



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 24 March 2004**

**7729/04**

---

**Interinstitutional File:  
2000/0238 (CNS)**

---

**LIMITE**

**ASILE 19**

**PUBLIC**

**NOTE**

---

from : Presidency

to : Council

on : 30 March 2004

---

No. prev.doc. : 7484/04 ASILE 17

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

---

Following presentation of this Note to the Permanent Representatives Committee on 24 March 2004, the Presidency invites the Council to consider questions at part III.

**I. Introduction**

1.1 The draft Directive has been the subject of intense negotiations under various Presidencies since 2000. European Councils have closely monitored the negotiations and have continually urged Ministers to reach agreement within set deadlines.

1.2 The last European Council, on 12 December 2003, welcomed the significant progress achieved in the negotiations for the adoption of the draft Directive. While taking note of the persisting political obstacles that have been delaying the conclusion of these negotiations, it reaffirmed the importance of developing a common European policy on asylum and invited the Justice and Home Affairs Council to complete its work as soon as possible to ensure that the first phase of the establishment of a European Asylum System is fully implemented within the deadline set in Tampere and the TEC. Consequently, it is a priority of the Irish Presidency to seek to resolve outstanding issues on the draft Directive by 1 May 2004.

1.3 The Presidency has made every effort to achieve a compromise on the outstanding issues including consideration of key issues at the informal JHA Council meeting on 22/23 January 2004, the JHA Council meeting on 19 February 2004 and meetings of COREPER, SCIFA, JHA Counsellors and informal meetings with Member States. Compromise proposals have been presented by the Presidency in line with the outcome of these meetings. This has allowed the Presidency to, inter alia, resolve problems on legal assistance, the personal interview and the scope of the Directive.

1.4 However, while there has been some progress, *four key issues* remain to be resolved, namely:

- the safe third country concept (Articles 27 and 28);
- exceptional application of the safe third country concept (Article 28A and 28B);
- the safe country of origin concept (Articles 30, 30A, 30B); and
- appeals provisions (Articles 38, 39 and 40).

- 1.5 While some delegations have shown a willingness to compromise on many Articles in the draft Directive, a small number of delegations have indicated that they will not be able to compromise on their stated positions in relation to the key issues. The Presidency has concluded, therefore, that a situation of deadlock now exists. The potential consequences of this situation are that mutual confidence in each others asylum systems will be eroded and a common EU asylum system based on minimum standards as envisaged by both the Tampere and Amsterdam Treaty will not be fully achieved.
- 1.6 The Presidency considers that, unless the small number of delegations referred to above are willing to compromise, there is nothing to be gained from continuing with the current approach of examining individual reservations to this text to see if consensus can be reached. Thus, the Presidency considers that it is now time to consider an alternative approach – a radical streamlining of the provisions. A possible framework for this approach is set out below.

## **II. Possible framework**

- 2.1 **Safe countries of origin (Articles 30, 30A, 30B)** – The Presidency recalls the decision of Council on 2/3 October 2003 to set up a minimum EU common list of safe countries of origin, to be adopted if possible at the same time as the Asylum Procedures Directive, that will be binding on all Member States. The text of these Articles was agreed subject to reservations from two delegations on Article 30B and the designation criteria set out in Annex II. One delegation has difficulties with the criteria for designation of countries as safe countries of origin for the purposes of national lists. That delegation also wants the flexibility to designate parts of countries as safe or countries/parts of countries as safe for specified groups of persons.

2.2 **Presidency proposal** – the Presidency presented a proposal to a meeting of JHA Counsellors on 23 March 2004 (see Annex) in the context of testing the new suggested approach. In summary, this proposal provides for:

- A 5 year standstill clause, with the possibility of extending this for a further 5 years, for those Member States who wish to maintain national safe country of origin concepts existing at the time of the adoption of the Directive.
- The designation criteria would be set by Member States.
- The concept of a common EU list of safe countries of origin rather than the concept of a common minimum EU list.

2.3 At the meeting of JHA Counsellors a preference was expressed for a minimum common list which would coexist with national lists on the basis of the designation criteria in Annex II. A possible compromise proposal received a positive response.

2.4 **Safe third countries (Articles 27 and 28)** – outstanding problems include:

- Two delegations do not want the possibility for the applicant to have access to an asylum procedure to form part of the designation criteria notwithstanding the contrary view of the majority of delegations as expressed at the informal JHA Council on 22/23 January 2004.
- Four delegations insist that there should be an opportunity for the applicant to rebut the presumption of safety in every case and want the relevant derogation in Article 28(2) deleted.
- Consensus cannot be reached on the nature of the connection between the applicant and the third country.
- One delegation wants the flexibility to designate third countries on the basis of a number of the designation criteria only.

2.5 **Presidency proposal** - The contentious provisions could be restricted to the following requirements:

- Member States to only apply the safe third country principle where the applicant is treated in accordance with certain principles e.g. those currently listed in Article 27(3)(a) to (c) of 7184/1/04 REV 1 ASILE 13.
- Member States to lay down in their national legislation all of the rules governing the application of the safe third country concept to individual applicants, perhaps subject to notification and/or reporting at Council level.

