The Amsterdam Proposals

or how to influence policy debates on asylum and immigration

Jan Niessen and Susan Rowlands (Editors)

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The European Network against Racism (ENAR) is a network of NGOs working to combat racism in all the EU Member States, to promote equality of treatment between EU citizens and third-country nationals and to link local/regional/national initiatives with European initiatives.

The Immigration Law Practitioners'Association (ILPA) is the UK's professional association of immigration lawyers, advisers and academics practising in or concerned about immigration, asylum and nationality law.

The Migration Policy Group (MPG) is an independent organisation based in Brussels. MPG is committed to improving policy development on immigration and related issues of diversity and anti-discrimination, through the promotion of facilitated exchanges between key stakeholders in Europe, North America and the international community, and through the production of substantive, comparative policy analysis.

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Table of contents

Introduction

In March 2000, the Immigration Law Practitioners' Association (ILPA) and the Migration Policy Group (MPG) published *The Amsterdam Proposals: The ILPA/MPG proposed directives on immigration and asylum.* That report contains proposals for Directives on asylum, family reunion, long term residents, visas and border controls, admission of immigrants and irregular migrants. Each of these proposals commences with a detailed explanatory memorandum setting out the relevant legal and political considerations, and concludes with the text of a proposed Directive. The proposals reflect the views and concerns of non-governmental organisations, law practitioners and academics active in the fields of immigration and asylum, and are intended to assist policy makers in the European Union in formulating their legislative proposals. The ILPA/MPG proposals are called *The Amsterdam Proposals* as a clear recognition of the fact that the Amsterdam Treaty has both empowered the European Union institutions to act on immigration and asylum, and provided a time-frame of five years within which legislative and other measures have to be adopted by the European Union.

In order to stimulate a policy debate across the European Union, involving both governmental and non-governmental actors, it was felt necessary to publish an executive summary of *The Amsterdam Proposals* together with concrete suggestions as to how to influence national and European policy debates on immigration and asylum. Therefore, ILPA, MPG and the European Network against Racism (ENAR) produced the present publication in English, French and German. It elaborates on and takes forward the proposals made in the publication *Guarding standards – Setting the Agenda* published in April 1999 by the European Council on Refugees and Exiles, ENAR and MPG. Chapter I looks at the policy agenda and explains why these proposals have been formulated. Chapter II summarises *The Amsterdam Proposals*. Finally, Chapter III makes concrete suggestions as to how to stimulate a policy debate on these proposals.

The Amsterdam Proposals reflect civil society's high expectations of the amended Treaty establishing the European Community and in particular its new Title IV on the creation of an area of freedom, security and justice. ENAR, ILPA and MPG view *The Amsterdam Proposals* as their contribution to the debates at the European and national levels. This publication aims to stimulate and to deepen those debates.

Brussels/London, April 2000

Chapter I

The European policy agenda

The European Union needs common immigration and asylum policies. The Amsterdam Treaty provides the legal basis for the design and adoption of such policies. By aiming to create an area of freedom, security and justice, the Amsterdam Treaty focused the concern of all EU institutions on immigration and asylum issues.

There are very good reasons why the European Union needs common immigration and asylum policies.

First, well-defined policies based on international human rights obligations clarify the differences and commonalities between asylum and immigration, and are thus capable of receiving public support. The main objective of refugee policies is the protection of persecuted individuals. All Member States must give the same high level of protection to such persons, and only a common and binding policy can guarantee such a level of protection. There are demographic reasons for putting an immigration policy in place. In order to maintain its present level of economic and social performance while its economically active population is ageing, Member States may well need migrants in the near future. Both immigration and asylum policies have to deal with such issues as visas, border control, family reunion, equal treatment and anti-discrimination. Since the Member States operate in a common market and in an area of free movement and establishment of persons, only common immigration and asylum policies can be effective.

