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subject **A proposal for an EU directive on the identification of statelessness and the protection of stateless persons**

Dear Madam Commissioner,

On behalf of the Meijers Committee I am pleased to send you attached note on our proposal for an EU directive on the identification of statelessness and the protection of stateless persons.

As always, we remain at your disposal for questions and comments.

Sincerely,



Theo de Roos
Chairman

cc: LIBE Committee of the European Parliament, General Secretariat of the Council of the European Union, Permanent Representatives of Member States.

Proposal for an EU directive on the identification of statelessness and the protection of stateless persons

13 October 2014

Executive Summary

The Meijers Committee calls on the EU to establish a common legal framework for the treatment of stateless persons in EU Member States. The development of such rules would improve the vulnerable position of stateless persons, one of Europe's major human rights issues. Common criteria should be developed in three areas: i) a fair procedure for determining whether a person is stateless; ii) the standard of treatment to be accorded to stateless persons; and iii) the conditions of residence for stateless persons.

Such rules can be based on Chapter 2, Title V TFEU, which equates stateless individuals with third-country nationals, on which the EU has legislated extensively. The Meijers Committee proposal fills the existing gap in EU law on the position of stateless persons without compromising nationality laws of Member States. Moreover, the proposal curbs secondary migration, while increasing the legal protection of stateless individuals. Action on these issues sits comfortably with both existing EU legislation and the policy aims of the European Council in the Area of Freedom, Justice and Security.

1. Introduction

The Meijers Committee calls on the EU to establish a common legal framework for the treatment of stateless persons in EU Member States. The development of such rules would improve the protection of stateless persons and fill the present gap in EU law on the legal position of stateless persons. The Meijers Committee suggests that common criteria be developed in three areas: i) a fair procedure for determining whether a person is stateless; ii) the standard of treatment to be accorded to stateless persons; and iii) the conditions of residence for stateless persons.

The vulnerable position of stateless persons is increasingly recognized as one of Europe's major human rights issues.¹ Over 400,000 stateless persons are believed to be living in the European Union. This number includes persons who have become stateless as a result of the dissolution of the

¹ European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)); Nils Muižnieks, Council of Europe Commissioner for Human Rights, 'Stateless but not rightless: improving the protection of stateless persons in Europe', 8 April 2014, CommDH/Speech(2014)6.

Soviet Union and Yugoslavia, but large groups of stateless individuals are found in all EU Member States. For example, an estimated number of 13,000 stateless persons are living in Germany, 1,100 in France, 2,000 in The Netherlands, and 9,000 in Sweden.² These may be persons who have been born and raised in a Member State, or they may have a migratory background.

Not all EU Member States have policies to deal effectively with statelessness, which leaves many stateless persons vulnerable to discrimination, human rights abuse, repeated or prolonged detention, and destitution. The price of statelessness is paid by societies and the individuals alike. It can prevent large groups of people from participating in socioeconomic life and there is a risk that certain groups will be permanently marginalized from society, as statelessness may be passed on from generation to generation.

In 2012, the EU pledged to achieve accession by all Member States to the 1954 Convention relating to the Status of Stateless Persons, the main international instrument for the protection of such persons. The only countries that are not yet parties are Malta, Cyprus, Poland, and Estonia. The 1954 Convention, however, remains poorly implemented by many Member States. Most Member States do not have functioning procedures for determining statelessness. Further, the absence in many Member States of a route by which stateless persons can regularize their status leaves these individuals at risk of permanent marginalization. This contrasts sharply with the existence of asylum determination procedures and protected statuses in all EU Member States which give effect to the 1951 Refugee Convention and which are consolidated in the common EU asylum policy.

2. Action by the EU

In recent years, an increasing number of Member States have responded to the predicament of stateless persons by establishing a determination and protection framework which is specific to such persons. In these national legal frameworks, statelessness is explicitly defined as a ground for protection, and individuals are able to claim protection based merely on their statelessness. These Member States include Belgium, France, Hungary, Italy, Latvia, Spain, and the United Kingdom.³ Such practices are in line with the position of UNHCR that determination of statelessness is necessary for the effective protection of stateless persons and that stateless persons should be able to regularize their stay if they cannot settle in another State.⁴ The Meijers Committee is of the opinion that this trend should be encouraged and consolidated by action of the European Union. A number of NGOs and academics have also called on the EU to act on statelessness.⁵

² UNHCR, 'Stateless persons – 2010' [<http://www.unhcr.org/4e5228096.html>]. Also see G. Gyulai, 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law* 14 (2012), 279-295.

³ European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons: A summary guide of good practices and factors to consider when designing national determination and protection mechanisms*, 2013.

⁴ UNHCR Handbook on Protection of Stateless Persons, Geneva, 2014.

