



**COUNCIL OF
THE EUROPEAN UNION**

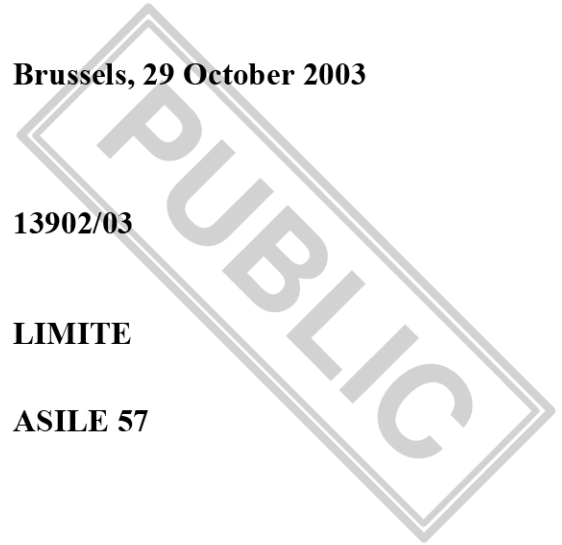
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LIMITE

ASILE 57



NOTE

from : Presidency

to : Permanent Representatives Committee

No. prev.doc. : 13901/03 ASILE 56

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

I

1. On 24 October 2000, the Commission presented a proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.¹ This proposal was the subject of discussions which led the Council to adopt Conclusions on this item at its meeting on 6 and 7 December 2001.² In these Conclusions, the Commission was invited to present an amended proposal taking into account the approaches defined by the Council.

When drafting the Conclusions, the Council took into account the Opinions of the European Parliament and the Economic and Social Committee, delivered respectively on 20 September 2001³ and 26 April 2001.⁴

¹ 11622/00 ASILE 46.
² 15107/1/01 ASILE 59 REV 1.
³ JO C 77E, 28.3.2002, p. 94.
⁴ JO C 193, 10.7.2001, p. 77.

2. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it nor subject to its application.

The United Kingdom¹ and Ireland² notified their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland.

3. In order to comply with the Council's invitation, the Commission convoked several meetings with national experts during the first quarter of 2002.

In June 2002, the Commission forwarded its amended proposal which was examined by the Council's bodies during the first half of 2003.

4. At its meeting on 5 June 2003, the JHA Council reached agreement on certain provisions of the amended 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).³ This mandate was confirmed by the Thessaloniki European Council.

Since then, the Asylum Working Party has met on several occasions in order to continue its examination of the proposal.

5. On 2 and 3 October 2003, the Council held a debate concerning a possible mechanism for identifying safe countries of origin and invited the Commission to work on the establishment of a minimum common list of such countries.

¹ 5631/01 ASILE 9.
² 6325/01 ASILE 17.
³ 10235/03 ASILE 35.

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

7. It is recalled that the Brussels European Council, held in Brussels on 16 and 17 October 2003, called upon the JHA Council to urgently complete its work on the proposal for a 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 and on the proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. The European Council recalled the need to comply with the deadline already set by the Seville and the Thessaloniki European Councils (end of 2003).
8. Delegations will find attached Articles 23 to 45 as they result from the work of the SCIFA, including some drafting changes suggested by the Presidency. Changes to 13901/03 ASILE 56 are in bold. Delegations comments are set out in the footnotes.
9. **The Permanent Representatives Committee** is asked to examine the following provisions :
 - (a) **safe third countries (Articles 27 and 28 and Annex II),**
 - (b) **unfounded applications (Article 29(2)),**
 - (c) **border procedures (Article 35A),**
 - (d) **appeals procedures (Articles 38 and 39).**
 - (a) **Safe third countries (Articles 27 and 28 and Annex II)**

At the JHA Council meeting on 2 October 2003, the question was put by the Presidency on whether delegations considered that a mechanism, similar to the one established for safe countries of origin, could be provided setting up a minimum common list of safe third countries.

As the necessary consensus was not reached on this question, the Working Party continued its work on Articles 27, 28 and Annex II, which only refer to national designation of safe third countries.

However, the Austrian delegation asked for this item to be included on the Council's agenda, in order to deal again with the possibility of establishing a minimum common list.

Neither at the Working Party nor at the SCIFA, have fundamental changes on delegations positions regarding this item arisen.

(b) Unfounded applications (Article 29(2))

At the SCIFA meeting, the Council Legal Service, supported by the Commission, expressed some perplexities concerning the wording of paragraph 2, Article 29. They both considered it as a tautologic drafting and recalled that the concept of "manifestly unfounded" applications is not defined in the draft Directive.

