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BRIEFING NOTE

**Policy Department C**
**Citizens' Rights and Constitutional Affairs**

# MINIMUM STANDARDS FOR THE PROCEDURES FOR GRANTING AND WITHDRAWING REFUGEE STATUS IN THE MEMBER STATES – ASSESSMENT (SUMMARY) OF THE IMPLEMENTATION OF THE 2005 PROCEDURES DIRECTIVE AND PROPOSALS FOR A COMMON EUROPEAN REGIME OF ASYLUM

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# MINIMUM STANDARDS FOR THE PROCEDURES FOR GRANTING AND WITHDRAWING REFUGEE STATUS IN THE MEMBER STATES – ASSESSMENT (SUMMARY) OF THE IMPLEMENTATION OF THE 2005 PROCEDURES DIRECTIVE AND PROPOSALS FOR A COMMON EUROPEAN REGIME OF ASYLUM

## BRIEFING NOTE

Abstract:
The note stresses the variety of procedural exceptions and the number of different procedures. It addresses in particular the concept of safe third countries, the opportunity of a single procedure covering all forms of "international protection", the questions relating to the approximation of national rules on assessment of evidence, detention, acceleration of proceedings and manifestly unfounded applications, judicial protection and suspensive effect.

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# BRIEFING NOTE NO. 1

**Minimum Standards for the Procedures for Granting and Withdrawing Refugee Status in the Member States – Assessment (Summary) of the Implementation of the 2005 Procedures Directive (PD) and Proposals for a Common European Regime of Asylum**

Date of implementation: 1 December 2007

## I. Assessment of the Implementation of the Procedures Directive

The date for implementing the Asylum Procedures Directive has only recently been passed. Therefore, no precise information as yet is available as to the implementation of the Directive in the EU Member States. However, from the general information available it is clear that the Directive did not amount to a substantial change of EU Member States procedures. As the European Commission has rightly observed, the Directive provides for a number of procedural standards rather than for a "standard procedure". There is a substantial degree of flexibility on many issues due to the fact that during the process of negotiation Member States have successfully managed to include a large number of provisions taking account of their specific national rules and practices. This has led to a specific technique of the Procedures Directive leaving Member States a large amount of interpretative discretion and options to maintain their national regulations. Therefore the existing procedures of EU Member States have to a substantial degree been maintained and only relatively minor changes been made.

There are substantial differences in particular with regard to the access to an asylum procedure (admissibility), issues of dealing with applications considered as manifestly unfounded, the application of safe third country and safe country of origin rules, rules on evidence and proof, administrative and judicial appeal procedures.

## II. Major Procedural Issues

### 1. General Provisions on Procedures

The procedural rights of asylum seekers laid down in the Procedures Directive are in principle sufficient to guarantee a fair treatment. However, due to the complex system of the Procedures Directive of ordinary examination procedures, prioritized or accelerated procedures, specific procedures (Art. 24), procedures in case of inadmissible applications

(Art. 25), the Procedures Directive as a whole provides a rather complicated structure with the consequence that it may not be very easily understood by applicants, national administrations or lawyers. It would be advisable to simplify the variety of procedural exceptions and derogations and reduce the number of special accelerated or special procedures.

## 2. Concept of Safe Third Countries

The concept of safe third countries is used in very different ways by EU Member States, in particular

1. as an exclusion device determining as inadmissible asylum seekers arriving from countries generally (by law or administrative regulation) declared as “safe third states”; this will generally result in a rejection of an applicant at the border and deportation in case of an internal application provided that a safe third state which is willing to admit the asylum seeker can be identified (which frequently is not the case),
2. as an exclusion device requiring an individual determination of safety taking into account the individual situation of an asylum seeker.

The Procedures Directive has deliberately left different options open by rather vague clauses (Art. 27 para. 2 lit. b) and a very general reference to “rules in accordance with international law” and Art. 3 ECHR (non-refoulement) as well as national law (Art. 27 para. 2 a).

Safe third country concepts are largely superseded by the Dublin II Regulation providing for an attribution of exclusive competences for asylum seekers once they have entered the EU area or received a visa or residence permit by an EU Member State. Thus, EU Member States like Germany or Austria with rather strict safe third country rules based upon a general determination of safety will apply the concept only if Dublin II cannot be applied. That reduces the practical importance of the concept to states with no external borders to application at airports or illegal entry from a safe third state willing to receive an asylum seeker for processing – which in practice is frequently difficult since the proven travel route cannot be easily identified. Nevertheless, the possibility to reject at the border remains an essential element of a safe third country concept with respect to asylum seekers arriving from a "safe third country".

