EUROPEAN GROUP OF NATIONAL HUMAN RIGHTS INSTITUTIONS

Common position – 9 January 2012

Common European asylum system: Commission proposals have mixed results

1. The huge diversity of provisions for the reception of asylum seekers put in place by the Member States of the European Union, as well as the lack in certain States of a fair procedure for granting the status conferred by international protection, has made it necessary to seek greater harmonisation of the rules governing the asylum system. Such harmonisation has become all the more essential given the existence of a mechanism for determining the Member State competent to handle an asylum application, which requires that asylum seekers be offered an equivalent level of treatment in each Member State of the European Union.

2. The European Tampere programme of 1999 and The Hague programme of 2004 paved the way for a European asylum policy. This policy was implemented by means of the adoption of several key texts: the Eurodac Regulation in 2000, the Dublin II Regulation and the Reception Conditions Directive in 2003, the Qualification Directive in 2004 and the Asylum Procedures Directive in 2005, which ended the first phase (1999 – 2005) of the Common European Asylum System. Pursuant to the Treaty of Amsterdam, the European Heads of State and Government specified that the objective was to create a Common European Asylum System (CEAS). Europe seeks in the second phase (2005 – 2012) of the process to achieve a common asylum procedure and a uniform status for people in need of international protection. The strategy rests on three pillars: (1) continuing the harmonisation of the legislative framework, (2) strengthening practical cooperation between the asylum-granting bodies of the Member States and (3) increasing solidarity, both internally within the Member States, and externally between Member States and the countries of origin and of transit.

3. The texts being commented on here were proposed by the European Commission and are intended to substantially amend the original instruments, which put in place minimum standards so that this time around common standards for all Member States are adopted. They are the Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (Recast), hereafter the "Reception Directive", and of the Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), hereafter the "Asylum Procedures Directive".

4. The European Group of National Human Rights Institutions (hereafter the European Group) welcomes the aim for greater harmonisation of national asylum systems. It is satisfied that in many ways, and in particular concerning the cases where detention order is possible, or concerning the vulnerable population, the recast proposal enhances the rights of the asylum seekers. It wishes, however, to emphasise that putting common standards in place should not lead, for applicants for international protection, to a decline in the respect for their rights guaranteed on a national level. A discussion of the proposals for recasting requires increased vigilance. It is important to ensure that the texts adopted will allow for the respect and exercise of all the rights

recognised by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms, as well as by all international human rights legislation, in particular the Geneva Convention and the guiding principles of the United Nations High Commission on Refugees (UNHCR). The European Group recommends in this regard that the statement of reasons of the two proposals make reference to the guiding principles of the United Nations High Commission on Refugees, as well as to the standards of the European Committee for the Prevention of Torture (CPT)[1].

5. Moreover, it is not certain that the texts currently under discussion are fully compliant with secondary Community legislation on asylum and with the relevant provisions of the aforementioned international instruments. It is likewise difficult to anticipate the impact of quite a number of the articles in the proposals for directives, which will be subjected to constructive interpretation by the Court of Justice of the European Union (CJEU) and in some cases by the European Court of Human Rights (ECtHR), following the European Union adhesion to the European Convention on Human Rights. This interpretation is further complicated by the multiplication of exceptions to the principles recognised by these Directives.

6. The European Group considers that legal certainty is all the more essential given the fundamental importance of the rights in question. Legal certainty requires that proposals for Directives be clear and comprehensible, and not be subject over time to overly frequent or unpredictable variations. This is even more crucial since, given that the texts in question are directives, the Member States remain free to determine the form and methods used to fulfil the objectives they set out. However, the texts do not seem entirely satisfactory in this respect. The use of terms, that are sometimes inappropriate (as is the case with the terms ‘applicant for international protection’ and ‘asylum seeker’, which are used interchangeably throughout the proposals for the directives), or that are not defined, impedes an understanding of the exact meaning of certain provisions (see for instance the term ‘preliminary interview’ (Article 8.3.b of the proposal for the Asylum Procedures Directive).