After long negotiations, the Presidency as well as delegations preferred to maintain such a provision, but in a more simplified draft. They considered that such a paragraph is useful since it creates the necessary links between Article 29 and Articles 23 (acceleration of the procedure) and 39 (limited suspensive effect).

(c) Border procedures (Article 35A)

This Article, unlike the one provided for in Article 35, is not a real border procedure for applicants for asylum.

In fact, provisions under Article 35A, which were asked for by the German delegation, supported by the Austrian and the United Kingdom delegations, concern the possibility of removal from the territory of a Member State in cases where an applicant for asylum comes from a neighbouring safe third country.

As most delegations were opposed to such a provision, an alternative draft was presented at the last SCIFA meeting which reached certain consensus.

(d) Appeals procedures (Articles 38 and 39)

This is a highly sensitive matter. The remaining questions outstanding are as follows :

- (i) During the work of the Working Party, the question was raised that Community law requires that the "remedy" foreseen in the draft Directive must be the one before the court or tribunal within the meaning of the case law of the Court of Justice on Article 234 TEC.

However, several delegations recalled that Council Conclusions (15107/1/01 ASILE 59 REV 1) established that the term "judicial body" should cover the concept of "quasi-judicial" in certain Member States. They considered a reference to "effective remedy before a national authority" would be sufficient.

With the changes introduced in paragraph 1 and the content of the second sentence of paragraph 2 of Article 38, the Presidency has tried to reach a compromise.

- (ii) The Commission proposal provided an automatic suspensive effect of the appeals made by an applicant for asylum to the decision of the determining authority concerning its application.

In Article 39(3) of the draft proposal, some exceptions to the principle of suspensive effect are provided for concerning special cases.

Certain delegations cannot agree with the principle of an automatic suspensive effect. They want suspensive effect to be decided on a case by case basis by the court or tribunal. For these delegations, this possibility should have the same relevance in the Directive as the suspensive effect.

In order to solve this problem, paragraph 2, Article 39 contains a stand-still clause, which has not been accepted by the relevant delegations.

- (iii) The Commission proposal provided for some cases where the applicant for asylum, after a negative decision on his/her application by the determining authority, could be removed without waiting for a decision by a court or tribunal on his request to remain on the territory. Following long discussions, the Presidency suggested deleting such a provision (former paragraph 5, Article 39), since it regards cases of expulsion which are out of the scope of the present Directive.

One delegation and the Commission asked for this provision to be reinserted.

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On these questions, the Permanent Representatives Committee is invited to advance negotiations or to indicate which of them should be submitted to the next JHA Council.

II

Amended proposal for a

COUNCIL DIRECTIVE

On minimum standards on procedures in Member States for granting and withdrawing refugee status

CHAPTER III

Procedures at first instance¹

Section I

Article 23

Examination procedure

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

¹ The following Recital will be added to the Preamble :
"It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum is left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive."

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, when no decision can be taken within six months,

- (a) the applicant concerned shall either be informed of the delay or
 - (b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time frame.
3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II.¹
 4. Moreover, Member States may lay down that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:²
 - (a) the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue 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*]; or

¹ F : scrutiny reservation linked to the final drafting of Chapter II.

² A/D : scrutiny reservations linked to the final drafting of Article 29(2).

F : scrutiny reservation linked to the final drafting of Chapter II.

FIN : submitted alternative wording included in addendum 1 to this note.

- (b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under 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*]; or
- (c) the application for asylum is considered to be unfounded because the applicant is from a safe country of origin within the meaning of Articles 30, 30A and 30B of this Directive, or
- (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or
- (e) the applicant has filed another application for asylum stating other personal data; or
- (f) the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or, it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
- (g) the applicant has made inconsistent, contradictory, unlikely or insufficient representations in relation to his/her having being the object of persecution under 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 a persons who otherwise need international protection*]; or

- (h) the applicant has submitted a subsequent application raising no relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or
- (i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or
- (j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or
- (k) the applicant failed without good reasons to comply with obligations referred to in Articles 7(1) and (2) 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*] and in Articles 9A(2)(a) and (b) and 20(1) of this Directive; or
- (l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible given the circumstances of his/her entry; or
- (m) the applicant is a danger to the national security or the public order of the Member State; or ¹
- (n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or

¹ **D** : read : "the applicant is a danger to the security of the Member State or constitutes a danger to the community of that Member State, or has been convicted by a final judgement of a particularly serious crime or the applicant has enforceable been expelled for serious reasons of public security and public order under national law; or"

- (o) the application was made by an unmarried minor to whom Article 5(4)(c) applies after the application of the parents or parent responsible for the minor has been rejected by a final decision.¹

Article 24

Specific procedures

Member States may moreover provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

- (a) a preliminary examination for the purpose of processing cases considered within the framework of the provisions set out in Section IV;
- (b) procedures for the purpose of processing cases considered within the framework set out in Section V.²

¹ **FIN**, supported by **NL/S/Cion** : add "and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin".

