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NOTE

from : Presidency

to : Permanent Representatives Committee

No. prev.doc. : 12639/03 ASILE 50

No. Cion prop. : 10279/02 ASILE 33 + REV 1 (de, en, fr) - COM(2002) 326 final/2

Subject : Amended proposal for a Council Directive on minimum standards on procedures
 in Member States for granting and withdrawing refugee status

1. On 5 June 2003, the JHA Council took note of a statement from several delegations calling upon the Commission to incorporate, into the above-mentioned proposal, the drawing up and review of a minimum common list of **safe countries of origin**.
2. Within the context of the proceedings of the Asylum Working Party, the Presidency had drawn up a "package" of three Articles which constituted a possible compromise. These three Articles referred respectively to the notions of safe country of origin, the setting up of a procedural mechanism for the drawing up of a minimum common list of safe countries of origin and to the possibility of allowing national designations of such countries.

A majority of delegations in the Working Party were in favour of the resulting draft text (A/B/D/E/F/I/L/NL/UK), three delegations were opposed to the principle of setting up a mechanism concerning safe countries of origin (FIN/P/S) and two did not take a definitive position (EL/IRL).

This draft compromise was contained in 12639/03 ASILE 50 and it was submitted for consideration to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) at its meeting on 22 September 2003.

3. At the SCIFA meeting, the representative of the Council Legal Service expressed strong doubts about whether this text was consistent with Community law since it provided for the adoption of a minimum common list of safe countries of origin which was not binding on all Member States.

This opinion led to a change of the positions of some delegations which had entered statements in the minutes of the JHA Council of 5 June 2003, while the three delegations which had previously expressed negative opinions, confirmed their position, since it would not be possible as the Council Legal Service confirmed, to approve the list by unanimity instead of by qualified majority.

EL declared itself in favour of a binding list, while IRL preferred a minimum common list in addition to the national lists.

Consequently, to take into account the suggestions of the Legal Service – which were strongly supported by the Commission representative, - the text which was previously drafted by the Presidency and contained in the document 12639/03 ASILE 50, has been changed in those parts which referred to the hypothesis of flexible application of the minimum common list.

4. In particular, Article 30 :

- establishes that the Member State shall reject an application for asylum from an applicant coming from a third country which has been identified as a safe country of origin, in accordance with the criteria set out in Annex III to the draft Directive, and it has been considered that such country is safe for that particular applicant and it has also been judged that there are no reasons for considering that third country to be unsafe for the specific situation of the applicant,
- without prejudice to the individual examination referred to in the previous indent and without prejudice to the designation of national lists, obliges the Member State to reject applications for asylum submitted by applicants who come from a country considered as safe country of origin and included in the minimum common list provided for in Article 30A.

5. Article 30A

- provides for a mechanism allowing the Council, on a proposal from the Commission and after obtaining the assent of the European Parliament, to adopt a minimum common list of safe countries of origin as well as for its revision,

6. Article 30B

- enables the Member States to determine, on the basis of the criteria set out in Annex III, a national list of safe countries other than those appearing on the minimum common list as safe countries of origin,
- sets up the range of sources of information to be used by Member States when assessing whether a third country can be designated as a safe country of origin,
- requires Member States to notify the Commission of their national laws or regulations concerning the designation of safe countries of origin.

7. The Permanent Representatives Committee is invited to consider the text contained in the Annex to this note as well as the following questions in view of the next JHA Council :

- *do delegations accept the compromise as proposed by the Presidency in the text contained in the Annex to this note? Or*
- *do delegations prefer, however, to provide for a not binding mechanism based solely on national designations?*

◦
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8. The draft Directive also provides for the possibility for Member States to introduce or maintain in their national legislations the principle of **safe third countries**. Such countries would not be those of the applicant's nationality but third countries where the applicants would have stayed or travelled through before arriving in the Member State and where they could have asked for protection.

The application of such principle has been the subject of extensive debate in the Asylum Working Party. Certain delegations considered that such a concept, while having a strong dissuasive effect concerning instrumental applications, lacks any substantive effectiveness since it would be impossible to apply if the safe country concerned was unwilling to readmit applicants who are not their nationals. This principle would be only applicable in practice where effective readmission agreements with such countries exist.

The draft Directive allows each Member State to decide whether or not to apply this principle and establishes the criteria for the inclusion of a third country in a national list. However, no mechanism for the setting up of any common list, even if it is a minimum list, is provided for.

The Permanent Representatives Committee is invited to consider the following questions with a view to the next JHA Council :

- *do delegations consider that a mechanism similar to the one established for safe countries of origin could be provided for with a view to setting up a minimum common list of safe third countries ? Or*

- *do delegations consider that the application of such a principle should be to let each Member State, which would have the possibility, while respecting certain conditions established in an Annex to the Directive, to establish their own national list of safe third countries ?*

Article 30

Safe countries of origin

1. (deleted)
2. A third country can be designated as a safe country of origin for the purpose of examining applications for asylum only in accordance with the criteria set out in Annex III.
3. A third country that is designated as a safe country of origin in accordance with the criteria set out in Annex III can be considered as a safe country of origin for a particular applicant for asylum only if
 - (a) he/she has the nationality of that country or,
 - (b) it is his/her country of former habitual residence, if he/she is a stateless person;
 - (c) (deleted)¹

and the applicant has not submitted any grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee in accordance with Council Directive .../ ...*[Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection]*.

