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van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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To Immigration and Asylum Unit – "Green Paper on Asylum"
Directorate General Justice, Freedom and Security
European Commission
B-1049 Brussels
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Reference CM0713

Regarding Green Paper on the future Common European Asylum System

by e-mail

Date 27 September 2007

Dear Sir/Madam,

Please herewith find attached the response of the Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') on the Green Paper on the future Common European Asylum System as presented by the Commission of the European Communities. (COM(2007) 301 final, Brussels, 6.6.2007)

Please feel free to publish these comments on the Commissions' website.

Yours sincerely,

On behalf of the Standing Committee,

Yours sincerely,

C.A. Groenendijk

Prof. dr. C.A. Groenendijk
Chairman

Prof. dr. P. Boeles
Executive secretary

Permanente commissie van deskundigen
in internationaal vreemdelingen-,
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Note on the Green Paper on the future Common European Asylum System as presented by the Commission of the European Communities

1. Introduction

The Standing Committee doubts whether the European Commission's Green Paper on the future Common European Asylum System is published at an opportune moment. While the implementation of the first stage was delayed and the process of evaluating the first stage instruments and initiatives is still underway, it seems too early to come forward already with precise proposals for the second stage. The fact that the results of the evaluation are not available yet is reflected in the rather broad and general wording of several questions as presented in the Green Paper. Therefore, the Committee is of the opinion that a real reflection and debate on the future architecture of the Common European Asylum System can only take place when the results of the evaluation of the first stage are available and discussed.
Against this background the time frame (2010) foreseen for the completion of the Common European Asylum System seems rather short, or as a matter of fact unrealistic. The fact that at present the Amsterdam Treaty continues to be the legal basis for a Common European Asylum System may be considered as an other counter-argument for a too speedy completion.
From this perspective the Committee limits itself to those issues of the Green Paper on which information on the implementation of the existing instruments and the deficits detected in practice is already available. Therefore the present note discusses in particular the following paragraphs of the Green Paper: 2.1. (processing of asylum application), 2.2. (reception conditions), 2.3 (granting of protection), 4.1 (shared responsibility) and 5.3 (addressing mixed flows at the external borders).

2.1. Processing of asylum applications

The Standing Committee welcomes the Commission's intent to adjust the shortcomings in Directive 2005/85/EC, the Asylum Procedures Directive. As the Committee stated in earlier comments (cf. the letter to the Presidency of March 18th 2004, CM04-07, and the letter to the European Parliament of February 5th 2005, CM05-05 (accessible at www.commissie-meijers.nl), the Directive fails to secure that applications for asylum are processed in accordance with relevant standards of international law. This is due to the lack of adequate regulations on a number of issues (for example appeal proceedings), but also to a number of provisions which are incompatible with the *Geneva Convention relating to the status of refugees* and/or the *European Convention on Human Rights*. The Committee would suggest that further harmonisation in this field should not merely aim at establishing "common" or even "uniform" procedures, but rather at securing conformity with international law, in order to secure that no one requiring asylum in the European Union is sent back to persecution.

As regards *question (1)*, the Committee would like to point out that a certain degree of further harmonisation could easily be achieved by deleting those provisions that allow Member States to deviate from Directive standards that secure procedural guarantees for applicants for asylum. It concerns, inter alia, the "European safe third countries concept" (Article 36), "border procedures" as meant in Article 35(2), and the special procedure for subsequent applications (Articles 32-34), so that for subsequent applications the normal safeguards of Chapter II apply. The same applies to the exception to the rule that each applicant should be able to lodge a separate application (Article 6(3)) as well as to the exception to the rule that applicants are allowed to remain in the member state during the procedure (Article 7(2)). A similar consideration applies to the circumstance that the Directive does not apply to procedures for granting subsidiary protection in those Member States that provide for separate procedures for that form of protection.

As regards *question (2)*, the Committee remarks that the Directive, and indeed the whole body of present EU asylum legislation, fails to adequately address the issue of "adequate access" as regards those refugees and persons otherwise in need of international protection who have not yet reached the external borders of the Member States. The Committee urges the Commission to propose arrangements and procedures for securing effective access also for those asylum seekers; see also the Committee's remarks concerning question 33.

As regards *question (3)*, the Committee would suggest that the Commission's original proposal for a Procedures Directive (COM(2000)578def), although amenable for further adjustment to relevant requirements of international law (cf. the Committee's comments on that proposal in its letter of May 18th 2001, CM01-020 (accessible at www.commissie-meijers.nl) would provide for an adequate starting point for improving the shortcomings in the present Directive.

As regards *question (4)*, the Committee remarks that establishing a “uniform” procedure would be a most ambitious endeavour. It would require harmonisation of not only domestic asylum legislation, but also harmonisation of domestic common administrative and procedural law and practices applicable to the processing of asylum applications. In the Committee’s view, securing conformity with international law should remain the principle aim of new Community legislation. The Committee further remarks that far reaching harmonisation would inevitably result in (further) separating asylum proceedings from other (common) procedural law of the Member States which may have adverse consequences.