D/IRL/UK : scrutiny reservations on this suggestion.

² **F** : add the following sub-paragraph :

"(c) procedures for the purpose of processing cases, within the framework of the provisions of Section III."

Section II

Article 25

Cases of inadmissible applications

1. Where an application is considered inadmissible under this Article, Member States are not required to examine whether the applicant qualifies 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*].
2. A Member State shall consider an application for asylum as inadmissible, if another State is responsible for examining the application according to the rules establishing criteria and mechanisms for determining which State is responsible for considering an application for asylum, unless that Member State examines an application for asylum even if such examination is not its responsibility under such criteria.
3. In addition, Member States may consider an application for asylum as inadmissible if:
 - (a) another Member State has granted refugee status;
 - (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;
 - (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Articles 27 and 28;

- (d) the applicant is allowed to remain in the Member State concerned on some other ground and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue 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*];
- (e) **the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement. In these cases, when the person concerned is no longer allowed to remain in the territory, Member States shall allow him/her to submit an application for asylum without any negative consequences;**¹
- (f) the applicant has lodged a subsequent application after a final decision and he/she does not submit new elements or findings, having occurred after the final decision, establishing a well-founded fear of persecution by virtue 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*];²
- (g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf and there are no facts relating to the dependant's situation justifying a separate application.

¹ NL : scrutiny reservation.

D : reservation. This level of protection is very low.

² Cion : this sub-paragraph should be deleted or inserted under Article 39(3).

Article 26

Application of the concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if

- (a) he/she has been recognised by that country or by UNHCR in that country as a refugee and he/she can still avail himself/herself of that protection, or
- (b) he/she enjoys **otherwise sufficient** protection in that country, **where he/she can benefit from the principle of "non-refoulement"**,

provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum, Member States may take into account the content of Annex II.

Article 27

National designation of countries as safe third countries¹

1. Member States may consider that a third country is a safe third country for the purpose of examining applications for asylum only in accordance with Annex II.
2. Member States may retain or introduce legislation that allows for the designation by law or regulation of countries as safe third countries. Such laws or regulations shall be compatible with Article 28.²
3. Member States which, at the date of entry into force of this Directive, have in force laws or regulations designating countries as safe third countries and which wish to retain these laws or regulations, shall notify them to the Commission within six months of the entry into force of this Directive and shall notify as soon as possible any subsequent relevant amendments.

Member States shall notify to the Commission as soon as possible any introduction of laws or regulations designating countries as safe third countries after the entry into force of this Directive, as well as any subsequent relevant amendments.

¹ **E** : add cases concerning certain communities which may be sure in some countries which have not ratified the Geneva Convention. It will submit a text relating also to Annex II.
F : scrutiny reservation concerning the safe third countries principle. It will submit a text.
FIN : scrutiny reservation.

² **UK** : scrutiny reservation concerning Articles 27 and 28 and Annex II.
A/D/NL : designation of safe third countries should be done in a common basis, through the establishment of criteria, leading to a single list. Otherwise, there would be a risk of secondary movements between Member States. A mechanism allowing updating of the list should be established.
IRL/NL : concerning safe third countries, a flexible mechanism should be established.
F/P/S : supported the Presidency draft. They were opposed to the establishment of any common list of safe third countries. They could only accept national lists in the Member States wishing to do so.

Article 28

Application of the safe third country concept

1. A country that is a safe third country in accordance with Annex II can only be considered as a safe third country for a particular applicant for asylum if:¹
 - (a) the applicant has² an opportunity to avail himself/herself of the effective protection of the authorities of that country; and³
 - (b) this particular applicant will be admitted or re-admitted to this country.⁴
2. **Member States may assume that the applicant has an opportunity to avail himself/herself of the protection of the authorities of a country if he/she has travelled through that country and he/she has had an effective opportunity to apply for asylum.⁵**
3. When implementing a decision based solely on this concept, Member States shall :
 - (a) inform the applicant accordingly; and
 - (b) provide him/her with a document in the language of the third country informing the authorities of that country that the application has not been examined in substance.

¹ **A/D** : scrutiny reservations linked to Article 35A.

S : reservation.

² **UK** : reinsert the words "or would have".