Therefore, safe third country concepts in general have a practical meaning for “front-EU Member States”, provided that:

1. determination of safety on the basis of reliable criteria (Art. 27 para. 1) is ensured to meet the human rights concerns on safety,
2. procedures and arrangements are in place to ensure proper treatment of the applicant (Art. 27 para. 1).

The concept of safe third country is based upon the idea that international protection against persecution on the Geneva Convention grounds does not imply a right to choose a country of reception. Protection should be limited to protection in a situation of inescapable emergency. Therefore, it should remain as an element of a common European asylum system.

Since safe third country regimes are in practice only effective in cooperation with third states, it is advisable to include agreements relating to the establishment and arrangement of external asylum processing devices. The concept of safety must ensure with a high degree of reliability absence of persecution as well as protection against refoulement.

The legitimacy as well as the reliability of general determinations could be substantially improved by a European "externalized" procedure. The Directive 2005/85 does provide for a procedure to establish lists of safe countries of origin and of safe third countries. Subsequent to the Court's judgement of 6 May 2008 (case C-133/06), Art. 29 para. 1 and 2 and Art. 36 para. 3 of the Directive, which have been declared as void, will have to be amended by new rules based upon the co-decision procedure. The amendment could be taken as an occasion to establish an advisory or consultative institution in charge of establishing safety criteria and preparing formal decisions.

***Proposals:***

Maintenance of the concept of safe third country and safe country of origin. Examination under which conditions the concept of safe third country has been applied in the state practice. Establishment of an advisory committee in charge of finding safety standards and criteria for determining safety of countries of origin and third states and drafting model agreements with safe third countries.

## 3. Safe Country of Origin Concept

Article 31 contains a safe country of origin concept. Article 29 provides for a procedure to determine safe countries of origin. Generally speaking, a safe country of origin concept, if it is primarily based upon a presumption of safety leaving it to the individual to present evidence to rebut the presumption does not contribute very much to the existing procedure in the Member States which will generally be based on experiences collected by the courts. In order to be effective, a safe country of origin should enable a more speedy process. This, in my view, could only be achieved if there would be a high degree of legitimacy of a safe country of origin determination. Such legitimacy could only be achieved by establishing a common European determination of safety of a country of origin as provided for in principle in Art. 29.

## 4. Single Procedure

The Directive provides only for an option for the establishment of a single asylum procedure, covering all applications for humanitarian international protection. The rules of the Directive may be applied to any kind of "international protection" beyond the case of asylum in the sense of Art. 3 para. 1 and para. 2 PD (when asylum proceedings cover Geneva Convention grounds as well as subsidiary protection). An obligatory comprehensive single asylum procedure should be established which would cover at least all requests for "international protection". An EU Member State would always be entitled to grant a residence permit under national law or on other national grounds. However, this should be limited to exclusively national residence titles and a determination should be made within a certain time limit after a rejection for international protection. The passing of the time limit should lead to a special status resulting in an exclusion from access to humanitarian protection claims within the EU and possibly enforcement measures. The advantage would be higher efficiency of the procedure, avoidance of subsequent procedures, a larger scope of applicability of Dublin II-rules and a higher prospect of enforcing a common return procedure.

***Proposal:***

Introduction of a single procedure covering all forms of "international protection" defined as refugee status under the Geneva Convention as well as subsidiary protection or temporary protected status under Directive 2001/55. "National protection" could be included if states choose to grant humanitarian protection on the basis of national law.

## 5. Approximation of National Rules on Assessment of Evidence

The Procedures Directive does contain some rules on the examination of applications but does not state specific rules on evidence and proof. The Qualification Directive contains such rules to a limited extent. I my view, one should be very careful in trying to provide for obligatory common rules on evidence and proof since this would imply substantial changes of the national judicial procedures generally. Asylum procedures are an integral part of national judicial systems and therefore usually the general rules on evidence apply. Therefore, it is very difficult to imagine that such rules could in case of asylum procedures differ from the general rules on evidence otherwise applicable in national systems as long as the asylum procedure remains a national procedure.

## 6. Detention

There is a provision on detention in Art. 18 of the Procedures Directive as well as in the Reception Conditions Directive (Art. 7 para. 3). Article 18 PC should be redrafted in more precise terms, regulating the conditions under which detention may be ordered and under which detention must be terminated. The definition of detention in the Reception Conditions Directive (Art. 2 b) is not very clear. There should be clear rules on the scope of application of those provisions (airport procedure?), the exact meaning of detention versus restrictions of free movement for the purpose of ensuring a speedy and efficient asylum procedure.

***Proposal:***

Detention as deprivation of liberty should be only admitted for specified reasons such as prevention of absconding, public order considerations etc.