2.2. Reception conditions for asylum seekers

The Standing Committee agrees with the Commission that the form and level of the material reception conditions granted to asylum seekers should be further harmonised. At the moment a wide margin of appreciation exists resulting in ample variations in the standards of reception conditions between Member States. The differences are in particular noticeable regarding the access to the labour market for asylum seekers. Article 11 of Directive 2003/9/EC (the Receptions Conditions Directive) leaves the Member States an almost unrestricted margin of discretion. From information released by the Commission regarding the implementation of the Directive in 23 Member States it has become clear that half of the Member States allow access to the labour market after one year, about nine Member States allow access after a shorter period of time (although some of these Member States have set very restrictive conditions, like the Netherlands who considerably limits the access of asylum seekers to the labour market by allowing them to work for a maximum period of 12 weeks per year only) and one Member State does not allow asylum seekers to work at all. About two thirds of the Member States further restrict the access to the labour market by requiring asylum seekers to possess a work permit. Also with regard to this work permit system no harmonisation exists, resulting in very diverse approaches in the different Member States. As already mentioned above, in addition to the requirement of the work permit various Member States have set other restrictive conditions and limitations (e.g. access limited to a particular kind of work).

As regards *questions (6)–(8)* the Standing Committee would suggest the following. Although most of the limitations to and conditions for access to the labour market can be considered as in conformity with the very broadly formulated Article 11 of the Directive, the provision contributes little to the harmonisation of the national rules on this issue. In particular if one bears in mind that the adoption of common minimum reception conditions is necessary for the coherence of a harmonised European asylum system. If the Commission, as it has already stated in its Explanatory Memorandum to the original proposal of the Directive, is of the opinion that a high level of harmonisation is crucial to avoid secondary movements between Member States, it is clear that as long as a wide margin of appreciation is left to the Member States with regard to e.g. access to the labour market this goal will be threatened. It is therefore essential that the issue of access to the labour market will be further discussed and harmonised. It is in the interest of the both asylum seekers and the Member States that asylum seekers are granted access to the labour market. Access to the labour market removes amongst others incentives for informal employment and reduces dependence on the Member State. Furthermore, while asylum seekers, as a result of the present Dublin system, are not given a choice as to where their asylum claims are to be processed, they should certainly be entitled to the same minimum standards of treatment in each individual Member State, in particular concerning access to the labour market.

2.3. Granting of Protection

As regards *question (10)* further approximation and raising the standards is necessary to bring EU legislation in consistent line with international humanitarian law and to prevent secondary movements. Guidance should be sought from UNHCR positions, which under art. 35 of the 1951 Geneva Convention is given the duty to supervise the application of the provisions of the Convention, and from decisions and interpretations of monitoring bodies of other relevant treaties.

EU legislation in the field of asylum must be in accordance with international refugee law. Many standards in Directive 2004/83/EC (the Qualification Directive) are in line with international refugee law. Some of the standards, however, fall short of standards of international law, or leave significant discretion to Member States. Given the serious consequences of withdrawal of status, refusal of status and refusal of renewal of status, the Standing Committee recommends, in particular, a thorough evaluation of the application of the grounds for withdrawal, refusal and refusal of renewal based on public order, as well as grounds for exclusion and, where needed, further approximation and higher standards.

The Commission therefore deems that there is a clear need for further approximation and higher standards. However there is also a need for flexibility for Member States to comply with their international obligations and to develop good practices.

There are still many divergences between State practices with regard to subsidiary protection Article 15(c) of Directive 2004/83/EC is a first harmonisation of national practices with regard to persons from conflict areas. This new ground for subsidiary protection is potentially an important instrument for protection and harmonisation, but its scope has not become sufficiently clear, failing interpretations of the European Court of Justice until now. Before further EU legislation is proposed, it is necessary to evaluate the scope of Article 15(c) of Directive 2004/83/EC. Depending on this, there may be a need to either complement or amend Article 15(c) of Directive 2004/83/EC in order to widen its scope.

Most Member States have developed national subsidiary forms of protection with regard to persons from countries of conflict. In conflict situations chances of violation of fundamental human rights for individual citizens are generally high. Because of the often volatile and dangerous situation, individualised risks are harder to substantiate and to assess. Therefore, there is a need for a wider ground for protection in conflict situations, to ensure compliance with obligations of non refoulement and to reflect the EU and its Member States' humanitarian traditions not to expel persons to a situation of (internal) conflict.