7. The proposed texts set up a system of derogations from recognised rights in cases of a large influx of persons requesting international protection (Recital 29, Article 6.4, Article 14.1§2, Article 31.3.b, in addition to the existing Article 43.3 of the Asylum Procedure Directive). However, without any additional details as to the number of such applicants for international protection, the geographical perimeter in question or the reference period to be used in determining whether there are in fact a large number of applications for international protection, these provisions are a source of legal uncertainty. There is the risk that certain Member States may use these provisions to set up systems that derogate *de facto* and most of the time from the rights recognised by the Asylum Procedure Directive. It should be emphasised that there is already a provision devoted fully to this issue – temporary protection – in Directive 2001/55/EC, which has never been implemented. These provisions should therefore be deleted or, failing that, given a more precise definition.

8. In addition to the problems relating to respect for the principle of legal certainty, a number of other issues have come to the attention of the European Group. We will devote particular attention to examining the legal certainty to which international

[1] We refer here to the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979.

protection seekers are entitled, the impact of these directives on the principle of '*non-refoulement*', the right not to be deprived of one's liberty and the right of asylum seekers to decent reception conditions.

<u>Respect for the principle of *non-refoulement*</u>

9. Respect for the principle of *non-refoulement* requires that the asylum procedure allows for an attentive examination of the request, and that the applicant not be returned to his or her country of origin before the final outcome of the procedure to determine his or her need for international protection. Care should also be taken to ensure that at each stage of the procedure an effective remedy is available that is with automatic suspensive effect and that the procedure is fair and equitable. To guarantee that the principle of *non-refoulement* is complied with effectively, it is essential that the proposal for an Asylum Procedure Directive be sufficiently precise and binding to prevent national practices developing which deviate from European standards or which are illegal.

10. The obligation of *non-refoulement* is incumbent on States from the time when the asylum seeker is under their jurisdiction. The European Group is pleased that the Reception Directive explicitly recognises the possibility of lodging a request for asylum in territorial waters (Article 3 of the Reception Conditions Directive).

11. The principle of *non-refoulement* also requires attentive treatment, after the fair processing of a request for international protection lodged at the border or in the transit zones of international ports and airports. The proposal for a directive leaves intact the possibility for Member States to put in place a procedure specific to borders which derogates from the rules applicable on their territory. As a result, these rules enable a Member State to refuse asylum seekers admission to its territory if it determines that their claim is either inadmissible or falling under the provisions of Article 31.6 of the Proposal for the Asylum Procedures Directive. However, it should be stressed that Article 31.6 provides, in particular, for the possibility of rejecting applications lodged from safe countries of origin. Apart from the fact that the notion of a safe country of origin is itself problematic (see below), the application of this notion to procedures at the border or accelerated procedures, which are carried out urgently, risks leading to 'at-risk' returns.

12. As regards the applications lodged on the territory of a Member State, the proposal for a directive leaves intact the bulk of the provisions on the accelerated procedure, although the latter restricts the guarantees offered to applicants for international protection and limits applicants' opportunity to prepare their application as best they can. In addition, the accelerated procedure and the procedures involving inadmissibility (where refugee status has been granted by another member-State and where the current request thus constitutes a subsequent application) are not subject to an automatic suspensive appeal. They thus constitute an exception to the right of applicants for international protection to remain on the territory until all internal means of recourse have been exhausted. The question of the adequacy of a suspensive appeal solely against a decision of return is currently being examined by the European Court of Human Rights[2]. The European Court of Human Rights recently decided that the examination of a first request in an accelerated procedure resulted in depriving the international protection seeker of his right to effective remedy. While awaiting the

[2] *I.M. contre France*, application n°9152/09, considered admissible on 14 December 2010.

court's judgment, the European Group emphasises that given the risks to which an asylum seeker is exposed, and with a view to greater clarity in the procedures, it would seem preferable to guarantee the right to an automatic suspensive appeal against the decision of the body responsible for asylum, in the case of a first request.

