

Berlin, 28 August 2007

Federal Republic of Germany

Replies to the Green Paper on the future Common European Asylum System

Commission of the European Communities, document COM (2007)301 final dated 6 June 2007

I. General observation

The Green Paper contains considerations with regard to the future Common European Asylum System. These considerations are mainly couched in questions which are commented on under II. However, this Green Paper also contains, in part, concrete objectives relating, for instance, to a higher common standard of protection and a higher degree of solidarity between EU Member States (at least according to the English version under number 1; the German version simply refers to “ a high level of solidarity”). Our view on this is also stated to a large extent under II.

A sweeping demand merely for a generally higher standard of protection lacks balance. Just as more stringent standards of protection must be achieved where refugees are not given adequate protection, where these shortcomings are due to legislative deficiencies and not deficiencies in terms of enforcement, “restrictive” regulations must, as required, be retained and tightened up where possible. The evaluations of the asylum directives, which are still due, will provide more detailed insights in this regard. Overall, however, the fact that an evaluation of the transposition and application of the legal provisions during the first phase of harmonisation constitutes the decisive basis on which a Common European Asylum System will be founded is not expressed in a sufficiently clear manner in the Green Paper.

Finally, the Green Paper does not contain any reference to the subsidiarity principle. It is imperative, however, that this principle be taken into consideration when shaping the Common European Asylum System as regards a discussion of the more extensive approximation of laws and when taking other actions at a Community level.

II. Regarding the questions raised

2. Legislative instruments

2.1 Processing of asylum applications

- (1) *How might a common asylum procedure be achieved? Which aspects should be considered for further law approximation?*
- (2) *How might the effectiveness of access to the asylum procedure be further enhanced? More generally, what aspects of the asylum process as currently regulated should be improved, in terms of both efficiency and protection guarantees?*
- (3) *Which, if any, existing notions and procedural devices should be reconsidered?*
- (4) *How should a mandatory single procedure be designed?*

In principle, the Federal German Government is in favour of greater standardisation of the regulations relating to the asylum procedure. In this regard, a particular aim should also be to arrive at a uniform EU list of safe countries of origin. Concepts which have proven themselves in terms of ensuring efficient and swift asylum procedures in the asylum laws of Member States should also be preserved in future in European legal norms (e.g. concepts concerning safe third countries, procedures at airports, repeat application procedures). In principle, however, Member States must also be accorded flexibility in a Common European Asylum System. Hence, for instance, procedural matters should not be regulated in detail and in a binding or completely uniform manner. In this regard, a large amount of weight is attached to guaranteeing effective access to asylum procedures. This ensures that those persons in need of protection promptly receive the protection to which they are entitled, while those persons not entitled to stay or receive protection can be returned quickly. No appreciable shortcomings have so far come to light in current regulations in this area. As far as current EU law is criticised, it should be clarified when evaluating the legal provisions during the first harmonisation phase whether any shortcomings are the result of deficiencies in terms of enforcement and how deficiencies of this nature can be eliminated.

The introduction of a single procedure for awarding refugee status and subsidiary protection status is welcomed in principle. Reference is made here to the reply to question 12 as regards the issue of uniform status which must be differentiated from the particular issue in question here.

- (5) ***What might be possible models for the joint processing of asylum applications? In what circumstances could a mechanism for joint processing be used by Member States?***