D : read "has had" instead of "has".

³ **A/IRL/NL/UK** : add "or".

Cion, supported by **B/D/F/FIN/S**, opposed to such an adding.

⁴ **Cion**, supported by **IRL/UK** : add the following paragraph :

"Member States need not examine whether the country is a safe third country in the particular circumstances of the applicant, where the Member State has designated the third country as a safe third country by parliamentary act or by national legislation in accordance with Article 27 paragraph 2."

B/D/NL/S : scrutiny reservations on this suggestion.

⁵ **A/EL/FIN/NL/UK** : scrutiny reservations.

Section III

Article 29¹

Cases of unfounded applications

1. Without prejudice to Articles 19 and 20, Member States may only reject an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to 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*].
2. **Unfounded applications for asylum in which any of the circumstances mentioned in Article 23(4) have been established, may, if national law so provides, be rejected as manifestly unfounded. Member States, in this case, may apply rules under Article 39(3).**²

¹ **UK** : scrutiny reservation linked to the final drafting of Article 39.

² **Cion** : this provision should be deleted and substituted by a Recital.

Article 30
Safe countries of origin

1. A third country can be designated as a safe country of origin for the purpose of examining applications for asylum only in accordance with Annex III.

2. A third country that is designated as a safe country of origin in accordance with the criteria set out in Annex III can, after an individual examination of the application, 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) he/she was formerly habitually resident in that country;

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]*.

3. Without prejudice to Article 30B, Member States shall, in accordance with paragraph 2, consider the application for asylum as unfounded where the third country is designated by the Council as safe pursuant to Article 30A.

Article 30A

Minimum common list of third countries as safe countries of origin¹

1. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries that shall be regarded by Member States as safe countries of origin in accordance with 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. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with 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.
3. 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(3) shall be suspended with regard to this third country as of the day following the Council decision requesting such a submission.
4. 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(3) shall be suspended with regard to the third country as of the day following the notification of the request to the Council.
5. The European Parliament shall be informed of the suspensions under paragraphs 3 and 4.

¹ **The Chair** recalls that following the JHA Council meeting on 2 October 2003, the Commission was charged to draft a first minimum common list of safe countries of origin to be attached to this Directive. Consequently, if such a list is agreed, some drafting changes to this Article will be needed.

6. The suspensions under paragraphs 3 and 4 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.

7. 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 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.

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 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 :
"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."

Article 31

(deleted)

Section IV

Article 32

(deleted)

Article 33

Cases of subsequent applications¹

1. Member States may apply a specific procedure as referred to in paragraph 2, where a person makes a subsequent application for asylum:
 - (a) after his/her previous application has been withdrawn by virtue of Articles 19 or 20;²
 - (b) after a decision has been taken on his/her previous application. Member States may decide to apply this procedure only after a final³ decision has been taken.⁴

¹ **S** : scrutiny reservation linked to its reservation to Article 38(1)(c).

² **FIN** : scrutiny reservation. Other reasons for having withdrawn the application should be considered.

³ **E** : delete the word "final".

⁴ **The Chair** : suggested to delete this sentence.

B : suggested the following draft :

"after a decision on his/her previous application has been taken, provided that there is no more appeal possibility on the merits."

2. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 1(b) on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue 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]* have arisen or have been presented by the applicant.
3. If, following the preliminary examination referred to in paragraph 2, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue 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]*, the application shall be further examined in conformity with Chapter II.
4. Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons which significantly add to the likelihood of the applicant qualifying as a refugee by virtue 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]*.¹
5. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 2, 3 and 4 in the previous procedure, in particular by filing an appeal before a court or tribunal.

¹ **D** : read :
"Member States may, in accordance with national legislation, further examine a subsequent application where there are other reasons according to which a procedure has to be reopened."

6. This procedure may also be applicable in the case of a dependant who lodges an application, after he/she has in accordance with Article 5 (3), consented to have his/her case be part of an application made on his/her behalf. In this case the preliminary examination referred to in paragraph 2 will consist of examining whether there are facts relating to the dependant's situation justifying a separate application.

Article 33A

(deleted)¹

Article 34

Procedural rules

1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 33 enjoy the guarantees listed in Article 9 (1).
2. Member States may lay down in national law rules on the preliminary examination pursuant to Article 33. Those rules may inter alia:
 - (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
 - (b) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her;
 - (c) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview.

¹ **D** : reservation on the deletion of this Article which read "Member States may retain or adopt the procedure provided for in Article 33 in the case of an application for asylum filed at a later date by an applicant who, either intentionally or owing to gross negligence, fails to go to a reception centre or to appear before the competent authorities at a specified time".

