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COUNCIL OF THE EUROPEAN UNION

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NOTE

From :	Presidency
to :	Asylum Working Party
Subject :	Discussion paper on subsidiary protection

General

The special European Council in Tampere stated at its meeting on 15-16 October 1999 that the common European asylum system should be completed with measures concerning subsidiary protection. It also advised the Council of the European Union to take the necessary decisions on the basis of the Commission proposals, in compliance with the schedule fixed in the Treaty of Amsterdam and the Vienna Action Plan.

Article 63 (2) (a) TEC imposes an obligation to decide on minimum standards for giving protection (for reasons other than those based on refugee status) to persons who cannot return to their country of origin or who otherwise need international protection. The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (the Vienna Action Plan)[1] adopted in December 1998 considers minimum standards for giving protection to those who are in need of international protection as a primary objective.

[1] OJ C 19, 23 January 1999.

In its report on the harmonisation of forms of protection complementing refugee status in the European Union, the European Parliament has expressed the wish that the work of harmonising Member States' legislation in this field be started immediately.

In discussions within the Asylum Working Party, it has appeared that the Member States consider that discussions are needed on a joint strategy on subsidiary protection. 6246/99 ASILE 7 drawn up by the German delegation includes a summary of the work that the Asylum Working Party has done in the field of subsidiary protection so far.

The purpose of this discussion paper is to outline preliminarily what aspects the Member States would like the joint strategy on subsidiary protection to cover. Temporary protection remains outside the scope of this paper.

Preconditions for granting subsidiary protection; target groups

In the discussions of the Asylum Working Party, support was given to the idea that at least the preconditions for granting protection could be harmonised, and that this harmonisation would be based on the valid international human rights instruments relevant to subsidiary protection. The most relevant of these valuable international instruments are Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The study on the international instruments relevant to subsidiary protection (10175/98 ASIM 178 ASILE 6 MIGR 6) includes an overview of some of these obligations.

Do all the Member States agree that at least all the valid international prohibitions of expulsion (other than those in compliance with Article 33 of the Geneva Convention) should be included in the Community legal instrument that will possibly be drafted?

- Death penalty, torture, inhuman or degrading treatment?

Should the Community legal instrument cover other situations besides international obligations binding the Member States? How should we, in the Member States' view, approach the following situations where conditions for refugee status are not met:

- systematic violence
- armed conflict (which is of long duration, and during which people are not provided with temporary protection)
- persecution for reasons other than race, religion, nationality, membership of a particular social group or political opinion
- violation of human rights which is not as serious as referred to in Articles 1 A and 33 of the Geneva Convention
- other general situation in the country of origin
- gender-specific problems
- impossibility of repatriation because of lack of transport links
- impossibility of repatriation because the country of origin refuses to take the applicant back
- factors relating to the applicant's state of health
- environmental disaster
- long duration of decision-making
- special needs of families with small children
- compulsory humanitarian reasons
- unaccompanied minors
- injustice of repatriation
- other similar reasons

Status of those benefiting from protection

As regards the instruments relevant to subsidiary protection (10175/98 ASIM 178 ASILE 6 MIGR 6), the study shows that these international instruments do not impose an obligation to grant the persons concerned any status, residence permits or similar rights. These international instruments only bind the Member States not to deport, or remove a person in another way from the country under certain circumstances.

It appears from 10676/97 ASIM 172 that the status of those benefiting from protection varies widely among Member States. The most common form of protection is a fixed-term residence permit which is renewable. There are, however, clear differences in whether an applicant is basically considered to stay in the country on a temporary or on a permanent basis. In addition, most Member States allow the applicant to remain in the country under certain circumstances on the basis of a permitted residence or because the deportation measures have been suspended. They do not, however, grant this person an official right of residence.

Furthermore, it was pointed out in the discussions that when applying the Dublin system, under which a foreign national may be transferred from one Member State to another, it is important that the person who is in need of protection receives the same standard of protection irrespective of the Member State in which his application is processed, even in cases other than those to which the Geneva Convention is applied.

- Do the Member States consider that the status of those benefiting from subsidiary protection should be harmonised?

If the Member States consider that the status of those benefiting from subsidiary protection should be harmonised, the following questions should also be discussed:

- Do the Member States consider that a consistent form of subsidiary protection (residence permit category) should be created for all who need subsidiary protection? This new form would cover the grounds based on international obligations and those relating to the situation in the country of origin, and also the grounds based on the applicant's situation in life. Or should we, alternatively, create different forms of protection based on the grounds for the need of protection?

Right to family reunification

Different Member States set different requirements for family reunification of persons benefiting from subsidiary protection. This may have an impact on the country in which the persons seek to settle. Some Member States have made it a requirement for family reunification that the family has guaranteed means of support whereas other Member States do not lay down this kind of conditions.

In some Member States, however, those benefiting from subsidiary protection do not have any right to family reunification.

- Should the right to family reunification of persons benefiting from subsidiary protection be harmonised?

Right to employment and social security

The rights to employment and social security granted to those benefiting from subsidiary protection vary among the Member States. The differences in the rights granted by different Member States have most likely some effect on the fact that the applicant seeks to stay in a certain Member State. On the other hand, it may be difficult to find a common solution to these problems at this point.

- Should the right to employment and social security of those benefiting from subsidiary protection be harmonised?

Procedures

9988/99 ASILE 9 (SEK (1999) 271 final) concerning common standards on asylum procedures states that there is a good case for using a single procedure to determine both questions relating to asylum and those relating to protection for other reasons to avoid having different procedures which might have to be applied consecutively, thus extending the time it takes to deal with an individual case. Once a Community legal instrument on common standards on asylum procedures has been adopted, it might be possible to decide that the procedure concerned be applied, as appropriate, even to cases where it has to be decided whether subsidiary protection is granted or not.

In these circumstances, we should know which States have already combined the two procedures, which States can combine the procedures in the short term, and which States would have serious difficulties in doing this.

Furthermore, an important issue relating to the procedures is the guarantees of legal protection. Therefore, we should also know in which States the persons applying for subsidiary protection have the right to appeal against the decision, and in which States this appeal has a suspensory effect on the implementation.