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COMMISSION OF THE EUROPEAN COMMUNITIES

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ANNEX

proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted

ANNEX

{SEC(2009) 1373}
{SEC(2009) 1374}

Detailed Explanation of the Proposal

Article 1

The title has been changed in order to better reflect the content of the article and to ensure consistency with Article 1 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ("Asylum Procedures Directive")¹.

The reference to the two distinct protection statuses: "refugees or as persons who otherwise need international protection" is replaced by a reference to "beneficiaries of international protection" so as to reflect the overall approximation of the applicable rules.

Article 2

b) As the term "beneficiaries of international protection" is extensively used in the Directive, it is appropriate to include a definition.

h) A definition of the term "applicants for international protection" is inserted in line with the Proposal for the amendment of the Reception Conditions Directive.

i) The amendments are aimed at taking into account the wide range of situations where a minor might be considered dependent, while ensuring that the decisive criterion is the best interest of the child. To this effect: i) the condition for the minor unmarried children of the beneficiary or of the couples referred to in Article 2(h) first indent to be dependent is deleted; ii) the new provisions foresee the possibility for the married minor children to be "family members" where it is in their best interests to reside in the same country as the beneficiary. This condition aims to respond in particular to situations of forced marriages or to cases where the minor is in practice separated from the spouse; iii) the new provisions address cases where the beneficiary is a minor, including in the definition of "family members" his/her parents or another adult relative responsible for him/her, where it is in his/her best interests to reside in the same country as these persons and iv) the minor unmarried siblings of the beneficiary are also considered as "family members", when the later is a minor and unmarried, provided that it is in the best interests of one or more of them to reside in the same country.

These amendments ensure coherence with the broadened definition of family members provided for in the Commission's proposals for the second-phase asylum instruments². In this manner, family members who are present in a Member State and would have already been granted, by virtue of the amended Reception Conditions Directive, the rights and benefits provided for family members of an asylum applicant will also be granted the rights and benefits laid down in the Qualification Directive where the applicant concerned is granted a protection status.

¹ OJ L 326, 13.12.2005, p.13

² Proposals of 9.12.2008 for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (COM (2008) 815 final/2, "Proposal for the amendment of the Reception Conditions Directive") and for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM (2008) 815 final/2, "Proposal for the amendment of the Dublin Regulation").

k) For reasons of legal clarity and with a view to align the directive with the 1989 UN Convention of the Rights on the Child, the definition of a minor is inserted in this Article.

(l) The definition of unaccompanied minor is amended in line with the definition of a minor.

Article 7

The lack of clarity of the concept has allowed for wide divergences in its implementation as well as for very broad interpretations, which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection. For instance, the current definition allows for the consideration as actors of protection of clans and tribes, despite the fact that they cannot be equated to States regarding their ability to provide protection. In other instances, authorities have considered non-governmental organisations as actors of protection with regard to women at risk of female genital mutilation and honour killings, despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution.

To address the deficiencies flowing from this lack of clarity, the amendments specify the conditions under which non-state entities may be equated to States regarding their ability to provide protection within the meaning of the Directive. To this effect it is specified that the list of actors of protection is exhaustive; ii) that protection should be effective and durable and iii) that non-state actors of protection should be willing and able to enforce the rule of law.

Firstly, it should be noted that, where the Directive establishes indicative lists (for instance in Articles 6 or 9(2)), it uses specific terms such as "include" or "inter alia"; therefore, *the absence of such terms in Article 7 is already an indication of the exhaustive character of the list*. However, for the sake of enhanced clarity, it appears useful to explicitly specify that the list of actors of protection is exhaustive.

These amendments ensure, firstly, that mere "willingness to protect" may not be deemed sufficient in the absence of the "ability to protect", hereby excluding entities (such as political parties or non-governmental organisations) which may wish and try to provide protection but do not have the (military, legal, etc.) power to effectively do so. Secondly, even actors who are willing *and able in principle* to provide protection but not providing it in reality or who can provide protection only on a transitional or temporary basis are excluded from the scope of the concept of actors of protection. Thirdly, the requirement to enforce the rule of law gives more prominence to the already applicable condition in Article 7(2) of the current Directive relating to the operation of an effective legal system, thus clearly excluding entities such as clans and tribes, criminal networks or guerrillas as potential actors of protection. In addition, the enforcement of the rule of law would also imply the enforcement of human rights standards.

