

Hanover, 30 August 2007

Responses
from the Ministers of the Interior and Senators of the Interior of the *Länder* of
Baden-Württemberg, Berlin, Hesse and Lower Saxony in the
Federal Republic of Germany
to the Green Paper on the future Common European Asylum System

Commission of the European Communities

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Preliminary remark

There is already evidence to show that it will be impossible to achieve the Commission's goals for a Common European Asylum System, which aims at a higher standard of protection for asylum seekers, refugees and other persons, greater harmonisation of legal provisions and increased solidarity between the Member States, without further intervention in the sovereignty of the Member States. The *Länder* of the Federal Republic of Germany will be affected, among other things, by the difficulties associated with the implementation of accommodation and residence requirements.

1. Comments on the Introduction

In its reference to the Hague Programme, with its aim of introducing a common asylum procedure and a single legal status, the Commission has set itself the task of achieving a uniformly high level of protection in all Member States. The entire adjective and substantive law of asylum is to be harmonised in order to achieve this purpose.

The criteria that need to be fulfilled in order to achieve this "high standard" remain unclear. The Commission only touches briefly on the problem of the different structures and diverging social and economic potential in the Member States when it suggests that a solution to the affordability of the intended "high standard" might lie in an equalisation of the load the Member States have to bear. In our opinion, however, before this area of the law is harmonised, the *sine qua non* is that the economies of the Member States should be roughly at the same level. More weight should be attached to this and allied problems, and the existing variations in level be made part of the proposed solutions.

Furthermore, we would suggest that the results of the evaluation of the harmonisation stage be included in further deliberations and that the principle of subsidiarity be taken into account in the Common European Asylum System too. A common policy on asylum should concentrate on those

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Annexe: Clemensstraße 17	After office hours: +49 511 120-6150			

areas where the European Union's open internal borders and its common external border demand harmonisation of European policy or where the individual Member States would be unable to cope.

2. Comments on legislative instruments

2.1. Processing of asylum applications

(Questions 1 - 5)

In their remarks preceding Questions 1 to 5, the authors of the Green Paper imply that the Asylum Procedures Directive allows for too much flexibility, which is why a greater degree of approximation of legal provisions and legal procedure will be needed if there is to be uniform decision making. We argue that the intended mandatory regulation of detailed procedural technicalities would disproportionately limit the Member States' capacity to act. This is inconsistent with the principle of subsidiarity, whereby Community measures are only justified if the objectives set cannot be satisfactorily achieved by the Member States. We see no need for generally valid procedural regulations aimed at achieving uniform standards in the area of asylum law. The standards set in the Asylum Procedures Directive are sufficient to guarantee an asylum procedure in accordance with the rule of law in every Member State. The form this takes must remain a matter for the Member States. Even the Geneva Refugee Convention refers to the application of the law of the country of residence in question and desists from demanding supranational regulations. We believe therefore that a way must be found to harmonise law and procedure not by regulation but by agreement on substantive law interpretational criteria, working criteria that have been reached by mutual consent.

Our deliberations should also focus on more efficient, quicker and therefore more cost-effective asylum procedures, rather than on calling into question tried-and-tested rules to simplify procedure.

2.2 Reception conditions for asylum seekers

(Question 6)

In principle, the Member States should retain a margin of discretion in their implementation of the minimum standards laid down, since this is the only way the individual Member States can allow for their distinctive national features when implementing the harmonised law of asylum. If the minimum standards laid down are proportionate and well balanced, the individual Member States will not feel overstrained when implementing the reception conditions. In addition, this will ensure that Member States with more highly developed standards for reception are not tempted to lower their existing national levels.

(Question 7)

No, they should not. The Member States should remain responsible for ensuring that the material reception conditions granted to asylum seekers are in keeping with a standard of living that will guarantee their health and livelihood.

(Question 8)

Only those citizens of third countries should gain access to the labour market who have been legally resident in the Member State in question over a longer period of time and who have fulfilled their legal obligations at all times.

The aspect of subsidiarity should be asserted more forcefully in this connection too.