A less individualised ground for protection for persons fleeing situations of large scale violations of human rights, could by nature involve larger numbers of persons. However, such situations are exceptional and State practice shows that in these situations Member States often do operate general protection schemes or at least some sort of expulsion stop. Until now, such national schemes have often been under pressure, because responses of other neighbouring Member States may be very different. In the worst cases this could lead to downward spirals of restrictive decision making. In our view, this increases risks of refoulement and leads to situations where persons fleeing some of the world's most serious human rights crises risk expulsion or are given no rights. Also, this leads to secondary movements. Hence, there is a need for further EU legislation both on granting and withdrawal of status(es) in such situations. Further harmonisation could be achieved by omitting the 'individual' criterion in Article 15(c) of Directive 2004/83/EC. Subsidiary protection should also be considered in situations outside conflict situations where persons are at serious risk of, or have been the victims of systematic or generalised violations of their human rights (compare Article 2(c)(ii) of Directive 2001/55/EC on Temporary Protection and the Commission's original proposal for Directive 2004/83/EC), for example when dictatorial regimes or factions randomly commit large scale, gross violations of human rights against the population or parts of the population.

EU approximation with regard to subsidiary protection can only be useful if there are no important divergences with regard to the legal position of holders of subsidiary protection. The EU should provide meaningful protection as a logical consequence of EU wide solidarity with the persons concerned, but also for the prevention of secondary movements and potential burden shifting between EU Member States. Especially the standards with regard to rights and benefits attached to subsidiary protection should be raised significantly in this light.

4.1. Shared responsibility

The Standing Committee supports burden sharing, in particular when "overburdening" of certain border Member States may put reception conditions and eventually the quality of decision making under significant pressure. The Dublin Regulation is not a system for burden sharing. The Commission observes that the system for responsibility allocation under the Dublin Regulation insufficiently secures observance of the principle of non-refoulement, especially because proper processing of asylum applications is not sufficiently secured (in this context, the Committee refers to the Commission's conclusions in its Communication on the evaluation of the Dublin system, SEC(2007)742, p. 20), and calls for amendment of the Dublin Regulation and/or the Procedures Directive in this respect.

5.3. Addressing mixed flows at the external borders

The Standing Committee fully agrees with the Commission that measures to combat illegal migration should be implemented in a manner which does not deprive the right to asylum as provided for in the EU *acquis* and international human rights and refugee law of its practical meaning. In an earlier letter to the European Parliament, the Committee expressed its concerns regarding the proliferation of strategies of pre-border control employed by several Member States, which have the potential to jeopardize access to protection of those who according to international law are entitled to protection (see letter to the Committee on Civil Liberties, Justice and Home Affairs

of the European Parliament, 24 October 2006, CM06-14, www.commissie-meijers.nl). Although this letter addresses the issue of controls at sea, similar concerns can be raised with regard to other forms of extraterritorial controls, in particular juxtaposed controls at international airports in third countries.

On a general note, the Committee considers that access to protection is best served by Community efforts to improve burden-sharing and to provide operational and financial assistance to Member States confronted with large scale arrivals; and not by entering into operational agreements with third States whereby primary responsibility for protecting persons is accorded to third States.

Regarding *question (33),* the Committee would suggest the following:

1. It should be explicitly guaranteed in Community law that all border controls (*functionally* defined in the Schengen Borders Code as activities carried out to an intention to cross or the act of crossing that border for the purpose of preventing unauthorised entry; see Article 2(9) Reg. 562/2006), irrespective of whether they are employed unilaterally, under the coordination of Frontex, or in conjunction with third States; and irrespective of *where* they are carried out; ensure access to the asylum procedure for those who must be considered to wish to apply for asylum, in accordance with the Dublin regulation (Article 3(1)) and the Procedures Directive. To be sure, this should include a guarantee that persons will be granted the *opportunity* to apply for asylum (see *mutatis mutandis* Article 6(5) Procedures Directive). To this end, the Commission could consider amendment of Article 35 Procedures Directive (on border procedures); and/or the Schengen borders code, to the effect that the safeguards of the asylum acquis are applicable to all border controls which meet the functional definition in the Schengen borders code (and hence, not only to border procedures 'at the border or transit zones'). With regard to maritime traffic, the Schengen borders code already provides for extraterritorial checks carried out during sea crossings or in the territory of a third country (see par 3.1.1. Annex VI of the Code).

2. Specific consideration for persons in need of international protection should be given at the operational level of border management. The EU border agency Frontex has been endowed with a number of tasks for the purpose of facilitating and coordinating external border controls, which include the drawing up of operational plans, the set up of joint operations and the conclusion of working agreements with third countries (see e.g. Articles 3(1), 8e and 14 of Reg. 2007/2004 as amended by Reg. 863/2007). These operational arrangements should, where relevant, provide for safeguards on access to the asylum procedure.

3. The Committee is aware that cooperation with third countries for the purpose of preventing illegal migration has become a prime objective of the Community. For this cooperation to be 'protection-sensitive', it is imperative that it goes beyond the mere provision of financial or material assistance for the purpose of enabling third countries to better manage migration. Cooperation with third countries should be accompanied by effective monitoring mechanisms regarding compliance of third States with international human rights and refugee law. Such compliance should be a precondition for cooperation with third States on migration, not only with regard to border controls, but also in the context of Regional Protection Programmes, EU resettlement schemes, or the establishment of centres for repatriated migrants.

Utrecht, 27 September 2007