In principle, the competence of the relevant Member State in terms of enforcement when implementing an asylum procedure must be upheld. Nevertheless, in exceptional situations, the joint processing of applications by Member States may be considered, for instance, when high numbers of asylum seekers are seeking admittance, a situation which, allowing for its size and geographical location, overtaxes the capacities of a Member State. Here, a distinction must be drawn between joint processing on a few matters of detail, which is limited to individual aspects or phases of the asylum procedure, and a comprehensive accompaniment of the asylum procedure as a whole. A decision must also be taken on whether one (or more) Member State(s) which does (do) not intrinsically have competence will participate in simply a supporting/advisory capacity (in matters of detail or comprehensively) in the implementation of an asylum procedure or whether sovereign responsibilities will be exercised jointly. Given the legal issues connected with the latter arrangement and which require clarification as a matter of priority, the obvious thing to do would be for other Member States to participate in a supporting/advisory capacity first of all on a voluntary basis in the form of a pilot project in the situations outlined above. It is possible that the study will provide the Commission with further knowledge regarding the adequacy and feasibility of the joint processing of applications. For the rest, the possibilities afforded by enhanced practical cooperation must be utilised and extended in order to arrive at a uniform application of EU legal provisions (e.g. regarding the assessment of countries of origin or the application of instances of exclusion clauses).

2.2 Reception conditions for asylum seekers

- (6) ***In what areas should the current wide margin of discretion allowed by the Directive's provisions be limited in order to achieve a meaningful level playing field, at an appropriate standard of treatment?***

- (7) ***In particular, should the form and the level of the material reception conditions granted to asylum seekers be further harmonised?***

Subject to the evaluation of the Directive on reception conditions for asylum seekers, which will highlight possible shortcomings when transposing minimum standards, the aim, in principle, should be enhanced approximation within the meaning of putting the regulations in concrete terms, primarily when guaranteeing material reception conditions. In this regard, solutions must be developed by means of which, at the same time in the context of harmonisation, pull factors are avoided and here too, Member States are accorded the necessary degree of flexibility and discretion. In this respect, reference is also made to the reply to question 10.

- (8) ***Should national rules on access to the labour market be further approximated? If yes, in which aspects?***

Asylum seeker access to the labour market should not be approximated over and above current regulations. Even if different labour market access provisions may work as a pull factor, what is decisive here is that there is no uniform EU labour market and no uniform requirement for labour across Europe. The labour market has shown itself to be completely different in Member States. It must therefore be ensured that national governments have room to manoeuvre when addressing labour migration in accordance with their respective national needs.

- (9) ***Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its length more precisely regulated?***

Asylum seekers should not be prevented from assuming their rights in an appropriate and timely manner as a result of detention. Based on previous assessments, the provision relating to detention does not need to be stated in more precise terms. It shall be assumed that current regulations under national law and the application thereof either already satisfy the relevant provisions of the European Convention on Human Rights or are being brought into line with these provisions if a judicial review establishes that current regulations are inconsistent with the European Convention on Human Rights. If an evaluation of the legal provisions during the first phase of harmonisation were to establish shortcomings in this respect, it should be examined whether further legal provisions should follow.

2.3. Granting of protection

- (10) ***In what areas should further law approximation be pursued or standards raised regarding***

- ***the criteria for granting protection***
- ***the rights and benefits attached to protection status(es)?***

The criteria for awarding refugee status and subsidiary protection status contain vague legal concepts and ambiguous definitions. Subject to an evaluation of the decision-making practices in Member States, matters in this area must be **put into concrete terms and clarified**. It must be clear who has refugee status, who is entitled to subsidiary protection and who should not receive either form of protection. Hence, for instance, Article 15 letter c) of the Qualification Directive needs to be put in more concrete terms as its wording is ambiguous and disputed in terms of interpretation. An **approximation of laws** over and above concretisation and clarification should only otherwise be necessary on certain points in the sphere of several discretionary clauses. On the other hand, certain deviations in the case of the rights and benefits associated with these forms of protection should be accepted,

especially as areas are affected here which were not subject to communitisation in themselves (e.g. social assistance). Finally, clarification should be provided in the area of the protective criteria as well as in the area of legal consequences as to which provisions should be applied in a compulsory manner and do not permit more favourable provisions at a national level.