13. The suspensive nature of the appeal in the case of an accelerated procedure is all the more problematic given that the proposal for the Asylum Procedures Directive maintains the notion of a 'safe country'. The European Group regrets that the European Commission has not eliminated national lists of safe countries of origin, which had already been subject to criticism by the UNHCR[3]. The use of lists of safe countries undermines the access of an asylum seeker to a fair and effective procedure. Moreover, each Member State's national list may include different countries, demonstrating that the use of such lists may lead to the rejection of applications for international protection in one Member State whereas another Member State with a different list might conduct an in-depth examination of the same application. At the very least, it is regrettable that the proposal for a directive does not provide safeguards in respect of the procedure for designating certain countries as safe countries of origin, in order to enable the Commission to conduct an ex-ante review of the national lists to guarantee that they are largely consistent and prevent illegal national practices. In any case, the application of this notion should not go through without prior examination of all individual requests in a fair and equitable procedure.

14. If Article 6, §1 of the European Convention on Human Rights does not apply to asylum procedures[4], asylum seekers must nevertheless be entitled to an effective appeal, have access to an impartial tribunal and have a right to a fair hearing within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union. The right to obtain information, legal advice and, where applicable, representation before the bodies responsible for granting asylum is an essential guarantee of a fair hearing. Asylum seekers should thus always be informed of the decision taken on their application in a language that they understand. The same should be true whether the applicants are or not assisted or represented by a legal adviser or other counsellor (12.1.f). As regards legal assistance and free representation in appeals procedures (Article 20), the proposal for a recast allows Member States not to grant free representation in cases of an appeal that has no "tangible prospect of success". There is a real danger that the evaluation of tangible prospects may limit the applicant's effective access to justice, with the result that international protection would not be guaranteed[5]. Similarly, to evaluate whether the applicant for protection may or may not benefit from free legal assistance, it is important to verify that the applicant has effective access to the means which he or she is supposed to have available.

Individual liberty

[3] See the Provisional Comments of the HCR on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, 9 November 2004).

[4] This position was repeatedly adopted by the European Court of Human Rights: "*decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1*". 14: 149 ECtHR, *Mamatkulov and Abdurasulovic v. Turkey*, 06/02/2003, § 80; See *Inter alia* ECtHR, *Olaechea Cahuas v. Spain*, 10/08/2006, § 59; ECtHR, *Muminov v. Russia*, 11/12/2008, § 126.

[5] On this point, we can follow the point of view of the ECRE-ELENA: (9th IARJL World Conference: Bled 7 – 9 September 2011, The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law, by Jean Monnet Professor *ad personam* Elspeth Guild, Radboud University, Nijmegen).

15. Asylum is a fundamental right, included in the Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union. Its exercise should be protected, notably by guaranteeing access by the interested party to complete information and to the resources necessary to prepare for the procedure. It is therefore of great importance to ensure that international protection seekers are not deprived of their liberty. To this end, retention must in principle be prohibited. If it is permitted, it must be justified by compelling reasons and when strictly necessary, notably for reasons of security. It is required, for this case, to mention the article 5.1 of the European Convention of Human Rights which exhaustively enumerates the situations that can lead to measures of deprivation of liberty. In the case of minors, while a certain number of restrictions on their freedom of mobility may be envisaged, the possibility of placing them in retention should be ruled out.

16. The European Group is pleased that Article 8 of the proposal for a recast of the Reception Conditions Directive explicitly recognises the principle that retention should be a measure of last resort. Generally speaking, less coercive measures should be taken than the deprivation of liberty. The Group would have preferred, however, that in order to ensure optimal legal certainty for international protection seekers, the formulation draw on Article 15 of the Return Directive[6] and a similar paragraph be included stating that retention is a measure of last resort and defining the restrictive conditions in which it is possible, while guaranteeing the limitative nature of this list of possibilities.