The conditions shall not render the access of applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.

3. Member States shall ensure that

- (a) the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, in case the application will not be further examined, of the reasons and of the possibilities of seeking an appeal or review of the decision;¹
- (b) if one of the situations referred to in Article 33 (2) applies, the determining authority shall further examine the subsequent application in conformity with the provisions of Chapter II as soon as possible.

¹ **IRL** : read "...and of the possibilities of challenging the decision."
UK : scrutiny reservation linked to the final drafting of Chapter V.

Section V

Article 35

Cases of border procedures¹

1. Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide, at the border or transit zones of the Member State, on the applications made at such locations.²
2. However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force at the time of the adoption of this Directive, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations.

¹ **UK** : parliamentary scrutiny reservation concerning this Article.

A : reservation linked to Article 35A.

² **B** : add a Recital in order to explain that the border procedure applies to those applicants which do not meet the conditions for entry to the territory.

3. The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

- shall be allowed to remain at the border or transit zones of the Member State, without prejudice to Article 6; and
- must be immediately informed of their rights and obligations, as described in Article 9 (1) (a); and
- have access, if necessary, to the services of an interpreter, as described in Article 9 (1) (b); and
- are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 10 to 12; and
- can consult a legal adviser or counsellor admitted as such under national law, as described in Article 13 (1); and
- have a representative appointed in the case of unaccompanied minors, as described in Article 15 (1), unless Article 15(2) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why his/her application for asylum is considered as unfounded or as inadmissible.

4. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.
5. In event of particular types of arrivals or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.
6. Member States shall notify the Council and the Commission of the implementation of the procedures referred to in this Article.

Article 35A¹

1. **Member States may maintain in accordance with the laws in force at the time of adoption of this Directive 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

¹ NL/S : reservations.

D : preferred the following alternative wording :

"Article 35A

1. Member States may also provide that a person requesting asylum with a border authority cannot be allowed to enter the territory if:
 - (a) he enters from a safe third State in the sense of Article 27;
 - (b) it is obvious that the person was safe from persecution in another third country; or
 - (c) he 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.
2. The person requesting asylum can be removed if the border authority finds in the vicinity of the border immediately before or after in illegal entry and if the conditions pursuant to paragraph 1 apply.
3. In cases of an illegal entry of a person requesting asylum from a safe third State according to paragraph 1 (a), the person may be removed to such a safe State by the competent national authorities also from inside the country.
4. Member States may provide that no asylum procedure according to Chapter II of this Directive takes place in cases of paragraphs 1 to 3 of this Article. Articles 17 and 22 of this Directive apply accordingly.
5. When the removal of the applicant cannot be effected, Member States shall in any case apply the provisions of this Directive."

² A/D/FIN : scrutiny reservations.

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; and¹

has been so designated by an act of parliament or with the consent of parliament by national legislation.²

3. 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.

¹ **D** : cases where the applicant poses a threat to the general public should also be included under paragraph 2.

² **P** : scrutiny reservation.

CHAPTER IV

Procedures for the withdrawal of refugee status

Article 36

Withdrawal of refugee status

Member States shall ensure that an examination may be started to withdraw the refugee status of a particular person when new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.

Article 37

Procedural rules

1. Member States shall ensure that, where the competent authority is considering to withdraw the refugee status of a third country national or stateless person in accordance with Article 14B 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*], the person concerned shall enjoy the following guarantees:
 - (a) to be informed in writing that the competent authority is reconsidering his or her qualification for refugee status and the reasons for such a reconsideration; and
 - (b) to be given the opportunity to submit, in a written statement or in¹ a personal interview in accordance with Article 9 (1) (b) and Articles 10 to 12, reasons as to why his/her refugee status should not be withdrawn.

¹ FIN/NL : scrutiny reservations. A personal interview should always be possible.

In addition, Member States shall ensure that within the framework of such a procedure:

- (c) the competent authority is able to obtain precise and up to date information from various sources, such as, where appropriate, information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of the persons concerned; and
- (d) where information is collected on the individual case for the purpose of reconsidering the refugee status, it is not obtained from the actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a refugee, whose status is under reconsideration, nor jeopardize the physical integrity of the person and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

Member States may derogate from Articles 9 (1) (b) and Articles 10 to 12 when it is technically impossible for the competent authority to comply with the provisions of those Articles.¹

2. Member States shall ensure that the decision of the competent authority to withdraw the refugee status is given in writing. The reasons in fact and in law shall be stated in the decision and information on how to challenge the decision² shall be given in writing.