Second, well-defined immigration and asylum policies facilitate the successful incorporation of immigrants and refugees into receiving societies. Clear admission policies will make it easier to accommodate the needs of new arrivals, while family reunion fosters the links of immigrants and refugees with receiving societies. Visa policies should allow immigrants and refugees to visit their families in other EU Member States regularly and to be visited by family members still living in the country of origin. Residence permits should enable immigrants to visit their country of origin regularly for short or extended stays. These and other measures would put immigrants and refugees on a par with EU nationals, promoting equal treatment and eliminating discrimination.

Third, the establishment of a common market requires the removal of barriers for the free movement of goods, services, capital and persons between Member States. The free movement of legally residing third-country nationals should be promoted as well as the free movement of EU nationals. Third-country nationals should profit from labour mobility, student exchanges, provision of services and entrepreneurship across internal borders, as do EU nationals. This will further benefit the development of the common market. The abolition of internal borders depends to a great extent on common rules regarding external borders. By the same logic, the promotion of free movement of third-country nationals within the EU will be enhanced when there is a common policy on immigration from outside the EU.

The Amsterdam Treaty has conferred considerable powers on the European institutions to act on immigration and asylum. The Treaty amends both the EC-Treaty and the Treaty on European Union. It adds a new Title IV in the EC-Treaty, the aim of which is to create an area of freedom, security and justice. It shifts issues of asylum, admission and residence of third-country nationals, and immigration from the third to the first pillar ("communautarisation"). Finally, the Amsterdam Treaty incorporates Schengen into the EC-Treaty. These changes are an enormous step forward because they allow the adoption of common immigration and asylum policies. Communautarisation enhances democratic and judicial control over the policy-making process in those fields.

Nevertheless, there are a number of weaknesses. Denmark, Ireland and the United Kingdom have reserved the right not to take part in the Council of Ministers' adoption of measures proposed within the framework of Title IV, and therefore may not be bound by them. Some decision-making procedures from the third pillar have been retained during a transition period of at least five years, and possibly more. The European Commission does not possess the sole right to take legislative initiatives - normally the case in the first pillar - but shares this right with Member States. This situation will change in five years, but until then the Council of Ministers will adopt measures by unanimity only. This could very well lead to a situation where no measures are taken at all, or

only after lengthy negotiations, increasing the likelihood that the outcomes will tend towards the lowest standards. The European Parliament must now be consulted on measures pending adoption by the Council of Ministers, whereas under the third pillar it was only informed of progress. However, this still falls short of the Parliament's powers elsewhere in the first pillar. Finally, on matters of asylum and immigration, the powers of the European Court of Justice have been somewhat limited compared with its authority on free movement matters. Only the highest court or tribunal of a Member State can request that the Court give preliminary rulings on issues covered by this Title. The unanimity clause and the limitations placed on the Parliament and the Court can be removed after five years.

The Tampere European Council (October 1999) decided to work towards the establishment of a Common European Asylum System based on the full and inclusive application of the Geneva Refugee Convention. This system should include, in the short term, a workable determination of the state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions for the reception of asylum seekers, the coordination of rules on the recognition and content of refugee status, and measures on subsidiary forms of protection. In the longer term, common rules for asylum procedure will be adopted, together with a uniform status valid throughout the European Union for those who are granted asylum. Furthermore, agreement should be reached on temporary protection for displaced persons and on sharing of responsibilities between Member States.

As far as immigration and equal treatment of immigrants are concerned, the Tampere European Council decided that legislation of Member States needed approximation coordination in such areas as conditions of admission and residence of third-country nationals. A more vigorous integration policy should aim at granting third-country nationals (including recognised refugees) rights and obligations comparable to those of EU citizens in the areas of, for example, residence, education, and (self-) employment. In addition, the Union should adopt measures to combat irregular migra-

tion and trafficking in human beings.

Non-governmental actors have an important role to play in the shaping of European immigration and asylum policies. Many of them speak on the basis of a profound knowledge of the situation of immigrants and refugees. In addition to voicing their concerns, they also have the ability to stimulate a public and policy debate based on concrete proposals for legislative and other measures. Attempting to influence decision-making can be a lengthy process, requiring interventions at both European and national levels.

