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BRIEFING NOTE

Policy Department C
Citizens' Rights and Constitutional Affairs

MINIMUM STANDARDS RELATING TO THE ELIGIBILITY FOR REFUGEE STATUS OR INTERNATIONAL PROTECTION AND CONTENT OF THESE STATUS' – ASSESSMENT (SUMMARY) OF THE IMPLEMENTATION OF THE 2004 DIRECTIVE AND PROPOSALS FOR A COMMON EUROPEAN REGIME OF ASYLUM

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BRIEFING NOTE

Abstract:
The note gives an evaluation of the effects of the transposition of several important aspects of the directive in the Member States. It underlines the difficulties relating to eligibility criteria for refugee status and for subsidiary protection status. It addresses in particular the question of the content of a uniform asylum status and subsidiary protection status.

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BRIEFING NOTE NO. 2

Minimum Standards Relating to the Eligibility for Refugee Status or International Protection and Content of These Status' – Assessment (summary) of the Implementation of the 2004 Directive and Proposals for a Common European Regime of Asylum

Date of implementation: 10 October 2006

I. Assessment of the Implementation of the Qualification Directive (QD)

1. General Remarks

The Qualification Directive has been implemented by the new Member States with some exceptions (Spain). So far implementation surveys have been undertaken by the European Commission[1] and UNHCR.[2]

The information available as yet on the transposition of the Qualification Directive does not support the assumption that the Qualification Directive has led to a downgrading of the protection standards ("lowest common denominator"). Taking subsidiary protection as an example it is clear that for many Member States the legal position of third-country nationals has been improved either because no subsidiary protection status existed before or only in the form of a mere prohibition of expulsion, or because the status was before issued on a discretionary basis or because the transposition has clarified the existing practice on a number of points. Taking Germany as an example the Directive has clearly broadened the scope of subsidiary protection, with regard to the actors of persecution or serious harm (Art. 6). For some Member States, however, the transposition did not bring about substantial change. For other Member States a deterioration has taken place due to transposition by reducing the scope of subsidiary protection and the level of secondary rights.

Generally speaking, a similar picture of a rather diverse state practice resulting in improvements as well as deteriorations with regard to the rights of applicants can be observed. With regard to Art. 7 para. 1 (actors of protection) a "deterioration" in many Member States may be noted with regard to the inclusion of non-state parties, particularly international organizations as actors of protection. With respect to Art. 8 (internal protection alternative)

[1] Odysseus Network – the examination is still going on; no results have been published as yet.
[2] Asylum in the European Union, November 2007 – survey on France, Germany, Greece, the Slovak Republic and Sweden.

deterioration is noted by a number of Member States as a result of transposition while in another group of states transposition has brought about improvement because of greater clarity. Article 9 para. 1 and 2 on the definition of persecution have generally been considered as improving the situation since an accumulation of acts may now constitute persecution, which previously had been considered as unclear in a large number of Member States. The same conclusion can be drawn with regard to Art. 10 para. 1 d in spite of some difficulties of interpretation. However, from some Member States it is frequently reported that domestic law is more favourable than the Directive. Some of the provisions on revocation, ending of or refusal to a new refugee status (Art. 14) or subsidiary protection status (Art. 19) are assessed as having led to cases of deterioration due to the obligation to terminate the status ("shall and/or be denied"). Finally, the transposition of the Qualification Directive indicates that a substantial number of Member States have maintained in their domestic law more favourable provisions, thereby avoiding a deteriorating effect of European harmonization. The question arises to what extent these divergences could be maintained in a concept of a "uniform refugee status" (see Briefing Note No. 4).

The information available on the laws and practices on the EU Member States subsequent to the implementation of the Qualification Directive shows the following picture: the Directive has produced some important harmonization with regard to eligibility criteria by solving controversial issues primarily arising from a different interpretation of the Geneva Convention.[3] This is particularly the case with regard to the issue of non-state persecution which is now clearly included among the actors of persecution. There are also clarifications with regard to other issues like protection by an international organization (Art. 7 para. 1 b) going beyond the wording of the Geneva Convention.

Frequently the Qualification Directive has taken up the language of the Geneva Convention as the common international legal basis of all EU Member States. In some cases, however, there are also substantial deviations from the wording of the Geneva Convention. Generally speaking, to a large part the Qualification Directive can be considered as an implementation of the Member States' common obligation arising from the Geneva Convention. However, conflicts may arise from the different interpretation of the Convention. Thus, for example, in some Member States a person would not qualify for refugee status if the act of persecution was not committed for reasons of a Convention ground even though protection is withheld on

[3] 1951 Convention Relating to the Status of Refugees and 1967 Protocol, UNTS No. 2545 and No. 8791.