17. The European Group is concerned about the expansion of possibilities for depriving of liberty of the international protection seekers. It points out in particular the possibility that asylum seekers may be placed in detention in order to decide, in the contexts of a procedure, on their right to enter the territory, as provided for in Article 8.3.c. of the proposal for a recast of the Reception Conditions Directive. The absence of specific details regarding the procedure referred to in this article risks penalising applicants for international protection who may enter or try to enter the territory illegally; such a measure would contravene Article 31 of the Geneva Convention, which stipulates that "*The Contracting States shall not impose penalties, on account of their illegal entry or presence*". Moreover, the combination of this article and Article 43 of the Asylum Procedures Directive relating to the border procedures, give rise to a number of questions. Thus, if the two articles aim to one and the same procedure, the current provisions would allow the retention order of the concerned population for 4 weeks: indeed, Article 43.2 of the Procedures Directive, which provides that "*When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State*", may be interpreted as allowing the retention of asylum seekers for a period of 4 weeks. The European Group recommends that, unless Article 8.3.c of the Reception Conditions Directive is deleted, Article 43.2 should indicate that the period of 4 weeks is a maximum period, and that Member States may stipulate a shorter period.

[6] Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, (…) Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Art. 15§1 Directive 2008/115/EC of the European Parliament and of the council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Official Journal of the European Union, 24 Decembre 2008, L 348/107

18. The retention of unaccompanied foreign minors must, in principle, be prohibited. The same occurs for the vulnerable groups that are mentioned in the proposal. The text under discussion clearly takes a step backwards as regards unaccompanied foreign minors, since it allows them to be placed in retention in absolutely exceptional cases. The European Group considers that the superior interest of children opposes to the retention order of minors. It regrets that the Commission has not used the occasion of the recast of these directives to propose a definition of a minor and to recall that, in the absence of evidence to the contrary, civil registration documents should suffice to prove that an asylum seeker is a minor. For minors, alternative measures should be organised. The grounds for each decision taken regarding a minor must take into account his or her best interests. The involvement of a specialised institution that can ensure compliance with the Convention on the Rights of the Child[7] at each stage of the procedure, in order to see to the best interests of the child, and with the comments made by the Committee on the Rights of the Child[8] should be envisaged.

19. Where detention of international protection seekers is permitted, the latter should be provided with the least coercive conditions of retention possible, and should be systematically informed of all their rights[9]. This principle is particularly important when it applies to families with children, who should only be placed in appropriate retention centres, and for the briefest period as possible. The European Group considers that the existence of an independent inspection of the detention facilities constitutes an essential guarantee for the prohibition the inhuman and degrading treatment. It encourages the other member States to ratify the optional Protocol referring to the Convention against torture and other cruel, inhuman or degrading treatments and punishments (OPCAT).

20. It is crucial that consistency be ensured between the various Community instruments n matters relating to aliens' law and asylum law. It is therefore important to harmonise the guarantees offered by the Reception Conditions Directive with those in the Return Directive, and in particular, concerning access by non-governmental organisations and associations to detention centres as provided for in Article 17.5 of the Return Directive[10].

21. In order that the retention of international protection seekers not be arbitrary, it is necessary to allow them effective appeal against the decision to place them in detention (Article 9 of the Reception Conditions Directive). Thus, it is important to provide all foreigners who are deprived of their liberty with precise and complete information, in a language that they understand, on the contents of those decisions and on the options available for challenging the decision, and not to limit themselves to a language "they are reasonably supposed to understand". This would not seem to

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[7] Article 37 CRC: States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time

[8] General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin; See also in this regard ECtHR, 12/10/2006, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium.

[9] ECRE, Comments on the Amended Commission Proposal to recast the Reception Conditions Directive, September 2001, p.18.

[10] See Article 17.4. of the Return Directive: "*Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation. 5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.*"

comply with the guarantees set out in Article 5.2 of the European Convention on Human Rights. Similarly, it is essential to ensure that applicants have access to free legal assistance and representation in cases where they cannot pay for these themselves (See §13 above). The restrictions placed on this right by Article 9.5 seem all the less acceptable given that the persons in question have been deprived of their liberty.