(Question 9)

We agree with the Commission that asylum seekers who have been detained should not be prevented from making timely and proper use of their rights. However, a Member State should in future still be able to determine where an asylum seeker may reside and to limit his freedom of movement within that State, in order that the case may proceed in a prompt and orderly fashion, and for other reasons already mentioned in the Directive. It should also remain for the Member States to decide whether asylum seekers should be temporarily accommodated in reception centres. As it stands, the Directive regulates this clearly and precisely enough, and there is no need for additional regulation in this respect.

If it be deemed necessary in particular cases to accommodate asylum seekers under lock and key in detention or deportation centres, the grounds for such measures should be clarified, and restrictions laid down as to the maximum length of stay at such centres. It will not be necessary to start with a general definition in abstract terms of grounds for justifying the exclusion of persons particularly deserving of protection from accommodation in detention centres. The special needs of this category of person are already adequately allowed for in each individual case.

2.3 Granting of protection

(Questions 10 - 12)

On the whole, we support the plan for developing general concepts to define the grounds for protection, but further harmonisation of the eligibility criteria would only be advisable if the intended uniformity cannot be achieved by the application of existing provisions under European law. An initial evaluation of the impact of the Asylum Qualification Directive on the decision-making of the EU Member States would thus need to be made, before any conclusions can be drawn on the necessity for further regulations. You call for the approximation of rights and benefits for persons with different protection status, but this already exists in Germany.

German law is exemplary as far as the status given to recognised refugees and other beneficiaries of subsidiary protection is concerned (for temporary protection see section 25(1) and (2) Residence Act [*Aufenthaltsgesetz*]).

There are indeed differences in status, in that persons persecuted for political reasons are recognised as having right of asylum, whereas if the deportation of a person is forbidden by law such persons are referred to as "other" politically persecuted persons. However, both groups of persons are acknowledged to be refugees in accordance with the Geneva Refugee Convention, and to a large extent they receive equal treatment. We see no need for the introduction of a uniform protection status. The present procedure should be adhered to, so that we may still categorise the various reasons for fleeing a country.

(Question 13)

We are opposed to a mandatory definition for groups of non-removable persons. In practice, there are a large number of legal and factual obstacles that result in the authorities not being able to carry out a deportation. We can neither classify these reasons nor list them exhaustively. For a decision to be just, it is vital to look at all the distinctive features of the particular case and to weight them accordingly.

(Question 14)

Mutual recognition of the Member States' asylum decisions must clearly be the aim of further harmonisation but beyond that, we are not sure what is meant by "transfer of responsibility for protection". As we pointed out in our Comments on the Introduction, the Member States still differ to a considerable degree in their social and economic structures. Extensive freedom of movement for recognised refugees would result in a heavier burden for those States that appear more lucrative

on the basis of their labour market and social benefits. However, the point of harmonising refugee law is to avoid movements of this kind.

2.4.1 Appropriate response to situations of vulnerability

(Question 15)

We would not dispute the fact that the specific needs of particularly vulnerable persons must be taken into account at all stages of the asylum procedure. There is, however, no need to lay down detailed procedural rules that are binding on all Member States, even going as far as standardised interrogation techniques, in order to ensure that vulnerable persons like unaccompanied minors are identified as such, and particularly vulnerable asylum seekers are treated in accordance with their special needs. We would suggest that the principle of subsidiarity should apply here too.

We do not share the Commission's opinion that there are serious inadequacies with regard to the definitions and procedures applied by the Member States for the identification of more vulnerable asylum seekers and that Member States lack the necessary resources, capacities and expertise to provide an adequate response to such needs. In any case, this is not the conclusion that can be drawn from the experience and knowledge gained in Germany in the context of the examination of asylum seekers on arrival and their initial interrogation.

