum law should be considered in order to avoid the frequent overlappings and the occasional incoherence of different directives passed at different times.

II. Particular Issues

In the public debate new elements to be implemented for the establishment of an efficient and coherent European asylum system have been suggested:

1. Mutual recognition of asylum decisions
2. The future of the Dublin system determining a responsible state for handling a request
3. Burden sharing between Member States – establishment of a system of intra-EU-distribution of asylum seekers
4. Establishment of a European office of coordination
5. The future of judicial protection – establishment of specialized European asylum courts or appeal boards
6. The external dimension of a common European asylum system

1. Mutual recognition of asylum decisions

The Dublin Regulation II does contain some rules on responsibility of EU Member States following a negative asylum decision. In addition, the Directive 2003/109 on long-term residence permits includes recognized refugees. Otherwise, national asylum decisions do not have an automatic consequence for other EU Member States. A decision is not binding on another Member State. UNHCR has mentioned that this leads to a number of problems, for instance in extradition cases (Response to the European Commission's Green Paper, September 2007, p. 27). It seems logical that with the establishment of a common European asylum system recognition decisions should be acknowledged by other Member States. However, it must be clarified what legal effects result from a system of mutual recognition. In addition, it would seem difficult at the present stage of harmonization to extend a system of mutual recognition to subsidiary protection.

Proposal:

The effects and the need of a system of mutual recognition should be further examined.

2. The future of the Dublin system – determination of the state responsible for handling an asylum request

The Dublin system has frequently been criticized as a waste of energy and resources in distributing asylum seekers throughout the European Union rather than declare the Member State responsible in which an asylum seeker files a request. The mere comparison of statistical information on numbers, however, ignores the essential objective of the Dublin system to avoid secondary movements and to avoid the use of the asylum system as a back-door to illegal immigration. It is essential that asylum seekers in order to receive proper protection may not be entitled to a free choice of the final country of reception within the European Union. Therefore, the efficient operation of the Dublin system requiring a quick determination procedure and efficient mechanisms to return an asylum seeker to the EU Member State responsible for handling a request should be maintained and further developed. This requires also a considerably stronger monitoring by the European Union of EU Member States' compliance with substantive and procedural standards of a common European asylum system. A situation, leading to a suspension of the operation of the Dublin rules within the European Union as a result of a Member State's non-compliance with basic standards on the rights of asylum seekers should automatically trigger a monitoring process by the European Union.

Proposal:

Introduction of a monitoring system for supervising the compliance with substantive and procedural standards of a Common European Asylum System.

3. Burden sharing between Member States – establishment of a system of intra-EU-distribution of asylum seekers

The Dublin system may lead to an unequal distribution of burden between EU Member States and may eventually endanger the willingness of Member States to fully comply with their duties under the Dublin II Regulation. At present, a system of intra-EU distribution of asylum seekers seems to be hardly acceptable. Further funds may be allocated to alleviate the particular financial burdens which have to be carried by the "front-states". However, if as the very basis of the common European asylum system it is accepted that asylum cannot only be considered as a national responsibility but a responsibility of the European Union, it would seem only logical to develop concepts for creating more solidarity within the EU by

1. establishing a mechanism extending the scope of application of Directive 2001/55 on temporary protection. Since the Directive does only apply in case of a mass-flow of refugees, it cannot be used for other purposes like reception of specific categories of persons needing international protection for a temporary period of time (Iraq, Afghanistan);
2. a system of voluntary cooperation in admitting persons needing temporary protection. A mechanism of financial compensation for EU Member States not participating could be devised (establishment of a pool of residence permits);
3. financial funds should be made available for joint processing and appeal systems in EU Member States where such cooperation may appear useful.

Proposal:

Development of a regime for the extension and facilitation of the application of Directive 2001/55.

4. Establishment of a European office of coordination

There is clearly an urgent need of coordinating the application of asylum practices. In particular, the practical implementation of directives will raise some issues of practical cooperation and coordination of activities, for instance with regard to the return of rejected

asylum seekers, access to data on countries of origin, establishment of common information centres on safety of countries of origin and third countries of transit etc. In addition, there is a need for identifying controversial issues of interpretation of the community rules on asylum as well as solving issues of interpretation of the Geneva Convention and the European Convention of Human Rights. An essential part of the cooperation needed relates to the application of existing norms by the EU Member States and is therefore within the basic responsibility of governments. Therefore, in the first place, inter-governmental consultation and cooperation should be strengthened by establishing a clearing committee in charge of working out recommendations for the solution of controversial issues of interpretation.

Proposal:

Establishment of a clearing committee.

5. Judicial review

With the involvement of the European Court of Justice and the European Court of Human Rights into the interpretation of European asylum law the question of the role of courts in solving issues on which no political agreement could be reached may have to be considered when the function of a future legislation and cooperation is discussed. It is primarily the function of the EU Member States and the European Parliament to shape the future content of a common European asylum system. It is the role of the courts to interpret the law rather than making the law. This should be considered in the further process of harmonizing the legislation.

The problem of judicial protection will raise another issue with regard to the establishment of specialised European asylum courts or appeal boards in charge of interpreting the European norms on the common European asylum system. It is likely that the large number of requests for preliminary rulings as well as the highly specialised nature of questions to be presented to the European Court will require additional personnel resources and skills. A possible solution might be the establishment of specialised European asylum appeal boards consisting of judges or experts of asylum law in the different EU Member States. This system, based on specific procedural provisions enabling a more rapid determination process would have considerable advantages to the existing system.

Proposal:

Establishment of a specialised European Board of Appeals.

6. The external dimension of a common European asylum system

With the process of harmonizing respectively approximating asylum legislation EU Member States by the first generation of directives the external dimension of a common European asylum system somehow seems to have lost some of its focus although the European Commission has made several attempts to address the issue. One of the reasons may be that only modest progress seems to have been achieved in the relations with third countries. In spite of the modest progress made, it is evident that a common European asylum system cannot work efficiently without including to a much larger degree its external dimension. At all stages of the asylum procedure, where questions of alternative protection, determination of responsibility and return of unsuccessful asylum seekers arise, the external dimension must be considered.

Briefly, the following elements may be mentioned, which have been discussed in previous papers and studies in a controversial way:

- external processing in countries of first asylum
- strengthening the reception capacities of first asylum countries
- more flexible approaches to react to specific refugee movements
- establishment of standardized return rules and procedures in cooperation with countries of origin
- extending the system of bilateral readmission agreements to a general concept of readmission.

Proposal:

Elaboration of a coherent concept of external processing and alternative methods of examining protection requests.

Final comment:

Although at present all proposals are clearly directed towards an asylum system based upon national responsibility for examining asylum seekers, the examination of a system of an exclusively European-administered asylum system based upon European substantive and procedural standards should not be completely excluded. A study should be devoted to explore into the substantial problems as well as possible advantages (exclusion of recourse to

national procedures, standards and requests) and flexibility should be established for experimenting with joint asylum procedures as well as experimental European asylum processing.