A useful means of influencing policy-making is to draw up concrete proposals for legislative measures. Such legislative proposals have a number of advantages. First, they help to focus the debate on clearly defined areas, forcing key issues to be maintained on the European agenda, or serving as a reference document by which official proposals are judged. Second, NGO proposals may better respond to the needs of the people concerned than those put forth by the European Commission. The Commission's position, while often close to that of NGOs (particularly in the initial stages), is strongly influenced by the Member States. It is in the Commission's interest to put forward proposals that are likely to win the support of the Council of Ministers because this will avoid too many of its legislative proposals being rejected. Third, NGO proposals can be used as tools to mobilise support for the adoption of certain measures or to raise awareness of the need for European measures. Moreover, they may show how the concerns of immigrants and refugees can best be translated into European measures, and inspire policy-makers to include some of these essential elements in their own proposals.

Non governmental organisations active in the field of immigration and anti-discrimination have experience in using their own legislative proposals as a means of influencing policy-making. A good example is the *Starting Line*, a proposal for a Directive on the elimination of racial and religious discrimination, which has gained the support of a great number of organisations across the European Union and has highly influenced the European Commission's own proposal for a Directive on this matter.

The Amsterdam Proposals have been drafted for all these reasons. Instead of presenting one or two proposals for Directives covering the whole field of immigration and asylum, *The Amsterdam Proposals* include six separate Proposed Directives on various matters related to immigration and asylum. These are, of course, interrelated and, as the policy debates progress, they may be amended and complemented by proposals covering related issues.

II

Chapter II

The Amsterdam Proposals

The Amsterdam Proposals contain one Proposed Directive on asylum a five on immigration. The Proposed Directive on asylum has been broken into six separate Proposed Directives covering responsibility for applications, reception conditions, the definition of refugees, asylum procedures, temporary protection and subsidiary protection. The Proposed Directives on immigration are on family reunion, long term residents, visas and border controls, admission of migrants and irregular migrants.

Proposed Directive on Asylum

II

Purpose

The right to asylum is a fundamental human right extensively set out in international human rights treaties, most notably the 1951 UN Convention on Refugees. The purpose of this Proposed Directive is to establish a common European asylum system which ensures that the right to asylum within the European Community is upheld effectively.

Scope

The Proposed Directive applies to all persons seeking to exercise their right to asylum in the European Community.

Responsibility for asylum applicants

The Proposed Directive provides that an application for asylum shall be examined by one Member State only. This shall normally be the first Member State in which the application is made. However, where it appears that an applicant already has a connection or close links with another Member State, then the applicant may be called upon to apply for asylum in that other Member State. However, responsibility for examining the application shall not be so transferred unless the applicant agrees to apply in the other Member State *and* the other Member State agrees to accept responsibility for him or her. In all such cases, Member States shall facilitate the movement of the persons concerned.

The Member State responsible, under the above provisions, for examining an asylum application shall be obliged to take back the applicant if, at any stage of the asylum procedure, he or she leaves that Member State and is irregularly or illegally in another Member State.

Reception conditions for asylum applicants

Member States shall ensure that the social, educational, accommodation, family reunion and health and welfare rights of asylum applicants are met throughout the asylum procedure (that is, until such time as the application has been definitively rejected). To that end, Member States shall ensure coordination between the governmental authorities and non-governmental agencies responsible for meeting the needs of asylum applicants. In particular, Member States shall ensure appropriate training of those involved in meeting such needs.

Whilst awaiting a decision on their application, asylum applicants may move freely throughout the territory of the host Member State, subject only to restrictions on grounds of public policy, public security or public health and to a requirement to keep the relevant authorities informed of their current address. Member States shall allow asylum applicants to undertake paid employment until their application has been definitively rejected.

Asylum applicants shall normally enjoy the right to accommodation, including access to housing and housing allowances, on the basis of equality with nationals of the host Member State. However, as a temporary measure, applicants may be housed in designated centres or other accommodation. Similarly, asylum applicants and their family members shall enjoy the rights to education, health care and social security on the basis of equality with nationals of the host Member State. Furthermore, Member States shall ensure that specialised health care is provided for those applicants who have suffered torture or sexual violence.