¹ **NL**, supported by **FIN** : add "because the person concerned is no more present in the territory of the Member State".

P : suggested to read "for instance in cases where the person concerned is no more present in the territory of the Member State."

² **UK** : scrutiny reservation linked to the final drafting of Chapter V.

3. Once the competent authority has taken the decision to withdraw the refugee status, Articles 13, paragraph 2, 14, paragraph 1 and 21 are equally applicable.
4. By derogation to paragraphs 1, 2 and 3, Member States may decide that the refugee status lapses by law in case of cessation in accordance with Article 13(1), sub-paragraphs (a), (b), (c) and (d) 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*] or if the refugee has unequivocally renounced his/her recognition as a refugee.¹

¹ NL : scrutiny reservation. Procedural guarantees should be included in this provision.

CHAPTER V
Appeals procedures¹

Article 38
The right to an effective remedy²

1. Member States shall ensure that applicants for asylum have the right to an effective remedy, **including** before a court or tribunal against the following :³
 - (a) a decision taken on their application for asylum made in the territory of the Member State, including at its border or in its transit zones as described in Article 35(1);
 - (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

¹ **IRL** : scrutiny reservation on the entire Chapter.
A/EL/UK : reservations on the entire Chapter.
P : linguistic reservation on the entire Chapter.

² **E** : reservation linked to Article 39.
A/B/EL/P/UK : recalled that Council conclusions (15107/1/01 ASILE 59 REV 1) established that the term "judicial body" should cover the concept of "quasi-judicial" in certain Member States. They considered a reference to effective remedy before a national authority would be sufficient.

Cion : recalled existing caselaw of the Court of Justice of the European Communities concerning this issue.

The Council Legal Service opinion regarding this question is set out in 8124/03 JUR 168 ASILE 21.

³ **D** : scrutiny reservation on this paragraph linked to the final drafting concerning safe third countries.

The following Recital will be added to the Preamble :

"It reflects a basic principle of Community law that the decisions taken on an application for asylum must be subject to an effective remedy before a court or tribunal in the meaning of Article 234 TEC. The effectiveness of the remedy depends on the administrative and judicial system of each Member State seen as a whole."

NL : scrutiny reservation concerning this Recital.

- (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;¹
 - (d) a decision refusing entry within the framework of the procedures provided for under Article 35 (2);
 - (e) a decision for the withdrawal of the refugee status pursuant to Article 37.
2. Member States shall ensure that the effective remedy referred to in paragraph 1 includes the possibility of an examination on both relevant facts and points of law.²

Member States may provide that the courts and tribunals may, for the establishment of the relevant facts, be allowed to rely on examinations conducted by administrative authorities or other third parties.³

¹ S : reservation. An important number of appeals could be involved.

² EL : scrutiny reservation.

B, supported by A : add the following : "in that context, Member States may provide that the examination of facts by a court or tribunal can be limited."

Should this text not be accepted, A would ask to add the following paragraph :

"3. Member States may under national law provide that the effective remedy referred to in paragraph 1 is guaranteed through the combined effect of two or more successive remedies before a court or tribunal."

³ E/UK : scrutiny reservations.

Article 39

Right to remain during review and appeal proceedings¹

1. **Without prejudice to paragraph 2**, Member States shall allow applicants for asylum lodging an appeal before, or requesting a review by, a court or tribunal in accordance with Article 38, to remain in the Member State concerned pending its outcome.

Member States shall also allow applicants for asylum requesting a review by an administrative body prior to appeal before, or review by, a court or tribunal to remain in the territory of the Member State concerned pending its outcome.

¹ **FIN** : scrutiny reservation concerning the entire Article.

E/P : reservations. Avoid establishing the suspensive effect as a general rule for appeals. E submitted the following wording which is supported by P :

"Article 39

Right to remain during review and appeal proceedings

1. The legal consequences of a negative decision taken by the determining authority on an application for asylum will not be suspended by the lodging of an appeal before, or the request of a review by, a court or tribunal in accordance with Article 38, or of a request of a review by an administrative body prior to appeal before, or review by, a court or tribunal.
2. National legislation shall establish the cases and conditions in which paragraph 1 will not be applicable, providing at least that the applicant has the right to request a court or tribunal of the Member State concerned to decide that he or she be allowed to remain in the territory pending the outcome of the appeal or review.
3. Where national legislation establishes that, as a general principle and in derogation of paragraph 1, applicants are allowed to remain in the territory of the concerned Member State during review or appeal proceedings, it may as well exclude from this general principle complete categories of applications, such as the following:
 - (a) where the application for asylum is considered to be inadmissible; or
 - (b) where the application is considered to be unfounded pursuant to Article 29(1) and any of the cases listed in Article 23(4) apply; or
 - (c) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33; or
 - (d) where entry is refused within the framework of the procedures provided for under Article 35.
4. Member States shall ensure that applicants for asylum are duly informed of the possibilities and conditions to remain in a Member State pending the outcome of the reviews or appeals referred to in paragraph 1."