- (11) ***What models could be envisaged for the creation of a “uniform status”? Might one uniform status for refugees and another for beneficiaries of subsidiary protection be envisaged? How might they be designed?***
- (12) ***Might a single uniform status for all persons eligible for international protection be envisaged? How might it be designed?***

As regards the status, i.e. the rights and benefits, a distinction should continue to be drawn between refugees within the meaning of the Geneva Refugee Convention and those beneficiaries of subsidiary protection. This differentiation also forms the basis of the Geneva Refugee Convention. Moreover, the circle of persons who receive subsidiary protection is very heterogeneous. It also includes persons who do not need to be protected as refugees from the outset over the longer term, in particular, those persons affected by armed conflicts. It should be examined whether this circle of persons should be granted the comprehensive rights of refugees which are primarily intended to enable integration as swiftly as possible. Otherwise, it does not make any sense to distinguish between the protective criteria of refugees and those persons receiving subsidiary protection when both forms of protection are treated in the same way in terms of legal consequences.

- (13) ***Should further categories of non-removable persons be brought within the scope of Community legislation? Under what conditions?***

Community legislation should not be extended to the status of persons in respect of whom obstacles relating to deportation exist beyond the scope of subsidiary forms of protection within the meaning of Directive 2004/83/EC in the context of the harmonisation of asylum law. During the first phase of harmonisation, States had come to an agreement that international protection always presupposes persecution and that other disadvantages, such as obstacles relating to deportation which are the result of illness do not justify offering such protection. This principle should be retained since otherwise, the common foundation of “international protection” would be abandoned and the concept would have to be redefined.

- (14) ***Should an EU mechanism be established for the mutual recognition of national asylum decisions and the possibility of transfer of responsibility for protection? Under what conditions might it be a viable option? How might it operate?***

In principle, the mutual recognition of decisions seems viable. However, this question and the consequences arising therefrom should only be tackled upon conclusion of the second harmonisation phase if it is certain that the actual harmonisation carried out warrants mutual recognition of asylum decisions.

2.4. Cross-cutting issues

2.4.1. Appropriate response to situations of particular vulnerability

- (15) ***How could the provisions obliging Member States to identify, take into account and respond to the needs of the most vulnerable asylum seekers be improved and become more tailored to their real needs? In what areas should standards be further developed?***

- (16) ***What measures should be implemented with a view to increasing national capacities to respond effectively to situations of vulnerability?***

All directives contain detailed provisions on the most vulnerable asylum seekers and other parties who are entitled to protection. Further concretisation in the form of more detailed regulations within the framework of EU legal provisions is not necessary. The suspicion expressed by the Commission that there are serious shortcomings in this area should first be looked into in the context of evaluation. If their suspicion were to be confirmed, it will depend, primarily, how each individual case is dealt with practically and on the individual situation facing the most vulnerable individuals. This could not be combated by further legal regulations.

2.4.2. Integration

- (17) ***What further legal measures could be taken to further enhance the integration of asylum seekers and beneficiaries of international protection, including their integration into the labour market?***

Over and above the guarantees already provided for in current legislation, there is no need for selected integration measures favouring asylum seekers in the labour market, inter alia. Rather, the completion of the asylum procedure must be awaited prior to undertaking specific integration measures since such measures should only relate to those persons who have the prospect of the right of abode over the long term. This is also particularly appropriate against the background of low acceptance quotas as regards asylum seekers and other problems which arise when enforcing the departure obligation. In the case of persons who are entitled to subsidiary protection, following a stay of three years, national law makes provision, in principle, for equal access to the labour market. Reference is otherwise made to the principle comments made in relation to question 8 regarding labour market access.

2.4.3. Ensuring second stage instruments are comprehensive

- (18) ***In what further areas would harmonisation be useful or necessary with a view to achieving a truly comprehensive approach towards the asylum process and its outcomes?***

More pressing than opening up new areas of harmonisation is the adaptation, at any rate, of contradictory or insufficiently coordinated provisions in the directives which are the result of consecutive negotiations on the individual directives (e.g. in relation to unaccompanied minors, exclusion criteria in the Directive for giving temporary protection and the Qualification Directive, and the ratio of subsidiary protection [Article 15 letter c] to temporary protection measures). Equally pressing is the approximation of national decision-making practices.