Finally, these amendments ensure coherence in the approach under the current Directive to the assessment by Member States of the situation in the country of origin, to the extent that they are consistent with the requirement set for the purposes of cessation in Article 11(2), i.e. that the change of circumstances in the country of origin should be significant and of non-temporary nature.

Article 8

The amendments firstly aim to specify that the applicability of this Article requires not merely the absence of a well-founded fear of persecution or of a real risk of serious harm but rather the availability of *protection* against persecution or serious harm in at least part of the country of origin. Indeed, international protection is only required as a substitute to domestic protection; its purpose and content is not limited to *non-refoulement*. It is necessary therefore to specify that international protection may be withheld only where *protection* is available in at least part of the country of origin.

Furthermore, it is necessary to ensure that the concept of internal protection is compatible with the core obligations flowing from Article 3 ECHR, as interpreted in a recent judgment of the ECtHR³. In this judgment, the Court referred to its standing jurisprudence, according to which "Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision". Moreover, it confirmed "the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention" and stated that it "considers that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment".

The current definition of the concept not only omits essential requirements flowing from this judgment, but also outright contradicts in some respects the conditions set by the Court. A series of amendments are therefore necessary to transpose within the Directive the conditions set out in the judgment and ensure the compatibility of the concept with Article 3 ECHR.

To this effect:

- The three pre-conditions set out in the above mentioned judgment for the applicability of the concept of internal protection, namely that the applicant should be able to "travel, gain admittance and settle" in the proposed alternative location are introduced in the Article, thus obliging the determining authorities to assess the practical feasibility and the physical risks involved in travelling to the region concerned as well as the existence of a legal right to enter and settle there.
- The possibility to apply the internal flight alternative despite technical obstacles is deleted, since it is incompatible with the requirements specified by the ECtHR's judgment. Indeed, if technical obstacles (such as lack of travel or identification documents, lack of cooperation of authorities in the country of origin or physical inability of the applicant) mean that the individual cannot travel and gain admittance to the alternative location and thus have access to protection there, the internal flight alternative simply cannot apply.
- Finally, an explicit reference is introduced to the content of the obligation imposed on Member States by Article 8(1) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ("Asylum

³ Judgment of 11 January 2007, Salah Sheekh v. the Netherlands, paragraph 141

Procedures Directive)⁴, namely that the competent authorities should obtain precise and up-to-date information on the general situation in the country.

Article 9

In many cases where the persecution emanates from non-State actors such as militia, clans, criminal networks, local communities or families and where the decisive factor is the absence of (state) protection, the act of persecution is not committed for reasons related to a Geneva Convention ground but, for instance, with criminal motivations or for private revenge. However, it often happens in such cases that the State is unable or unwilling to provide protection to the individual concerned because of a reason related to the Geneva Convention (for example religion, gender, ethnicity etc).

The proposal makes explicit that the causal link requirement (i.e. the requirement of a connection between the acts of persecution and the reasons for persecution under the Geneva Convention) is also fulfilled where there is a connection between the acts of persecution and *the absence of protection* against such acts.

Article 10

In order to address the lack of clarity – and the resulting inconsistencies in the implementation - of the last phrase of Article 10(1)(d), it is specified that gender-related aspects of an asylum claim should be duly considered for the purposes of recognising membership of a particular social group or for identifying such a group.

Gender as such is normally not sufficient as a criterion for the definition of a particular social group; it is generally used in combination with other factors, such as class, marital status, ethnic or clan affiliation etc. However, women may also form a particular social group in some societies, as evidenced by discrimination in their fundamental rights.

Evidently, this does not imply that all women (in a given country or society) would automatically qualify for refugee status. Applicants should in any event establish that they have a well-founded fear of persecution and that their membership of the particular social group is *the basis* for their fear of persecution or for the absence of protection. Moreover, the assessment of the existence of a particular social group depends entirely on the particular circumstances in the country of origin.

