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From:	Presidency
On:	28 September 2017
To:	Strategic Committee on Immigration, Frontiers and Asylum
No. Cion doc.:	11317/16 ASILE 27 CODEC 1077
Subject:	Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (First reading) – Policy debate on the safe third country concept

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**1. Safe third country concept**

On 22-23 June 2017, the European Council agreed that *"in order to enhance cooperation with third countries and prevent new crises, the 'safe third country' concept should be aligned with the effective requirements arising from the Geneva Convention and EU primary law, while respecting the competences of the EU and the Member States under the Treaties. (...) The European Council invites the Council to continue negotiations on this basis and amend the legislative proposals as necessary, with the active help of the Commission."*

In order to fulfil the above European Council mandate, certain provisions of the proposal on the Asylum Procedures Regulation (APR), presented by the Commission in July 2016 and examined in the Asylum Working Party session in September 2017, needs to be examined in the light of necessary alignment with the effective requirements arising from the Geneva Convention and Protocol relating to the Status of Refugees of 1951 and 1966 respectively (hereinafter "the Geneva Convention") and EU primary law, while respecting the competences of the EU and the Member States under the Treaties.

## **2. New provisions of the proposal on the Asylum Procedures Regulation in relation to the safe country concepts**

A third country according to the currently applicable Asylum Procedures Directive (APD) (2013/31)<sup>1</sup> is deemed as safe if:

- life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- there is no risk of serious harm as defined in Directive 2011/95/EU;
- the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

According to APR proposal (11317/16) the third country is deemed safe if it respects the criteria mentioned above with one exception: the last bullet point mentioned above has been broadened as follows "*the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate*".

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<sup>1</sup> Articles 35, 38 ,39

The APR proposal thereby refers to the criteria of a ‘first country of asylum’ which are listed in Article 44(2) of the APR proposal as follows:

- life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- there is no risk of serious harm as defined in Regulation (EU) No XXX/XXX (Qualification Regulation);
- the principle of non-refoulement in accordance with the Geneva Convention is respected;
- the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected;
- there is a right of legal residence;
- there is appropriate access to the labour market, reception facilities, healthcare and education; and
- there is a right to family reunification in accordance with international human rights standards.”.

In addition, APR proposal aims<sup>2</sup> at developing the concept of safe third country, further by clarifying the notion of "*sufficient protection*", which has not been defined in the current directive.

### **3. The notion of "sufficient protection"**

As in the currently applicable directive, "sufficient protection" is an autonomous notion in the APR and it is distinct from the "*protection in accordance with the substantive standards of the Geneva Convention*".

The APR proposal attempts to flesh out the notion of "sufficient protection", by detailing certain conditions, which would ensure that the persons sent to a safe third country could benefit from a durable solution there.

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<sup>2</sup> Articles 45, 46, 49 and 50

The proposal defines the notion of “sufficient protection” by requiring, in addition to protection against persecution, serious harm and *refoulement*, that there is a right to legal residence, appropriate access to the labour market, reception facilities, healthcare, education and the right to family reunification in accordance with international human rights standards. Although, all these rights could be considered as integral components of the "sufficient protection" concept, it needs to be examined whether some of these conditions exceed or are less precise than those indicated in the Geneva Convention.

For example:

- the APR proposal mentions the *"appropriate access to (...) education"*, while the Geneva Convention refers to *"elementary education"*;
- the APR proposal refers to the *"appropriate access to the labour market"*, while the Geneva Convention refers to the *"right to engage in wage-earning employment"* and to *"practicing a liberal profession"*;
- the APR proposal contains a reference to *"the right of legal residence"*, while the Geneva Convention refers to the more generic right to *"stay lawfully"*.

Furthermore, the APR proposal refers to the right to family reunification, among its criteria for the definition of sufficient protection, which does not exist as such in the Geneva Convention.

#### **4. Other relevant elements**

Two other elements relevant for the concept of safe third country might require further discussion:

- the connection between the applicant and the safe third country: in its Article 45, the APR proposal states that there should be *"a connection between the applicant and the third country in question on the basis of which it would be reasonable for that person to go to that country, including because the applicant has transited through that third country which is geographically close to the country of origin of the applicant"*.

With regard to the connection requirement, the Commission proposal clarifies that transit can constitute such a connection but the proposal does not contain any other elements, which might contribute to further qualifying such a connection. In the current APD the connection with the third country is deemed necessary while rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country are laid down in national law.

- the possibility to apply the safe third country concept when the protection, in accordance with the standards of the Geneva Convention, or sufficient protection can only be guaranteed in certain parts of the territory of the third country in question.

The APR proposal does not foresee such a possibility but it does not explicitly exclude it either. This issue could prove particularly relevant when the EU is faced with situations of mass influx.

## 5. Questions:

Considering the above background elements, delegations are invited to answer to the following questions:

- To which degree should the criteria for considering that there is "*sufficient protection*" in a third country be aligned with the effective requirements of the Geneva Convention, while respecting EU primary law in particular the Charter of Fundamental Rights, in order to fulfil the mandate given by the European Council in June 2017?
- In your opinion, are there any other elements (for example the requirement for a connection between the applicant and the third country or possibility to apply the concept of safe third countries when available protection is being guaranteed only in certain parts of the territory of the third country) in the APR proposal, which should be developed further in the light of European Council Conclusions from June 2017 and if, then to what extent?