Detention of definitively rejected asylum applicants

The Proposed Directive prohibits the use of detention other than in the case of *definitively rejected* asylum applicants, who shall only be detained where:

- such detention is prescribed by law for a specific reason (see below) and for a specific period, which must be as short as possible;
- such detention is used proportionately, after prior consideration of the alternatives to detention and the effect of detention in each individual case; and
- the detention of the person concerned is strictly necessary for compelling

reasons relevant to his or her individual case.

More particularly, a definitively rejected asylum applicant may only be detained in order to:

- ensure the application of a removal order against him or her;
- verify his or her identify, where he or she has refused to cooperate with the identification process; or
- protect public security or public order, where there is evidence to show that the person is likely to pose a risk to such principles.

Furthermore, Member States must ensure that all detention decisions are subject to prompt, mandatory and periodic review by an independent and impartial body, and that detainees are held humanely and separately from convicted prisoners or prisoners on remand.

The definition of 'refugee' under the 1951 UN Convention

The Proposed Directive provides that, in examining asylum applications, Member States shall assess the merits of the application against the definition of a 'refugee' and the concept of a 'well-founded fear of persecution' contained in Article 1 of the 1951 UN Convention on Refugees. In order to ensure common, liberal and inclusive interpretations of that definition and concept by Member States, the Proposed Directive brings together all the existing rules and guidance relating to the nature of a 'well-founded fear of persecution', as well as to issues such as the agents of persecution, the grounds of persecution and other issues related to the *inclusion* of an individual within the scope of Article 1.

In particular, the Proposed Directive provides that a 'well-founded fear of persecution' exists not only where the applicant was subject to persecution or directly threatened with persecution, but also where the applicant wishes to avoid a situation entailing the risk of persecution. And it provides that, where persecution is confined to a specific part of the applicant's country, he or she will not be refused asylum merely because he or she *could* have sought refuge in another part of the same country (the so-called 'internal flight alternative' rule). Moreover, Member States remain free to interpret Article 1 of the 1951 UN Conven-

tion more favourably. At the same time, Member States shall ensure that, whenever giving consideration to withholding or cancelling recognition of refugee status under the exclusion and cessation clauses of the 1951 UN Convention, the authorities will apply such clauses restrictively.

In the case of a person recognised as a refugee by a Member State, the Proposed Directive provides that he or she shall enjoy the rights to family reunion and to free movement within the European Community.

Procedural rights

The procedure for examining an asylum application is a critical part of the common European asylum system, since a defective procedure will result in violations of international human rights law. The Proposed Directive therefore sets out a number of procedural rights and minimum standards which Member States shall observe whilst concluding the examination of asylum applications as quickly as possible.

All asylum applications must be decided individually, objectively and impartially by a clearly identified competent authority, on the basis of the facts and circumstances put forward by the applicant, who shall enjoy the right to a personal interview with an examiner who is fully qualified in the field of asylum and refugee matters. The applicant shall also enjoy the rights to the services of an interpreter, whenever necessary, and to qualified and competent legal advice or assistance throughout the procedure. Furthermore, special provision must be made for unaccompanied minors, and for applicants who have suffered torture or sexual violence or are mentally disturbed. In the event of a negative decision, the applicant shall enjoy the right of appeal to a court or independent review authority.

Accelerated procedures

The Proposed Directive limits the use of accelerated procedures to a narrow range of circumstances:

- to determine the admissibility of an asylum application (that is, whether the

applicant has already been recognised as a refugee, or has been granted a permanent residence permit in a third country, and could therefore safely return to that country); or

- to determine the merits of an asylum application where the applicant raises no issue under the 1951 UN Convention or other human rights instruments. However, such an application may *not* be subjected to accelerated procedures where it includes a claim of torture or relates to the 'internal flight alternative' rule, or where the applicant's credibility is at stake.