We would moreover question whether it is possible to identify and "define" the group of "most vulnerable" asylum seekers even more precisely and unambiguously than in the past. Sweeping statements such as already crop up in the Directive and categorise whole groups of persons as "vulnerable", even though their vulnerability is not the same or similar, are to be avoided. The mere use of such categories as "sick persons", "the elderly" or "women" will not always allow one to pick out those who are really in need of special protection. Here too, one should in fact refer in each case to the individual situation and the state of the asylum seeker's health (see our answer to Question 13). Insofar as there are deficiencies of this kind in individual Member States, such States might receive specific help from relevant EU programmes.

(Question 16)

We are against the establishment of mandatory EU-wide standards regarding qualifications and skills for professionals involved in giving support to asylum seekers; such measures would in our view be excessive. It should be left to the Member States to provide the actors and agencies involved with specific training and further education courses designed to address the special needs of more vulnerable persons, in order for such professionals to obtain sufficient qualifications and to concentrate existing resources. This will not require an "EU-wide" training programme.

It would seem sensible to have an exchange of information at EU level with the aim of strengthening capacities and sharing experience, but this should not be regimented. It would make more sense, from an economic point of view as well, for Member States also to grant other Member States and the agencies involved access to already existing information systems (e.g. German Foreign Office reports, Central Information Office for Support for Returnees [ZiRF]).

2.4.2 Integration

(Question 17)

We are opposed to giving asylum seekers greater access to the labour market than they legally have at present, because such a measure will lead to an increase in the use of the asylum procedure for entry into the EU job market. Furthermore, a wider opening of the labour market would strengthen the trend towards early integration. This is undesirable, because most of the

persons will be obliged to leave the country, since fewer than 5% of them will obtain recognition status once their proceedings are over.

Integrational measures should only be provided once the asylum seeker has recognition status and/or his continued residence does not depend on the fact that measures to put an end to his residence cannot be enforced for reasons that the alien has to answer for.

Since Member States only have limited resources at their disposal for financing integrational measures to help recognised refugees and other aliens requiring such help, it would seem unwise to provide integrational measures for asylum seekers at EU level.

2.4.3 Ensuring second stage instruments are comprehensive

(Question 18)

A closer definition of the phrase "a truly comprehensive approach towards the asylum process" is missing. We are sceptical about the consequences such measures might have for harmonisation. From the context, we understand that the Commission intends to establish extremely far-reaching mandatory measures. We would prefer it if the Commission were to observe the principles of solidarity, subsidiarity and proportionality laid down in the Action Plan implementing the Hague Programme (2005/C 198/01) (cf. the sixth indent [*Translator's note: I think this should be "fifth" indent*] of no. 1 of the Action Plan).

3. Comments on Implementation – Accompanying measures

(Questions 19 and 20)

Greater practical co-operation is at the heart of greater harmonisation in deciding cases of application for asylum in the EU. The EURASIL forum is already making a valuable contribution to the sharing of experience between the Member States. However, it has not yet succeeded in removing the frequently observed variations in the asylum authorities' decisions. While the jurisdiction of national asylum authorities and courts must be preserved, the situation might be improved by the sharing of specific experience and information at decision-takers' level. This affects all aspects of requests for protection, including the "gender or child-specific persecution" mentioned, questions raised by reasons for refusal and the handling of false statements. It would be preferable to have a specific exchange of information on practical decision making of this kind, with a view to approximation, rather than binding stipulations on the interpretation of legal provisions; in the final analysis, every decision on asylum can only be a decision on an individual case.

(Questions 21 and 22)

The creation of a European support office has already been provided for in the Hague programme. The tasks assigned to it might be the measures for co-ordination, information and support mentioned by the Commission in the Green Paper, but these should not be in the form of orders. The administrative and other expenses incurred would have to be in due proportion to the scope of the tasks undertaken.