such a ground. This practice is in accordance with the text of Art. 9 para. 3; however, some Member States may argue that recognition in such case is required by the Geneva Convention and therefore the Directive would have to be interpreted in accordance with Art. 63 of the EC Treaty in accordance with the Refugee Convention. Another example is internal protection where it is argued by UNHCR that Art. 8 of the Qualification Directive omits what is considered by UNHCR an essential requirement of an international protection alternative, i.e. that the proposed location is practically, safely and legally accessible to the applicant.[4]

In spite of some harmonization achieved by solving controversial issues in the interpretation of the Geneva Convention there is still substantial divergence in the law and practice of the EU Member States with regard to refugee status as well as subsidiary protection. With regard to the refugee status the frequently pursued technique of choosing a wording very close to the language of the Geneva Convention (cessation clause, exclusion from refugee status etc.) does not necessarily mean a substantial contribution towards a harmonization of laws and practices of EU Member States. EU Member States have for decades differently interpreted the Geneva Convention for instance with regard to the *concept of a social group* (see Art. 10 para. 1 d Qualification Directive).

Although Art. 10 para. 1 d contributes now to a common understanding of the concept some controversial questions have not been solved. Thus, for instance, Art. 10 states that "gender-related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". The existing information on state practices, however indicates that domestic law largely differs as regards the question whether a particular social group can be defined on gender-related aspects alone. It is also by no means clear whether Art. 10 para. 1 D, mentioning two requirements for forming a particular social group, means that these requirements apply cumulatively, since the different language versions of the Directive indicate different interpretations.

Divergence and lack of harmonization is even more apparent with regard to the laws and practices of EU Member States on *subsidiary protection*. Some Member States like Germany do not use the term "subsidiary protection", but transpose the Directive by taking up its content and including it into a chapter on residence permit on humanitarian grounds including Art. 18 of the Qualification Directive, although with a somewhat different wording. A

[4] UNHCR Guidelines on International Protection No. 4; see also Asylum in the European Union, p. 10.

substantial number of EU Member States has maintained the existing concepts of humanitarian residence permits which partly may have a larger scope of application, partly may be more restrictive with respect to the requirements to be granted a residence permit.

Some of the terms used by the Qualification Directive are also very unclear if not somewhat contradictory. For instance, the Qualification Directive in Art. 15 lit. c refers to an "individual danger" while recital 26 excludes risks to which a population is generally exposed and qualifies the granting of a humanitarian residence permit by requiring "indiscriminate violence" in a "situation of an international or internal armed conflict". Presently, it is evident that the state practice applying these terms differs substantially not only between the EU Member States but presumably (as the German court practice indicates) also within one EU Member State. In some EU Member States the situation in Iraq, for instance, is qualified as an "internal armed conflict", while in others it is not. The same is true with regard to the assessment of the situation in Chechnya and in Somalia.[5] In Germany, there is contradictory jurisprudence on the meaning of the term "indiscriminate violence" versus the term "individual danger".

It is fairly obvious that these divergences have a substantial impact upon the aims of a Common European Asylum System (CEAS). It can be assumed that practices about the chance of being recognised on refugee grounds or subsidiary protection grounds may be a substantial factor in the decision-making process on where to apply for international protection.

Proposal:

Rather than attempting a "full" harmonization which probably would either take a long time or add only a set of new rather vague clauses, one should set up a mechanism whereby ad hoc mediation and settlement of interpretation issues may be undertaken. A clearing committee could be set up in charge of working out recommendations on the request of the European Parliament or the EU governments. No obligation to follow the advice would result, but only a duty to inform about the reasons for not following a recommendation.

[5] See UNHCR Report of November 2007, p. 12.

II. Particular Issues

1. Eligibility Criteria, Further Harmonization and Clarification of the Concept

Difficulties have arisen with regard to eligibility criteria for refugee status and for subsidiary protection status primarily in the areas of actors of persecution, actors of protection and internal protection (see also UNHCR, Asylum in the European Union, November 2007, p. 8). With regard to subsidiary protection the eligibility criteria of Art. 15 (c) leave a wide margin of discretion to Member States relating to the interpretation of the clause:

> "Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Actors of protection according to Art. 7 para. 1 include parties or organizations including international organizations that control the state or a substantial part of the territory of the state. There is as yet not guidance on the interpretation of this provision regarding international organizations by the Council as provided for in Art. 7 para. 3. It seems that a substantial number of EU Member States have not transposed this provision. In addition, it is unclear to what extent parties or non-state organizations may be considered as controlling a part of the territory of the state.

According to Art. 8 Member States may apply the internal protection alternative which has led to a substantial divergence in the state practice. Further legislation may clarify the conditions under which the internal protection alternative is applicable. The provision should be made obligatory and state more precisely the requirements concerning living conditions of an applicant.