2. In derogation to paragraph 1, Member States may maintain national legislation in force on the date of the adoption of this Directive by which applicants for asylum can be allowed to remain in the Member State only upon a decision by a court or tribunal.¹
3. Member States may maintain or introduce national legislation derogating from paragraph 1 in the following cases:
 - (a) where the application for asylum is considered to be inadmissible; or
 - (b) where the application is considered to be unfounded pursuant to Article 29(1) and any of the cases listed in Article 23(4) apply; or
 - (c) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33; or
 - (d) where entry is refused within the framework of the procedures provided for under Article 35; **or**
 - (e) **where the review has not been requested or the appeal has not been lodged within the time limits provided for in national law; or**
 - (f) **where the applicant for asylum has been or is detained with a view to deportation in accordance with Article 5 ECHR; or**
 - (g) **where the application for asylum is considered to be unfounded pursuant to Article 29(1) and has been rejected within four weeks in a procedure in conformity with Chapter II;**²

¹ A/D/I : preferred the former text which read :
"Member States may maintain national laws in force on the date of the adoption of this Directive, which derogate from the principle of paragraph 1."

² NL : scrutiny reservation linked to its wording concerning paragraph 3.
F : scrutiny reservation concerning sub-paragraphs (e) to (g).

provided that the applicant has the right to request a court or tribunal of the Member State concerned to decide that he or she be allowed to remain.¹

4. Member States concerned shall ensure that applicants for asylum are duly informed of the possibilities to challenge a negative decision.²

¹

UK : read :

"Member States may provide that the applicant has the right to request a court or tribunal of the Member State concerned to review the lawfulness of the decision, or to decide that he/she be allowed to remain in that Member State."

Cion opposed to UK text.

S : scrutiny reservation on UK text.

D : add the following : "In cases under Article 39(3)(c) an expulsion make take place until a decision by a court has been obtained." Also add the following paragraph :

"Member States may also derogate from paragraph 1 of Article 35A" (Eventually to be modified in accordance with the final text of Article 35A).

²

A/IRL/L/UK : this paragraph should be deleted.

Cion preferred the former version of this paragraph which read :

"Member States concerned shall ensure that applicants for asylum are duly informed of the possibilities to obtain a decision by a court or tribunal as provided for in paragraphs 2 and 3."

A/Cion : scrutiny reservations on the deletion of former paragraph 5 which read :

"5. No expulsion shall take place until the court or tribunal has ruled in the case referred to in paragraph 4. Member States may provide for an exception in the following cases:

- (a) where it has been decided that an application for asylum is inadmissible;
- (b) where a court or tribunal has already rejected a request from the concerned applicant for asylum to remain in the Member State concerned and it has been decided that, since that rejection, no new relevant facts have been submitted with respect to the particular circumstances of the applicant or his/her country of origin after this rejection;
- (c) where a subsequent application will not be further examined in conformity with Chapter II as referred to in Article 33;
- (d) where it has been decided that grounds of national security or public policy preclude the applicant for asylum from remaining at the border, airport or port transit zones or in the Member State concerned;
- (e) where the applicant for asylum is from a safe country of origin within the meaning of Articles 30 and 31."

Article 40¹

Time limits and scope of the examination in review or appeal

1. Member States shall provide for:
 - (a) time limits for giving notice of appeal or judicial review² and, where applicable, for requesting an administrative review;
 - (b) all other necessary rules for lodging an appeal or requesting a judicial review and, where applicable, for requesting an administrative review;
 - (c) rules whereby, if the court or tribunal overturns a decision, it must either remit the case to the determining authority for a new decision or must itself take a decision on the merits of the application.
2. Member States may lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her review or appeal together with the rules on the procedure to be followed in these cases.
3. Member States may lay down time limits for the court or tribunal to examine the decision of the determining authority.

¹ **D** : add the following provision :

"Article 40A

Member State's rights to an effective remedy before a court against the decisions taken by a court or authority are not affected."

F/NL : such an idea could be expressed in a Recital.

² **UK** : reservation on the reference to "giving notice of appeal or judicial review".

CHAPTER VI
General and final provisions¹

Article 41

Confidentiality

Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.²

¹ The following Recital will be added to the Preamble:

"With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination."