Article 11

A paragraph is inserted, reflecting the exceptions to cessation related to compelling reasons arising out of previous persecution which are set out in Articles 1C(5) and 1C(6) of the Geneva Convention.

Article 16

A paragraph is inserted, reflecting the exceptions to cessation related to compelling reasons arising out of previous persecution which are set out in Articles 1C(5) and 1C(6) of the Geneva Convention. It should be noted that, while their wording only relates to refugees, these exceptions are interpreted as reflecting a general humanitarian principle that is now

⁴ OJ L 326, 13.12.2005, p.13

well-grounded in State practice and is therefore applied beyond its wording⁵. The application of these exceptions also with regard to subsidiary protection status is necessary and justified to the extent that their purpose and reasoning for their introduction in the Geneva Convention with regard to refugees applies equally with regard to beneficiaries of subsidiary protection.

Article 20

The third paragraph is amended so that it explicitly refers to victims of trafficking and persons with mental health problems. Although the list of vulnerable persons contained in this Article is not an exhaustive one, it is considered essential to ensure that these categories of persons are to be considered by all Member States as persons with special needs, in view of their particular vulnerable situation, as is the case under the Commission's Proposal for the amendment of the Reception Conditions Directive (under Article 20, paragraph 3).

Paragraphs 6 and 7, which allow for the reduction of rights and benefits granted to beneficiaries of international protection who obtained their status on the basis of activities engaged in for the sole or main purpose of securing protection, are deleted. This deletion addresses concerns about potential violations of the principle of non-discrimination. At the same time, risks of such "manufactured" claims can be appropriately addressed through robust credibility assessments in accordance with Article 4, paragraph 3, point d.

Article 22

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the phrase "persons recognised as being in need of international protection" is replaced by the phrase "beneficiaries of international protection".

For reasons of clarity and to reflect similar amendments in the terminology in the Proposals for the amendment of the Reception Conditions Directive and the Dublin Regulation, the phrase 'in a language likely to be understood by them' is replaced by the phrase 'in a language that they are reasonably supposed to understand'.

Article 23

The possibility to define conditions applicable to the benefits granted to family members of beneficiaries of subsidiary protection is removed, as such a limitation cannot be regarded as necessary and objectively justified.

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive references in paragraphs 2, 3 and 5 to the "beneficiary of refugee or subsidiary protection status" and to "such status" are replaced by references to "beneficiary of international protection" and to "such protection".

Article 24

⁵ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Geneva, January 1992, paragraph. 136; UNHCR ExCom Conclusion No. 69 (XLIII) of 1992

This Article is amended with a view to granting beneficiaries of subsidiary protection and their family members the same rights as refugees and their family members regarding the duration of the residence permit.

Article 25

The discretion to limit the possibilities of beneficiaries of subsidiary protection to travel to cases where serious humanitarian reasons require their presence in another state, as referred to in the second paragraph of this Article, does not appear to be objectively justified and has proved to be of limited added value in practice. Therefore, it is deleted.

Article 26

Firstly, this Article is amended so as to ensure that beneficiaries of subsidiary protection have access to employment and activities such as employment-related education opportunities and vocational training under the same conditions as refugees.

Secondly, with a view to enhancing the access of beneficiaries of international protection to employment, the list of activities contained in paragraph 2 is expanded so as to also include training courses for upgrading of skills and counselling services offered by employment offices.

Thirdly, in order to address the problems related to the financial constraints which prevent beneficiaries of international protection from following the vocational training they need to (re)qualify for employment, Member States should endeavour to facilitate, where necessary, the participation of beneficiaries of international protection in vocational training through "part-work / part-study" programmes or maintenance grants and loans.

Article 27

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, references in paragraphs 1 and 2 to "refugee or subsidiary protection status" are replaced by references to "international protection".

As the Proposal contains several amendments related to access to procedures for recognition of qualifications, it is preferable, for reasons of clarity, to introduce a new article 28, specifically addressing this issue. Paragraph 3 of Article 27 of the Qualification Directive is now part of this new Article 28.