3. Implementation - accompanying measures

- (19) ***In what other areas could practical cooperation activities be usefully expanded and how could their impact be maximised? How could more stakeholders be usefully involved? How could innovation and good practice in the area of practical cooperation be diffused and mainstreamed?***
- (20) ***In particular, how might practical cooperation help to develop common approaches to issues such as the concepts of gender- or child-specific persecution, the application of exclusion clauses or the prevention of fraud?***

The strengthening of practical cooperation fulfils an important complementary function in the establishment of a Common European Asylum System. In the second harmonisation phase as well, it cannot be denied that the strengthening of practical

cooperation will contribute to European Community legal provisions being applied in a uniform manner. The widely differing decision-making practices in certain situations (e.g. asylum seekers from Iraq and Chechnya) reveal a need for action. To this end, it must be ensured, on the one hand, that when taking decisions on asylum applications, Member States must have the same factual bases at their disposal. In particular, a common EU portal, which should lead to the effective networking of national information systems in the Member States concerning countries of origin, will contribute to the coordination of information concerning countries of origin across Europe. In this regard, particular reference is made to the ECS [European Country of Sponsorship] project which is currently being implemented with the participation of eleven States on the basis of the MLo [migration and information logistics] information system of the Federal Office for Migration and Refugees. On the other hand, it must be ensured that the information is also applied in the same way by Member States.

The uniform application of legal norms must be ensured in this regard for substantive refugee law as a whole and not just in relation to gender- or child-specific persecution, the application of exclusion clauses or the abuse of asylum. To guarantee this, the participation of stakeholders is not required. What is needed, however, is the mutual exchange of experience and information and coordination at a decision-making level. This should be achieved by a reform of existing bodies and committees at Community level (contact committees, EURASIL, the Asylum and Migration Committee) and the establishment of an asylum cooperation network, as has already been discussed for a long time. The structures to be established should be informal, flexible and the unnecessary bureaucratising of labour avoided.

- (21) *What options could be envisaged to structurally support a wide range of practical cooperation activities and ensure their sustainability? Would the creation of a European support office be a valid option? If so, what tasks could be assigned to it?*
- (22) *What would be the most appropriate operational and institutional design for such an office to successfully carry out its tasks?*

The Hague Programme makes provision for the transformation of structures designed to facilitate practical cooperation into a European support office as soon as a common asylum procedure is introduced in the EU. In order to guarantee, above all, a flexible and streamlined organisation and to avoid unnecessary bureaucratisation, for instance, as a result of the duplication of structures which already exist in or between the Member States, a check must be carried out within the framework of a feasibility study as to whether, by means of an intensive and effective networking of those structures and information systems which already exist in the Member States and by enhancing practical cooperation by using modern information technology, cooperation could be guaranteed between Member States in a Common European Asylum System. The tasks of a support office would be restricted to pure coordination, by means of which political responsibility within the Council for the European Asylum System would be maintained, along with that of the Member States when making decisions on asylum applications. Otherwise, refer to the answers to questions 5, 19 and 20.

4. Solidarity and burden sharing

4.1. Responsibility sharing

- (23) *Should the Dublin system be complemented by measures enhancing fair burden sharing?*

- (24) *What other mechanisms could be devised to provide for a more equitable distribution of asylum seekers and/or beneficiaries of international protection between Member States?*

Evaluation of the Dublin system only began with presentation of the evaluation report by the Commission on 6 June 2007. The Dublin system has eliminated the problems outlined relating to the filing of applications in several Member States (“asylum shopping”) and “refugees in orbit” in a sustained manner, while also proving its worth. Within the framework of its area of application, this system guarantees fair “burden sharing” when receiving asylum seekers between Member States. In this connection, Member States will always have differing numbers of asylum seekers and these figures are also subject to fluctuations in comparison with other Member States. In this respect, the Dublin system does not need to be changed, in principle. In particular, those criteria laid down in the Dublin Regulation for determining a Member State’s competences do not require alteration. If the reception capacities of individual Member States are overtaxed, especially also on account of their geographical location and size, how Member States could be supported or the burden on them relieved in exceptional cases requires an in-depth discussion in the relevant political bodies within the EU. Otherwise, also refer to the reply to question 5.