² (Former paragraph 5 of Article 7).

Article 42

Report

No later than two years after the date specified in Article 43, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up this report. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every two years.

Article 43

Transposal

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after the date of its adoption] They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Member States shall communicate to the Commission the text of the provisions of national law, which they adopt in the field covered by this Directive.¹

¹ **The Chair** suggested to add a provision concerning the treatment of those applications lodged before the transposal of this Directive by the Member States and which have not been yet solved by the competent authorities at the date of the transposal. Such a provision could follow the lines of Article 29 of Council Regulation (EC) 343/2003 ("Dublin Regulation").

Article 44
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 45
Addressees

This Directive is addressed to the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels,

For the Council
The President

DEFINITION OF "DETERMINING AUTHORITY"

When implementing the provision of this Directive, Ireland may, insofar as the provisions of section 17 (1) of the Refugee Act 1996 (as amended) continues to apply, consider that:

- “*determining authority*” provided for in Article 2 (e) of this Directive shall, insofar as the examination of whether an applicant should or, as the case may be, should not be declared to be a refugee is concerned, mean the Office of the Refugee Applications Commissioner; and
- “*decisions at first instance*” provided for in Article 2 (e) of this Directive shall include recommendations of the Refugee Applications Commissioner as to whether an applicant should or, as the case may be, should not be declared to be a refugee.

Ireland will notify the European Commission of any amendments to the provisions of section 17 (1) of the Refugee Act 1996 (as amended).

DESIGNATION OF SAFE THIRD COUNTRIES¹

In considering whether a country is a safe third country **with regard to those foreign nationals or stateless persons to which the designation would apply**,² regard shall be had to whether it

- (a) observes the standards laid down in international law for the protection of refugees and
- (b) observes basic standards laid down in international human rights law relevant to the prohibition of the removal of refugees and persons seeking asylum.

A. The standards laid down in international law for the protection of refugees

A safe third country is any country that has ratified the Geneva Convention and observes the provisions of that Convention with respect to the³ rights of persons who are recognised and admitted as refugees.

¹ **D** : wanted an introduction similar to the one which appears under Annex III. The Chair will provide a text in this sense for the next meeting of the Asylum Working Party.

UK : add cases where part of a country may be considered as a safe third country.

² **E** : introduce cases concerning certain communities which may be sure in some countries which has not ratified the Geneva Convention. It will submit a text.

³ **UK** : read : "principle of non-refoulement" (rest deleted).

Notwithstanding the above, a country that has not ratified the Geneva Convention may still be considered a safe third country if¹

- (a) it observes in practice the standards laid down in the Geneva Convention with respect to the² rights of persons in need of international protection within the meaning of this Convention; or
- (b) it complies in another manner with the need for international protection of these persons, either through cooperation with UNHCR or other organisations which may be working on behalf of the UNHCR or by other means deemed to be adequate for that purpose by the UNHCR.

B. The basic standards laid down in international human rights law

A safe third country is any country that has ratified the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as ‘European Convention’) or³ the 1966 International Covenant on Civil and Political Rights (hereafter referred to as ‘International Covenant’) or the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as ‘Convention against Torture’), observes the standards laid down therein with respect to the right to life, freedom from torture and cruel, inhuman or degrading treatment, and provides effective remedies against foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant or Article 3 of the Convention against Torture.

¹ **D** : reservation linked to Article 35A.

FIN : This sub-paragraph could be deleted.

² **UK** : read "principle of non-refoulement" (rest deleted).

³ **D** : reservation linked to Article 30A.

Notwithstanding the above, a country that has not ratified the European Convention or the International Covenant or the Convention against Torture may still be considered to be a safe third country if it observes in practice the standards laid down in International Human Rights Law with respect to the right to life, freedom from torture and cruel, inhuman or degrading treatment, and provides effective remedies against foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant or Article 3 of the Convention against Torture.¹

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Every general assessment of the observance of these standards for the purpose of designating a country as a safe third country in general or with respect to certain foreign nationals or stateless persons in particular must be based on a range of sources of information, which may include reports from diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

Where Member States solely assess in an individual decision the safety of a third country with respect to a particular applicant, such a decision need not be motivated on the basis of a general assessment as provided above.

¹ **D** : scrutiny reservation.

DESIGNATION OF SAFE COUNTRIES OF ORIGIN¹

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently neither persecution 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.

In making this assessment, account shall be taken inter alia of the extent to which protection is provided against persecution or mistreatment through :

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of 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;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms.

¹ **S** : parliamentary scrutiny reservation.
UK : scrutiny reservation.