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**NOTE**

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from : Presidency

to : Council

on : 6 November 2003

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

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1. It is recalled that, at its meeting on 5 June 2003, the JHA Council reached agreement on certain provisions of the above-mentioned proposal and instructed the Permanent Representatives Committee to further examine the Directive with a view to reaching an agreement within the time limit set by the Seville European Council (end 2003). This mandate was confirmed by the Thessaloniki European Council and the Brussels European Council on 16 and 17 October 2003.

On 2 October 2003, the Council held a debate concerning some aspects of the draft Directive.

Since then, the Asylum Working Party, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Permanent Representatives Committee have continued their work on this proposal.

Following this work, two other points are now submitted to the Council :

## A. Safe third countries

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

The application of such a principle has been the subject of extensive debate at technical level. Many delegations expressed strong doubts concerning its effectiveness, since it would be impossible to apply where the safe country concerned was unwilling to readmit applicants who are not their nationals.

The current draft Directive allows each Member State to decide whether or not to apply the principle and establishes the criteria for the inclusion of a third country on a national list.

The JHA Council decided on 2 October 2003 to insert in the Directive a mechanism for the setting up of a minimum common list of safe countries of origin, but no consensus was reached with respect to the possibility of setting up a minimum common list of safe third countries.

The Presidency accordingly gave the mandate to the Working Party to further examine the possibility of merely establishing national lists.

In the meantime, one delegation has asked to reopen this debate at the JHA Council and so the question of whether a minimum common list of safe third countries should be provided for in this Directive is once again submitted to the Council.

## **B. Article 35A**

Following the request from a delegation, a particular procedure has been inserted under this Article, which provides for the possibility for a Member State to remove an asylum applicant (who has entered irregularly into its territory or arrived at its border) coming from a neighbouring safe third country. In this case, the application will not be examined by the Member State (see Annex to this Note).

The current draft results from the proceedings of the Working Party, SCIFA and the Permanent Representatives Committee.

A consensus has not been reached due to the opposition of some delegations which have argued that such a provision :

- may cause confusion with regard to those Articles dealing with the safe third country notion;
- would lead to procedural difficulties concerning the functioning of the Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("Dublin II" Regulation);
- is not a true border procedure, but may also be applied inside the territory of the Member State;
- is not a true asylum procedure, since the application is not examined by the determining authority.

In these circumstances, the Presidency submits to the Council the question of whether :

- to maintain the current draft which allows all Member States to introduce such a procedure; or
- to limit the possibility of using such a procedure to those Member States whose legislations already provide for it at the time of adoption of the Directive.

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**Article 35A<sup>1</sup>**

1. Member States may introduce<sup>2</sup> procedures which forsake an examination as described in Chapter II in cases where a competent authority has established on the basis of the facts that the applicant for asylum is seeking to enter or has entered in the Member State from a neighbouring safe third country.
  
2. A third country can only be considered as a safe third country for the purpose of paragraph 1 if it
  - (a) observes the provisions in the Geneva Convention or the Protocol to the Geneva Convention with respect to the principle of non-refoulement and the rights of persons who are recognised and admitted as refugees; and
  - (b) has in place an asylum procedure prescribed by law; and
  - (c) observes the standards laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the standards relating to effective remedies; and<sup>3</sup>

has been so designated by an act of parliament or with the consent of parliament by national legislation.<sup>4</sup>

Where the third state does not readmit the applicant for asylum in question, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

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<sup>1</sup> **F/S** : reservations.

<sup>2</sup> **B/FIN/IRL** : scrutiny reservations.

<sup>3</sup> **D** : add the following cases to paragraph 2 :

- when it is obvious that the person was safe from persecution in another third country;
- when the applicant poses a threat to the general public, because he has non-appealably been punished with imprisonment of at least three years in the Member State on account of a particularly serious criminal offence and where his leaving the Member State did not take place more than three years ago.

<sup>4</sup> **P** : read : "has been so designated in accordance with national legislation".