⁵ See *inter alia* the contributions of the European Network on Statelessness and the Netherlands Institute for Human Rights to the Public Consultations of the European Commission on the future of Home Affairs policies

There are compelling reasons for addressing statelessness at the European Union level. First, it encourages the proper application and implementation of human rights obligations of the Member States under the 1954 Convention and other human rights treaties. Second, it implements the EU's aim to set the conditions for residence and define the rights of third country nationals, which according to Art. 67(2) TFEU includes stateless persons. Third, it corresponds to the aim affirmed in the European Council Strategic Guidelines of June 2014 of promoting integration policies which foster social cohesion and economic dynamism.⁶ Fourth, harmonizing the treatment of stateless persons, as well as a common approach to statelessness as a ground for protection and residence, reduces the risk of undesirable secondary migration within the EU.

Generally, action directed at statelessness may be taken in the following four areas: identification and protection of stateless persons, and prevention and reduction of statelessness. These issues are addressed in the 1954 Convention, the 1961 Convention on the Reduction of Statelessness, and other international instruments. Because many solutions to the prevention and reduction of statelessness will have an impact on the nationality laws of Member States, in which the EU generally lacks competence, the regulation of these issues should be left primarily to the Member States. The EU is, however, competent to legislate on the goals of identifying and protecting stateless persons. An explanation is given below of why an EU instrument regulating these issues complies with the requirement of subsidiarity, what the Treaty basis is for such an instrument, and the key legal elements that should make up such an instrument.

3. Subsidiarity

A European Area of Freedom, Security and Justice entails common rules for the treatment of third-country nationals and stateless persons. At present, Member States' practices and legislation display considerable differences in the treatment of stateless persons. Disparities exist with regard to the availability and functioning of formal procedures for determining statelessness, as well as the residence status and the substantive protection offered to stateless persons. Within the Schengen area, decisions on the residence of stateless persons taken by one Member State may have effects on other Member States.

A common framework for the identification and protection of stateless persons will help to limit the secondary movements of stateless persons resulting from such disparities. Stateless persons will be less inclined than previously to decide on their country of residence based on different treatment standards.

The adoption of criteria for identifying stateless persons also fosters the uniform application of existing EU law establishing rights for such persons. Since EU law treats stateless persons as third-country nationals (Art. 67(2) TFEU), such persons fall within the personal scope of all EU legislative

[http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting_0027_en.htm]. See also K. Swider, 'Protection and Identification of Stateless Persons Through EU Law', July 2014, Amsterdam Centre for European Law and Governance Research Paper No/ 2014-5. On 10 September 2014, the Dutch government announced that it would introduce a stateless determination procedure: *Kamerstukken II* 2013/14, 19637, 1889.

⁶ Art. 79(1) TFEU; Conclusions of the European Council of 26/27 June 2014.

instruments on migration, such as the EU asylum directives, the Family reunification directive, and the Return directive. Insofar as national procedures for determining statelessness affect the rights conferred and protected by the legal order of the Union, such procedures lie within the scope of Union law and are ultimately governed by the principles of Union law.⁷ Furthermore, it may happen that it is not clear whether a person is stateless or that he is in fact a national of a (different) Member State. A lack of clarity in such cases bears with it the risk that persons may be treated under the wrong legal regime. A procedure for determining statelessness would ensure that rights granted by the EU legal order would have a useful effect and would promote the uniform application of EU law.

Moreover, the necessity of a directive also derives from the EU's objective to establish a common migration policy that is not only fair towards stateless persons but is also based on solidarity among Member States (articles 67 (2) and 80 TEU). Member States that offer a (better) protection regime would likely have to bear a heavier larger burden than Member States that offer less beneficial protection, or none at all.

4. Legal Basis

Unlike its predecessors, the Lisbon Treaty specifically addresses the legal position of stateless persons. According to Article 67(2) TFEU, such persons are to be equated with third-country nationals. Accordingly, legislation based on Chapter V TFEU that contains obligations and rights of third-country nationals applies equally to stateless persons. The EU legislator has regulated the position of third-country nationals and stateless persons extensively on the basis of Articles 78 and 79 TEU. Although the heading of Chapter 2 of Title V TFEU suggests that it pertains only to migrants, it should be noted that Articles 78 and 79 pertain to all third-country nationals and stateless persons, wherever they are born and whether or not they are migrants. Accordingly, stateless persons born and residing in a single EU Member State also fall within the ambit of the existing directives ensuing from Articles 78 and 79 TFEU.

EU measures aimed at the prevention and reduction of statelessness may have an adverse impact on the prerogative of Member States to regulate their nationality laws.⁸ Such EU legislation most likely would involve a requirement on Member States to naturalize stateless individuals. In contrast, legislation on the identification and protection of stateless persons (the subject of this proposal) does not in itself affect sovereignty in the field of nationality. Admittedly, a determination of statelessness or the granting of legal residence to a stateless person could have the effect that the person would qualify for naturalization under national nationality laws, as may be the case with stateless children born in a Member State or after prolonged lawful residence in the Member State. However, the proposed instrument would only facilitate the recognition of stateless persons as defined in international law and set the conditions for granting them lawful residence. It would not

⁷ See *mutatis mutandis* Case C-135/08 (Rottmann), paras 42, 48.