Article 28

As indicated above, this Article regulates the access of beneficiaries of international protection to procedures for recognition of qualifications and thus now contains paragraph 3 of Article 27 of the Qualification Directive.

In addition however to requiring equal treatment with nationals, the objective pursued is to address the specific obstacles faced by beneficiaries of international protection in the context of the recognition of their qualification, in particular because of the fact that they are often unable to provide documentary evidence of their claimed skills and qualifications and because of the high costs of these procedures.

To this effect, Member States should endeavour to establish at national level alternative appropriate procedures for the assessment, validation and accreditation of the prior learning of beneficiaries of international protection; in this context it is explicitly specified that any relevant measures should respect Articles 2(2) and 3(3) of the European Parliament and Council Directive 2005/36/EC⁶. Moreover, Member States should endeavour to exempt beneficiaries of international protection from the fees involved in the relevant procedures or to grant them financial assistance to meet these costs, where necessary.

Article 29 (ex-Article 28)

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the reference in paragraph 1 to "refugee or subsidiary protection status" is replaced by a reference to "international protection".

With a view to ensuring that beneficiaries of subsidiary protection have access to social welfare under exactly the same conditions as refugees, the possibility to limit such assistance to core benefits is deleted.

Article 30 (ex- Article 29)

With a view to ensuring that beneficiaries of subsidiary protection have access to healthcare under exactly the same conditions as refugees, the possibility to limit healthcare granted to them to core benefits is deleted.

In line with the Commission's proposal for the amendment of the Reception Conditions Directive, which aims to ensure that asylum applicants with mental health problems receive adequate health care, it is specified that the adequate health care which should be provided to beneficiaries of international protection who have special needs, should include appropriate mental health care.

Finally, to reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the reference in paragraph 2 to "refugee or subsidiary protection status" is replaced by a reference to "international protection".

Article 31 (ex- Article 30)

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the references in paragraph 1 to "refugee or subsidiary protection status" and "such statuses" are replaced by references to "international protection" and "protection", respectively.

Paragraphs 5 and 6 are amended with a view to ensuring consistency with the Commission's proposal for the amendment of the Reception Conditions Directive. Similarly to the provisions set out in Article 19, paragraphs 4 and 5 of this Proposal, Member States are required to establish procedures for tracing the family of unaccompanied minors as soon as possible after protection has been granted and to ensure that those working with unaccompanied minors have had but also continue to receive appropriate training.

⁶ Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, p. 22)

Article 32 (ex- Article 31)

In line with the approach advocated in the Handbook on Integration⁷ regarding national housing policies towards immigrants, this Article is amended so as to require Member States to endeavour to develop and put in place housing policies aimed at preventing discrimination and achieving equality of opportunity.

Article 33 (ex- Article 32)

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the reference to "beneficiaries of refugee or subsidiary protection status" is replaced by a reference to "beneficiaries of international protection".

Article 34 (ex- Article 33)

This Article is amended, firstly, so as to require that Member States provide beneficiaries of international protection with access (or create preconditions which guarantee access) to integration programmes which they consider appropriate with a view to taking into account the specific needs of this category of persons. As examples of such a "targeted" approach, the Article refers to introduction programmes and language courses aimed at addressing such specific needs.

Secondly, it is ensured that beneficiaries of subsidiary protection have access to integration facilities under the same conditions as refugees.

Article 35 (ex- Article 34)

To reflect the approximation of the protection statuses and to ensure consistency in the terminology used throughout the Directive, the reference to "beneficiaries of refugee or subsidiary protection status" is replaced by a reference to "beneficiaries of international protection".

Article 38 (ex- Article 37)

This reporting mechanism shall be retained under the new Directive.

Article 39 (ex- Article 38)

It is proposed to introduce an obligation for a correlation table. The Commission systematically proposes such a table.

Article 40

This is a standard article specifying the result of adopting this Directive.

⁷ Second Edition, available at http://ec.europa.eu/justice_home/doc_centre/immigration/integration, pp. 32-36