The problems with regard to the definition of eligibility criteria for granting subsidiary protection status have already been described. There are a number of issues relating to the subsidiary protection. Since the definition is limited to international or internal armed conflict, many Member States grant under national law alternative forms of humanitarian protection to persons facing a comparable danger in situations which may not be qualified as an armed conflict. The question arises whether the eligibility criteria should be extended to other categories of persons who may be in need of international protection. It should be noted, however, that Art. 15 includes also persons facing torture or inhuman or degrading treatment

or punishment of an applicant in the country or origin, thus covering persons protected under Art. 3 ECHR. Therefore, it seems unlikely that the EU Member States will be inclined to extend the eligibility criteria for subsidiary protection status.

All comparative surveys on the transposition of the Qualification Directive indicate clearly that with regard to eligibility criteria there is a need for establishing a mechanism to create more legal certainty and clarification by harmonized interpretation. Since we are dealing to a large part with the interpretation of Geneva Convention standards it is not sufficient to focus exclusively upon the interpretation of the provisions of the directives. UNHCR has repeatedly suggested to establish a system or a forum charged with the interpretation and examination of the impact of community legislation upon the national asylum systems (see for instance UNCHR Recommendations for a New Programme for the Establishment for an Area of Freedom, Security and Justice, September 2004, p. 6). Since the application of the Geneva Convention and the European Convention of Human Rights is primarily within the responsibility of Member States' governments, it would seem the primary responsibility of the Member States' governments to establish a clearing committee which - using the expertise of UNCHR and NGOs - may work out recommendations or guidelines for the interpretation of unclear provisions.

On the procedural level such an institution could also be charged with the elaboration of guidelines relating to the interpretation and use of evidence and assessment of credibility (cf. UNHCR, Response to the European Commission's Green Paper, September 2007, p. 24).

Proposal:

Establishment of a clearing committee of independent experts of asylum law and practice.

2. Content of a Uniform Asylum Status and Subsidiary Protection Status

The content of international protection as regulated by chapter VII of the Directive refers to the Geneva Convention ("shall be without prejudice to the rights laid down in the Geneva Convention"). The Geneva Convention in fact does contain a comprehensive enumeration of rights. Therefore, most states have relied on pre-existing norms codifying the refugee rights enumerated in the Geneva Convention for the purpose of transposing the Directive. It seems doubtful whether there is a real need to further elaborate the content of refugee status in addition or in interpretation of the rights of refugees under the Geneva Convention. Further

harmonization could also lead to a loss of clarity. In the absence of a gap in the protection of rights of recognised refugees there is no need for additional legislation.

A major criticism put forward against the Qualification Directive is the different treatment of beneficiaries and subsidiary protection. UNCHR and the NGOs have suggested to reduce the difference in rights and benefits between refugees and beneficiaries of subsidiary protection and therefore extend particularly the right to family reunification, delete the possibility to condition the status of family members of beneficiaries of subsidiary protection according to Art. 23 para. 2 of the Directive, delete the restriction of social assistance to "core benefits" for the beneficiaries of subsidiary protection, delete the limitation of health care for beneficiaries of subsidiary protection under Art. 29 of the Qualification Directive and ensure that beneficiaries of subsidiary protection have access to integration programmes, are allowed to work and have access to vocational training under the same conditions as refugees (see UNHCR, Response to the European Commission's Green Paper, p. 24 f.).

It should be noted that the Lisbon Treaty distinguished between refugees and beneficiaries of subsidiary protection providing for a uniform status for each of the two categories. Whether this provision precludes the establishment of a single uniform status for both categories may be an open question. The provision in any case cannot be interpreted as excluding the extension of rights and benefits to beneficiaries of subsidiary protection.

There are of course substantial legal differences between refugees and beneficiaries of subsidiary protection. Only with regard to Convention refugees Member States are bound under international law to accord a specific set of rights while beneficiaries of subsidiary protection do enjoy a basic right of non-refoulement without being entitled to a specific set of rights. It has been argued that the rights of beneficiaries of subsidiary protection should correspond to those of refugees since their protection needs are equally compelling and generally as long in duration as those of refugees (UNHCR, op. cit., p. 25). However, there is a need to explore in more detail the merit of this argument. The rights of refugees as laid down in the Geneva Convention and in the Qualification Directive are based upon a permanent protection alternative although refugee protection as well may be subject to termination under certain circumstances. However, there is a need of exploring to what extent beneficiaries of subsidiary protection to a larger extent may or should be expected to return following a termination of a temporary situation of armed conflict. As experiences in

Germany have shown with the reception of war refugees from Yugoslavia, the concept of temporary protection has overall worked satisfactorily. It is doubtful, whether an extension of rights equal to recognised refugees is suitable to promote the idea of temporary international protection. On the other hand, there is clearly a need to adjust the rights and benefits or beneficiaries of subsidiary protection to those of refugees after a certain amount of time if there is no realistic prospect of safe return. The question should be explored further by examining more in detail the different categories and beneficiaries of subsidiary protection.

Proposal:

Before the concept of equal treatment of recognised refugees and persons entitled to subsidiary protection is pursued, there should be a study on the experiences of Member States and applications with regard to temporary protection versus permanent residence.