Procedure for asylum applications from unaccompanied minors

22. The Reception Directive states in its article 24 procedural guarantees for foreign unaccompanied minors, amongst which the mandatory designation of a guardian to assist and represent them. The Asylum Procedures Directive has a quite similar provision in its article 25. Nevertheless, some differences appear and the European Group recommends, as to better guarantee the best interest of the child, that this article 25 be amended. It should be considered to specify explicitly in the international protection Procedures Directive that member states, when making decisions on carrying out personal interviews and other established mechanisms, should take into account the particular needs of minors, which can differ, depending on their age or maturity. The same applies to all vulnerable groups who can encounter specific needs concerning both the procedure and the reception conditions.

23. Similarly, it should be also considered to revise the Asylum Procedure Directive in such a way that unaccompanied minors are always granted a guardian and where necessary also a legal advisor.

Reception conditions

24. Foreign international protection seekers arriving on the territory of a Member State have the right to be received in a dignified manner. To this end, they must, during the examination of their application and as soon they enter the territory (if possible within a period of 72 hours until the registration of their application, according to the asylum procedures directive), be able to fully exercise their fundamental rights. Particular attention should be paid to respect for asylum seekers' right to private and family life.

25. In the light of consistent recommendations to this effect[11], the members of the European Group reaffirm that applicants for international protection should be entitled to work as soon as possible, in accordance with Article 1 of the European Social Charter[12]. They should first be given assistance with a view to entering the labour market.

26. As regards decent reception conditions, it is important to recall the conclusions of a recent study by the European Union Agency for Fundamental Rights (FRA)[13], which states that applicants for international protection who are housed in private accommodation (e.g., hotels, cf. Article 18.4) during their procedure appear to have

[11] See in particular the response by the Centre for Equal Opportunities and the Fight against Racism (Belgium) to the European Commission's Green Paper on the future Common European Asylum System and the opinion of the CNCDH [French National Consultative Commission on Human Rights] on the Directive laying down minimum standards on the reception of asylum seekers in Member States of 8 July 2002.

[12] Article 1 European Social Charter: "*The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised: 1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon.*"

[13] FRA, Access to effective remedies: the asylum-seeker perspective, Conference edition (EN), Vienna, 2010.

much less information as to the procedure and their rights than those staying in reception centres maintained for this purpose. It would therefore be preferable to ensure that asylum seekers are not being isolated, and to allow them, if they wish so, to benefit of a collective accommodation to guarantee the respect for their rights as provided for in the Reception Directive. The possibility for Member States to derogate from their obligations to offer decent material reception conditions in cases where this is justified, and in particular where “housing capacities normally available are temporarily exhausted” (Article 18.8.b) must imperatively be better defined, given a strict interpretation, and limited so as to ensure that the member States do not discharge of their obligation to respect in any circumstance the dignity and rights of applicants for international protection.

27. Furthermore, the proposal for a directive extends the possibility to reduce or withdraw the benefice of material reception conditions in cases where an asylum seeker has lodged a subsequent application (Article 20.1.c). Referral to Article 2 of the Asylum Procedures Directive is a positive step, insofar as this applies only to final decisions. However, the notion of ‘subsequent application’ is now understood as covering the entire European Union. The system put in place would thus result in depriving asylum seekers who have had their application definitively rejected in one Member State of their rights to decent reception conditions, despite the fact that certain asylum systems do not guarantee the right to respect international protection seekers’ fundamental rights. In sum, this system would contribute to reproducing, as regards reception conditions, the system set up by the Dublin II Regulation, which is currently in the process of being recast due, notably, to repeated criticisms of the burdens which it placed on certain States and the way in which this affects international protection seekers. The European Group thus requests that Article 20.1.c be deleted, or, failing that, that a humanitarian clause be inserted that would exclude the application of this article where the international protection seeker may be at risk of inhuman or degrading treatment in the event of removal.

28. The European Group of National Human Rights Institutions calls upon the European institutions to continue their work of recasting the Reception and Asylum Procedures Directives, with the aim of improving the standard of protection of asylum seekers’ fundamental rights.