4. **Without prejudice to Article 30B,**² Member States, [...] shall reject³ the application for asylum as unfounded⁴ where the third country is designated by the Council as safe pursuant to Article 30A.

[...]

¹ **B/FIN/NL/UK** : scrutiny reservations on the deletion of this paragraph. B/UK wanted to cover cases of persons born in a safe third country without having its nationality. (This subparagraph read: "he/she is formally habitually resident in that country").

² **FIN/S** : scrutiny reservations.

³ **B/F** : read "shall consider"

⁴ **NL** : add "or may reject it".

Article 30A¹

Minimum common list of third countries as safe countries of origin

1. The Council may, acting by a qualified majority² on a proposal from the Commission and after obtaining the assent of the European Parliament, adopt a minimum common list³ of third countries that shall be regarded by Member States as safe countries of origin in accordance with the criteria set out in Annex III. When making its proposal, the Commission shall make use of information from the Member States, its own information and, where necessary, information from UNHCR, the Council of Europe and other relevant international organisations.
2. (deleted)
3. The Council may, acting by a qualified majority on a proposal from the Commission and after obtaining the assent of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with the criteria set out in Annex III. The Commission shall examine any request made by the Council or by a Member State that it submit a proposal to amend the minimum common list.⁴

¹ **FIN/IRL/P/S/UK** : scrutiny reservations.
A/B/F/I/L : a common list of safe countries of origin should be established in order to set up an effective functioning of this principle.
FIN/P : scrutiny reservations. The text should clearly set out that it will always be an individual examination.
S : reservation . It was opposed to the setting up any list of safe countries. There should always be an individual examination.
NL/UK : could accept a common list if it is a flexible one.

² **F/P** : the Council should act by unanimity, given i.a. that such a provision could raise difficulties linked to the Common Foreign Security Policy (F : amendments to the list under (3) could be made by qualified majority).

³ **P** : scrutiny reservation. The concept of minimum common list should be clarified.

⁴ **F/S/UK** : were concerned about lack of flexibility of the suspension mechanism provided for in paragraphs 4 and 5.

4. Where the Council requests the Commission to submit a proposal for removing a third country from the minimum common list, the obligation of Member States pursuant to Article 30(4)(a) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.
5. Where a Member State requests the Commission to submit a proposal to the Council for removing a third country from the minimum common list, that Member State shall notify the Council in writing of the request made to the Commission. The obligation of this Member State pursuant to Article 30(4)(a) shall be suspended with regard to the third country as of the day following the notification of the request to the Council.
6. The European Parliament shall be informed of the suspensions under paragraphs 4 and 5.
7. The suspensions under paragraphs 4 and 5 shall end after [three] months, unless the Commission makes a proposal, before the end of this period, to withdraw the third country from the minimum common list. The suspensions shall end in any case where the Council rejects, [...] a proposal by the Commission to withdraw the third country from the list.
8. Upon request by the Council, the Commission shall report to the Council and the European Parliament on whether the situation of a country on the minimum common list is still in conformity with the criteria set out in Annex III. When presenting its report to the Council and the European Parliament, the Commission may make such recommendations or proposals as it deems appropriate.¹

¹ NL : establish a regular reporting duty.

Article 30B

National designation of third countries as safe countries of origin

1. Without prejudice to Article 30A, Member States may retain or introduce legislation that allows for the national designation of third countries **other than those appearing on the minimum common list** as safe countries of origin **for the purpose of examining applications for asylum**.
2. Member States shall assess whether a third country can be designated **by them** as a safe country of origin in accordance with the criteria set out in Annex III on the basis of a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.
3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating **third** countries as safe countries of origin and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the adoption of this Directive and shall notify as soon as possible any subsequent relevant amendments.
4. Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating **third** countries as safe countries of origin after the entry into force of this Directive, as well as any subsequent relevant amendments.¹

¹ **UK** : add the following paragraph :

"4. Member States may also designate part of a country as safe or designate a country as safe for a specified group of persons in that country where the conditions of Annex III are applicable to that part or group."

B/D/F/FIN/S : reservations on this UK suggestion. F/FIN/S considered that such a provision could lead to discrimination on the basis of sex, race, religion, etc.

IRL : add a new paragraph in order to enable Member States to share information used to designate countries as safe countries of origin along the following lines :

"5. Member States may, upon request from another Member State, exchange information used to designate a country as safe country of origin".

CRITERIA WITH RESPECT TO THE DESIGNATION OF SAFE COUNTRIES OF ORIGIN

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law and the general political circumstances, it can be clearly shown that there is generally neither persecution¹ as defined in Article 11 of Council Directive .../... [*Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*] nor serious harm as defined in Article 15 of the said Council Directive.

To that end, the assessment of the legal situation, the application of the law and the general political circumstances shall [inter alia] take into account whether

- (a) the country is governed by the rule of law;
- (b) it has democratic structures;
- (c) it observes the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention; and
- (d) it provides for a system of effective remedies² against violations of these rights and freedoms.

¹ **D** : read "it appears that there is neither persecution...".

² **FIN** : refer to the possibility of having a fair trial instead of to "effective remedies".