2.6 Consequently, the provisions regarding the nature of the connection and the mechanism for applying the concept (i.e. designation by list or on a case by case basis, application of the rebuttable presumption, etc.) could be left to national discretion.

2.7 **Appeals (Articles 38, 39 and 40)** - The main problems on these Articles relate to the difficulty in reflecting national systems of non-suspensive effect of appeals (Article 39). Despite an orientation debate at the JHA Council of 19 February 2004, a number of delegations still insist that there should be a derogation from the right of applicants to request a court or tribunal that they be allowed to remain in the territory of the Member State pending an appeal or review. One delegation considers that its legal system is not fully reflected in these appeals provisions.

2.8 **Presidency proposal** - Article 38 on the right to an effective remedy would remain as currently drafted in 7184/1/04 REV 1 ASILE 13. The contentious provisions of Article 39 would be restricted to oblige Member States to lay down rules:

- On whether an appeal or review would have suspensive effect.
- On the right to request a court or tribunal whether an applicant can remain pending the outcome of the appeal or review.

2.9 **Exceptional application of the safe third country concept (Article 28A)** – One delegation wants to have the possibility to establish a national list of safe third countries for the purposes of this procedure in addition to the proposed common EU list. Three delegations do not want the procedure to operate on the basis of an agreement with the third country concerned. Concerns have been expressed that the provisions are more appropriate to border procedures rather than safe third country procedures.

2.10 **Presidency proposal** - the approach to this Article could include:

- Re-associating the Article with Section V of the Directive dealing with border procedures.
- Retaining the higher designation criteria for third countries.
- Retaining the concept of the common EU list of safe third countries as a requirement for the application of the provisions of the Article.
- Introducing a requirement for Member States to set out in their national legislation the modalities for the application of the procedure.
- Deleting the current requirement for an agreement and providing for a Council/Commission joint statement to the effect that the conclusion of agreements would be pursued with third countries considered as safe under this Article.

### III. Questions for Council

**The Council is invited to consider the following questions:**

- 1. In relation to safe countries of origin and the Presidency proposal in the Annex, does the Council wish discussions to continue based on:**
  - **The present text in 7184/1/04 REV 1 ASILE 13 with the possibility of one Member State not participating in the final Directive; or**
  - **Option 1 as presented by the Presidency at the JHA Counsellors meeting - the concept of a common EU list of safe countries of origin and a 5/10 year standstill clause on national concepts; or**
  - **Option 2 as proposed at the JHA Counsellors meeting - a minimum common list coexisting with national lists based on the same designation criteria, with a more restricted standstill clause.**
  
- 2. Does the Council agree that the Presidency's proposed framework for dealing with safe third countries, Article 28A and appeals should be followed in tandem with negotiations on or following agreement on the safe country of origin approach.**

**Article 23**

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:

...

- (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 **and** 30A [...] of this Directive, or
  - **because the applicant is from a safe country of origin within the meaning of Article 30 B; or**
  - because the country which is not a Member State is considered to be a safe third country for the applicant, without prejudice to Article 29(1); or

....

**Article 30**  
**Safe countries of origin**

1. **The Council may designate** a third country as a safe country of origin for the purpose of examining applications for asylum only in accordance with Annex II.
  
2. A third country that is designated as a safe country of origin in accordance with the criteria set out in Annex II 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 serious 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. [...] Member States shall, in accordance with paragraph 2, consider the application for asylum as unfounded where the third country is designated by the Council [...].

## Article 30A

### Common list of third countries as safe countries of origin

1. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a [...] common list of third countries that shall be regarded by Member States as safe countries of origin in accordance with Annex II. 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 [...] common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State that it submit a proposal to amend the [...] common list.
3. Where the Council requests the Commission to submit a proposal for removing a third country from the [...] 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 [...] 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.

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 [...] common list is still in conformity with Annex II. When presenting its report to the Council and the European Parliament, the Commission may make such recommendations or proposals as it deems appropriate.

## Article 30 B

### National safe country of origin concepts

1. **With respect to third countries which the Council has not designated as a safe country of origin in accordance with Articles 30 and 30A, Member States may maintain, for a period of 5 years following the adoption of this Directive and in accordance with the national laws or regulations in force at the time of the adoption of this Directive, national safe country of origin concepts.**
2. **The period set out in paragraph 1 may be prolonged by a further period of 5 years in accordance with the provisions of the Treaty establishing the European Community.**
3. **In applying national safe country of origin concepts, Member States shall ensure that applicants have the possibility to submit any serious 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]*.**

**DESIGNATION OF SAFE COUNTRIES OF ORIGIN**

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law 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.

**[The existence of legislation allowing for the death penalty in a country need not as such prevent designation of that country as a safe country of origin.]**

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;
- [(e) respect of due process of law before the death penalty can be imposed and executed.]**

## Recital

**[Whereas while the existence of the death penalty in a third country need not as such prevent designation of that country as a safe country of origin, it is clear that the designation, as a safe country of origin, of a country applying the death penalty is not relevant in a particular case where there is a real risk of the applicant being subject to the death penalty or execution.]**

---