## 7. Acceleration of Proceedings and Manifestly Unfounded Applications

There is agreement that asylum procedures must be fair and efficient in order to prevent refoulement. At the same time, it is necessary to ensure a speedy determination of a claim for international protection. A speedy determination is not only in the public interest but also in the interest of the asylum seeker. Particularly acceleration of processing of asylum claims may also be desirable in case of an emergency situation. On the other hand, a speedy determination is a necessary requirement to prevent abuse of the system. Managing the entry into the asylum system of the European Union frequently means sufficient time to escape return and deportation regardless of the merit of the claim. The time is probable the most

important factor in the determination whether the high financial costs of an organized journey to the European Union will eventually pay off. The longer the procedure, the greater the prospect of muddling somehow through the system and eventually gaining access to better living conditions.

For decades EU Member States have more or less successfully tried a variety of procedures and techniques to accelerate proceedings and to cope with the issue of a rapid distinction between bona fide asylum seekers and applicants using the asylum system in the search for better living conditions without fulfilling the requirements for international protection. The Procedures Directive reflects the multitude of different attempts to ensure a quick and simultaneously fair procedure and cope efficiently with manifestly unfounded or abusive applications. The outcome is a conglomerate of different procedural rules in different situations like border procedures (Art. 35), specific procedures (Art. 24), prioritized procedures (Art. 23 para. 4) and inadmissibility procedures (Art. 25).

It can hardly be said that the outcome is a simple and transparent process. The degree of permissible derogations, the relationship between national law and the procedural requirements of the Directive (see for instance Art. 34), the variety of options for the Member States (Member States “may require”, “may provide”, “may determine”). In addition to the general authorization to introduce or maintain “more favourable standards“ (Art. 5 – who determines whether the standard is more favourable? - ) results in a complex regulatory framework which may increase the suitability of the system to prolong the procedures regardless of the merit of a claim for international protection. The involvement of the European Court in asylum proceedings through requests for preliminary rulings on the interpretation of the Directive may increase a danger of prolongation of asylum procedures.

***Proposal:***

Reduce complexity of the Directive and provide for the obligatory establishment of a uniform single asylum procedure; time limits and unequivocal rights and obligations for the applicant; use of general determinations by a Clearing Committee on issues of eligibility with regard to the merit of claims; excluding recourse to alternative or subsequent procedures for humanitarian protection unless new facts are demonstrated.

## 8. Judicial Protection and Suspensive Effect

The right to an effective remedy as provided for by Art. 39 of the Procedures Directive can be considered as a recognised principle of judicial protection. So far, however, different opinions exist as to whether the right to an effective remedy implies automatic suspensive effect respectively the right to remain in the Member State concerned pending the outcome of a proceeding. Article 39 para. 3 refers in a rather vague manner to a national competence of EU Member States to enact rules:

> "Member States shall, where appropriate, provide for rules *in accordance with their international obligations* dealing with
>
> a. the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome,
> b. the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. The Member State may also provide for an ex officio remedy;"

In its judgement of 16 April 2007 the European Court of Human Rights in Gebremedhin v. France (No. 25389/05) has decided that an effective remedy under Art. 13 EHCR requires a possibility to stop the execution of measures which may be contrary to the Convention before the national authorities have decided on the compatibility of a measure with the Convention. Referring to the judgment Conca v. Belgium (judgement of 5.2.2002, No. 51564/99, CEDH 2002-I) the Court has stated:

> "Compte tenu de l'importance que la Cour attache à l'article 3 de la Convention et de la nature irréversible du dommage susceptible d'être causé en cas de réalisation du risque de torture ou de mauvais traitements, cela vaut évidemment aussi dans le cas où un Etat partie décide de renvoyer un étranger vers un pays où il y a des motifs sérieux de croire qu'il courrait un risque de cette nature : l'article 13 exige que l'intéressé ait accès à un recours de plein droit suspensif.
>
> 67. La Cour en déduit en l'espèce que, n'ayant pas eu accès en « zone d'attente » à un recours de plein droit suspensif, le requérant n'a pas disposé d'un « recours effectif » pour faire valoir son grief tiré de l'article 3 de la Convention. Il y a donc eu violation de l'article 13 de la Convention combiné avec cette disposition. »

From the Court's reasoning an administrative decision refusing an application for protection may not be executed until a court has passed a decision. The Court does not prescribe a right

to remain until the Court has decided in substance on an appeal against a negative asylum decisions. The judgement requires, however, a suspensive effect until a judge has passed a decision on the lawfulness of the authorities' decision to execute a decision due to its manifest unfoundedness in a preliminary protection procedure. Although the Court did not deal with applications for international protection as such but with protection against violations under Art. 2 or 3 ECHR, it will be hardly possible to make a distinction in practice.

***Proposal:***

Redrafting Art. 39 along the lines of the ECHR-jurisprudence.