4. Comments on Solidarity and burden sharing

4.1 Responsibility sharing

(Questions 23 and 24)

The burdens borne by the Member States as a result of transfers under the Dublin System have so far been fairly balanced. We therefore see no need for corrective burden-sharing mechanisms, at least not for the present. Since the number of asylum seekers is declining throughout Europe, and since the harmonisation of asylum law is supposed to reduce the number of secondary movements, there would seem to be no future need for a more extensive system for spreading the burden either. We would also call into question whether it would ever be possible to develop a system of, and key to, burden-sharing that would result in a fair distribution of the burden, from both a quantitative and qualitative point of view. Let us not forget that there is still no agreement on a European key for the distribution of persons afforded temporary protection pursuant to section 24 of the German Residence Act. It must also be acknowledged that the distribution of asylum seekers would presumably require a considerable amount of administration and expenditure.

4.2 Financial solidarity

(Question 25)

Making an application for funding from the European Refugee Fund (ERF) currently involves a great deal of red tape that often overstretches the resources of both authorities and NGOs as potential applicants. As a matter of principle, it would be more sensible to link up the Member States' existing information systems or those they are in the process of setting up.

(Question 26)

So far, it is mainly only those measures that fulfil the criterion of "additionality" that have been supported by the ERF. After the funding period has passed, it is often impossible to proceed with tried-and-tested measures because "additionality" is lacking. Those countries that have already set up a large number of measures and projects thus find that there are now unreasonable restrictions on their room for manoeuvre. The criterion of "additionality" should therefore be abolished.

5. Comments on the External dimension of Asylum

5.1 Supporting third countries to strengthen protection

(Questions 27 - 29)

The EU, on account of its size and capacity, is basically better equipped to support refugees in third countries than the individual States. We therefore feel this type of support is a good opportunity for aid to be given where need arises, and for counteracting above-average refugee movements. Before one can pass final judgement on the effectiveness and sustainability of Regional Protection Programmes, it will first be necessary to evaluate the two pilot projects in Africa and Eastern Europe. As soon as findings relevant to possible plans are available, the EU ought to support the development of overall strategies to expand this type of aid.

5.2 Resettlement

(Questions 30 – 32)

We have been unable to work out exactly from the description of this field of activity whether resettlement is to take place within the territory of the EU or in that of third countries. We could imagine that resettlement of refugees near their homes, e.g. within the framework of Regional Protection Programmes, might be a good idea in principle.

5.3 Addressing mixed flows at the external borders

(Questions 33 and 34)

Managing mixed migratory flows and combating illegal entry are two of the tasks at the heart of EU refugee policy. Measures that have already been taken and have proved to be successful in reaching these goals should be intensified. We could also imagine that it might be a good idea to deploy professionals from EU organisations on the spot, when their help is urgently needed. The aim must be the identification at the earliest possible stage of those persons who, on the grounds of political persecution, are to be given access to the EU's protection system. Those persons who have entered EU territory for reasons not linked to asylum must be sent back to their countries of origin as quickly as possible. Raising the capacity for accommodation near the borders would be a suitable way to make this filtering process more effective, and to weight the balance in favour of those who are truly deserving of protection.

5.4 The role of the EU as a global player in refugee issues

(Question 35)

It is obvious that a community of states has more weight than an individual state on the international stage. However, the task of developing a harmonised European refugee policy is not yet finished, and its ideas have not yet been tested in practice. Above all, the EU should therefore concentrate on carrying out its specific projects. Having done this, its contribution to discussions at international level might be based on citing these projects as examples of good and successful refugee policies.

6. Final remark

In the Green Paper describing the measures under the future Common European Asylum System, the Commission puts forward its view on ways and means to complete the process of introducing a harmonised system of asylum in the EU. In some places, however, its attempts to achieve uniformity, go too far; if they were implemented, the result would be over-regimentation. The individual Member States should thus retain their basic competence, and greater attention should be paid to the principle of subsidiarity. Moreover, policy-making for the fair treatment of refugees must include thoughts on how to work out procedures for the stages following the rejection of a refugee's application and appeals against decisions in cases where it can be proved that incorrect facts were used for purposes of deception. The Green Paper fails to devote sufficient attention to the consequences of rejected applications and the illegal or fraudulent conduct of refugees. The Green Paper also fails to establish any links to the question of repatriation. The Commission should not deal with these topics in isolation, but integrate them into the discussion on a uniform law of asylum.