⁸ Case C-369/90 (Micheletti).

interfere with the right of Member States to define the national conditions under which nationality may be obtained.

Moreover, existing EU directives, such as the Qualification Directive and Long Term Residence Directive, have a similar effect, as most nationality laws allow refugees or permanent residents to obtain nationality after a certain period of legal residence. Despite this effect, the requirements for naturalizing refugees or long-term residents remain within the competence of Member States. A statelessness identification and protection directive would have a similar, limited scope.

The EU is tasked with the creation of a common asylum, migration and border policy that is fair to TCNs and stateless persons (Article 67(2) TFEU). Specifically, the Union legislator shall develop conditions of residence for TCNs and stateless persons, and definitions of their rights (Article 79(1) and (2) TFEU). Article 79(2)(a) provides the legal basis for defining the conditions of entry and residence of stateless persons. This may include defining the circumstances under which statelessness per se is a ground for residence. Article 79(2)(b) can serve as legal basis for defining the rights of persons who reside legally as stateless person in a Member State. Common rules on the protection of stateless persons can be based on these provisions and would complement the existing framework of substantive law.

Further, Article 79 TFEU must also be considered to provide the legal basis for setting common criteria for a statelessness determination procedure. Other directives adopted on the basis of Article 79 TFEU, such as the Students Directive (2004/114/EC), the Family Reunification Directive (2003/86/EC), and the Long-Term Residence Directive (2003/109/EC) also contain rules on procedural guarantees.

A statelessness determination procedure and protection directive could thus be grounded in Article 67(2) in combination with 79 TFEU. Such a directive would build on and complete the existing legal EU framework concerning third-country nationals and stateless individuals.

5. Legal Elements

5.1. Statelessness determination procedure

The 1954 Convention relating to the Status of Stateless Persons sets out the international legal definition of “stateless person” and the standard of treatment to be accorded such individuals, but does not prescribe any mechanism by which to identify stateless persons. It is clear, though, that without a procedure for determining whether a person is stateless, the provisions of the 1954 Convention remain without useful effect. The identification of statelessness is a logical prerequisite for compliance with the 1954 Convention.⁹ The outcome of a statelessness determination procedure can be that a person is stateless, that he is a national of a specified country, or that he is a national of an unknown country. Only in the case that a person is determined to be stateless will the proposed EU mechanism

⁹ UNHCR Handbook on Protection of Stateless Persons, Geneva, 2014, para 8.

impose obligations on Member States. These obligations relate primarily to granting protection to stateless persons in accordance with the 1954 Convention.

Member States can be left a margin of discretion in the design and operation of statelessness determination procedures.¹⁰ They may, for example, choose to integrate statelessness determination procedures within the competence of immigration authorities or confer the responsibility for statelessness determination on the organ responsible for nationality matters. There should, however, be a common interpretation of the definition of statelessness, as well as an outline of procedural guarantees and evidentiary standards for determining statelessness. While the 1954 Convention provides the internationally accepted definition of “stateless person”, authoritative guidelines on procedural guarantees, types of evidence and issues of proof in the context of identifying stateless persons are provided by the recently published UNHCR Handbook on Protection of Stateless Persons.¹¹ The EU instrument would incorporate these standards and may further draw inspiration from existing statelessness determination procedures in Member States such as Belgium, France, Hungary, Italy, Latvia, Spain, and the United Kingdom.¹² Further, the Asylum Procedures directive can provide useful guidance for setting procedural guarantees.

Any EU mechanism for determining statelessness should also address grounds for excluding persons from enjoying protection as a stateless person. These are listed in Article 1(2) of the 1954 Convention and include the same grounds taken up in Article 1F of the Refugee Convention, i.e. persons with respect to whom there are serious reasons for considering that they have committed international crimes, serious non-political crimes, or acts contrary to the purposes and principles of the United Nations. The provisions on exclusion from refugee status in the Qualification directive can serve as a point of reference.

5.2. Content of protection

The proposed EU mechanism would ensure that individuals with the status of stateless person are granted the standard of treatment pursuant to the 1954 Convention. Even though not all Member States have ratified the 1954 Convention,¹³ there is ample reason to recognize in a Union legal framework that persons who cannot invoke the protection of their country of nationality – because they have no such country – should be granted a basic level of civil, social, economic, and cultural rights in their country of habitual residence. The duty to provide such rights also stems from general human rights treaties and accords with the founding values of the Union of respect for human dignity, freedom, equality, and

¹⁰ Ibid, para 62 et seq.