4.2 Financial solidarity

- (25) *How might the ERF’s effectiveness, complementarity with national resources and its multiplier effect be enhanced? Would the creation of information-sharing mechanisms such as those mentioned above be an appropriate means? What other means could be envisaged?*
- (26) *Are there any specific financing needs which are not adequately addressed by the existing funds?*

The European Refugee Fund must always be viewed in the context of the respective situation in the Member States. Hence, especially with regard to the integration of acknowledged refugees or funding for the return of those asylum seekers who have been rejected, overlaps between national and EU programmes are unavoidable. When assessing transposition of the European Refugee Fund, a particular examination must be carried out as to how Member States’ scope for action can be extended and arranged more independently in order to ensure that funds are used where they are most needed.

5. External dimension of asylum

5.1. Supporting third countries to strengthen protection

- 27) *If evaluation is necessary, how might the effectiveness and sustainability of Regional Protection Programmes be enhanced? Should the concept of Regional Protection Programmes be further developed and, if so, how?*
- 28) *How might the EU best support third countries to deal with asylum and refugees issues more effectively?*
- 29) *How might the Community’s overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced?*

Subject to the results of the pilot project evaluations, the Regional Protection Programmes should be developed further and extended. This applies as regards both the current destination countries and regions so as to ensure that the impetus provided by means of the pilot projects to develop and extend the protective capacities leads to structures which are effective over a sustained period and which

comply with international law. In addition, taking into account the course of refugee and migration routes into the EU, new target areas for Regional Protection Programmes shall be determined. The EU's objective must be to work towards a situation where as many countries as possible become signatory states to the Geneva Refugee Convention (if necessary, the OAU Convention) while also applying their guarantees in practice. This objective must continue to be pursued within the framework of the coherent overall approach to migration policy which shall be implemented and developed further in relation to the respective regions of origin.

5.2 Resettlement

- (30) *How might a substantial and sustained EU commitment to resettlement be attained?***
- (31) *What avenues could be explored to achieve a coordinated approach to resettlement at EU level? What would be required at financial, operational and institutional level?***
- (32) *In what other situations could a common EU resettlement commitment be envisaged? Under what conditions?***

Resettlement is one of the permanent solutions for refugees. As has already been stipulated in the Council conclusions from 2004 and in the Hague Programme, resettlement measures at EU level should be specific to a particular situation and flexible, with a decision on participation left to the Member States.

5.3 Addressing mixed flows at the external borders

- (33) *What further measures could be taken to ensure that protection obligations arising out of the EU acquis and international refugee and human rights law form an integral part of external border management? In particular, what further measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of asylum seekers to protection?***
- (34) *How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders?***

When coping with mixed flows at the external borders, as is generally also the case (see also point 4), persons seeking international protection must have effective access to asylum procedures. If there are grounds to suspect that there are deficiencies in terms of enforcement at the external borders of the Member States regarding the relevant and unambiguous provisions of European and internal refugee law and the codification of human rights, further training measures at EU level, references in operational manuals and action plans, as well as information relating to discussions concerning use and the situation, could also contribute to eliminating any such deficiencies.

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

- (35) *How could European asylum policy develop into a policy shared by the EU Member States to address refugee issues at the international level? What models could the EU use to develop into a global player in refugee issues?***

The idea of a European refugee policy which is advocated by the EU as a global player in international forums on refugee policy is not a priority matter for the time being. In this respect, the actions of the respective Council Presidency, including the coordination of an EU position, where possible and necessary, are sufficient.