¹¹ Ibid.

¹² Good practices have been compiled in: European Network on Statelessness, *Statelessness Determination and the Protection Status of Stateless Persons, A summary guide of good practices and factors to consider when designing national determination and protection mechanisms*, 2013. See also Report of the Dutch Advisory Committee on Migration Affairs, ‘No Country of one’s own’, The Hague, December 2013, p. 111.

¹³ All but four Member States (Cyprus, Estonia, Malta and Poland) are party to the 1954 Convention.

respect for human rights.¹⁴ It also corresponds with the Union's objectives of ensuring fair treatment of third-country nationals residing legally in Member States and of promoting integration policies which foster social cohesion and economic dynamism.¹⁵

The proposed EU framework would provide a modern codification of basic rights to be accorded stateless persons in the sphere *inter alia* of social welfare, housing, employment, education, and healthcare. It should also include rights that are specific to stateless persons such as the issue of identity papers and travel documents, and the provision of administrative assistance in relations with foreign States.¹⁶ The regime of rights and benefits in the Qualification directive (2011/95/EU) can serve as point of reference. Indeed, in view of the minimal differences in content of protection established under the 1951 Refugee Convention and the 1954 Convention on Stateless Persons, the most practical solution would be to equate the content of protection of stateless persons with that of refugees under the Qualification directive, except for those rights that specifically address the plight of refugees, i.e. the prohibition of refoulement and protection against penalties for illegal entry.

5.3. Right of residence

The 1954 Convention does not entail a right of residence for stateless persons. Similar to the 1951 Refugee Convention, the 1954 Convention extends rights to stateless persons based on their degree of attachment to the State. Some provisions apply to any individual who is stateless and present in the State's territory; other rights accrue only to individuals whose presence is "lawful". UNHCR presumes, however, that the smaller category of rights accrues to individuals awaiting determination of their statelessness, while persons who have been recognized as stateless should be granted the more comprehensive catalogue of rights.¹⁷ Without a right of residence, the individual's status remains insecure and he can be prevented from enjoying the rights guaranteed by the 1954 Convention and other human rights treaties.¹⁸

The absence of a right of residence is further problematic in view of the practice in many Member States of making the enjoyment of socioeconomic rights conditional on lawful residence. Union law also presumes that fair treatment needs to be accorded only to legally resident third-country nationals.¹⁹ In all EU Member States that operate a statelessness determination procedure, including France, Hungary, Spain, and the United Kingdom,

¹⁴ Art. 1 Charter of Fundamental Rights of the EU; Art. 2 TEU.

¹⁵ Art. 79(1) TFEU; Conclusions of the European Council of 26/27 June 2014.

¹⁶ Art. 25, 27, and 28 of the 1954 Statelessness Convention.

¹⁷ UNHCR Handbook on Protection of Stateless Persons, para 132.

¹⁸ *Ibid*, para 147.

¹⁹ See eg Art. 79(1) TFEU and Art. 15(3) Charter of Fundamental Rights of the EU.

statelessness is a conditional ground for a residence permit.²⁰ This practice recognizes that the rights of the 1954 Convention can only be meaningfully enjoyed through the grant of a right of residence. In line with the solution chosen in the EU's asylum regime, this right may initially be temporary and renewable but lead to permanent residence after five years of legal residence.²¹

Statelessness should not, however, in all situations be a ground for residence. First, the 1954 Convention allows for the expulsion of stateless persons on grounds of national security and public order.²² Second, there may be good reason to refuse residence to a stateless person if he has previously enjoyed residence in another country (which can be a third country or another Member State), and if that other country is willing to admit that person and accord him the standard of treatment required by the 1954 Convention.²³ UNHCR submits that in such cases, the status to be provided can be 'more transitional in nature'.²⁴ The Stateless Determination Procedure introduced in 2013 in the United Kingdom includes as a requirement for leave to remain that the applicant "is not admissible to their country of former habitual residence or any other country."²⁵ It is suggested therefore, that these two situations should be included as grounds for refusing a right of residence, although such persons must be treated as stateless persons and at least be granted those rights under the 1954 Convention that are not contingent on lawful presence as long as they factually remain in a Member State.

²⁰ Report of the Dutch Advisory Committee on Migration Affairs, 'No Country of one's own', The Hague, December 2013, pp. 63-67. The Belgian government has announced that the recognition of statelessness will as a rule lead to a grant of temporary residence: Regeerakkoord België 1 December 2011, para 2.7.8.

²¹ Directive 2011/95/EU, Art. 24; Directive 2011/51/EU.

²² Art. 31(1).

²³ Cf. UNHCR Handbook on Protection of Stateless Persons, para 153-157.

²⁴ Ibid, para 153.

²⁵ United Kingdom Immigration Rules, para 403(c).

About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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