Complementary and temporary protection

The Proposed Directive provides that asylum in the alternative form of Complementary protection must be granted to all persons who fall outside the scope of Article 1 of the 1951 UN Convention or temporary protection status (see below), but who demonstrate that they need international protection because of the situation in their country. In all such cases the above responsibility rules, reception conditions and procedural rights shall apply.

The Proposed Directive further provides for the creation of 'temporary protection regimes'in situations where the asylum procedures of one or more Member States are temporarily overwhelmed by a mass influx of displaced persons. Such regimes may be European Community-wide or national, but persons falling within their scope shall remain the responsibility of the Member State in which they initially apply. Temporary protection must be granted to all persons whose safe return is impossible for the time being due to the situation prevailing in their country, and in particular to armed conflict or widespread human rights abuses. A temporary protection regime may last no more than two years, during which time it may be revised or terminated according to the prevailing conditions in the country concerned. Upon termination, persons previously covered shall either return voluntarily to their country, or shall be allowed to make (or resume) an application for asylum.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status. Furthermore, Member States shall comply fully with, and without derogation from, the United Nations Convention on the Rights of the Child.

Effect of illegal entry

Member States shall not impose penalties on asylum applicants who use illegal means to enter their territory (including the use of forged documents or clandestine entry), provided that they have not already obtained protection elsewhere and that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Proposed Directive on the Right to Family Reunion

II

Purpose

The right to family life is a fundamental human right protected by both international and regional human rights treaties. Clearly, however, the right to family life cannot be exercised effectively unless family members are able to live together. Therefore, several international and regional human rights treaties provide for the right to family reunion. The purpose of this Proposed Directive is to ensure that the right to family reunion within the European Community is upheld effectively.

Scope

The Proposed Directive covers family members of European Community nationals living in their 'own'Member State, as well as family members of 'third country nationals' (that is, non-European Community nationals) legally resident in the European Community. In the latter case, the Proposed Directive draws a distinction between temporary and long-term residents of the European Community, with different rights for each group.

The Proposed Directive does not cover family members of European Community nationals living in a Member State other than their 'own' Member State, or family members of asylum applicants and recognised refugees, as these groups are covered by separate proposals for legislation in this project. Nor does it cover family members of illegal residents of the European Community.

Temporary residents of the European Community

The Proposed Directive sets out a minimum period after which third country nationals legally, but temporarily, resident in the European Community may be joined by their family members. It provides that such temporary resident third

country nationals shall enjoy the right to family reunion at the latest after they have been legally resident in a Member State for one year *and* have the right of residence in a Member State for at least one further year.

In such cases, the right to family reunion covers the third country national's spouse or unmarried partner and their children under the age of 21, as well any descendants over the age of 21 who are dependants. The term 'unmarried partner'encompasses both 'intended spouse'(that is, a person who enters a Member State in order to marry a resident within six months of entry), and 'cohabitee' (that is, the partner in a relationship akin to marriage). The term 'children' encompasses legally adopted children and those children who may not be direct descendants but who are, in accordance with the customs of the country of prior residence, considered part of the principal's family unit.

The Proposed Directive further provides that family members of a temporary resident third country national who are granted admission under these provisions shall enjoy the right to work (that is, employment or self-employment) no later than six months after entering the European Community.

Family members of EC nationals and long-term residents

The European Community's existing internal rules on the rights of European Community nationals who move to other Member States provide such individuals with an unqualified right to family reunion. There can be no justification whatsoever for treating either long-term resident third country nationals or European Community nationals living in their own Member State any differently. Accordingly, the Proposed Directive provides that such individuals shall enjoy an immediate right to family reunion (that is, without any qualifying period), and that such family members shall enjoy an immediate right to work (that is, employment or self-employment).

As in the case of temporary resident third country nationals, this right to family reunion covers the principal's spouse, intended spouse or cohabitee and their children under the age of 21, as well any descendants over the age of 21 who are dependants.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status. Furthermore, Member States shall comply fully with, and without derogation from, the United Nations Convention on the Rights of the Child.

Judicial enforcement

Member States shall ensure that all those who consider themselves wronged by a failure to grant the right of family reunion shall have access to the courts with effective powers of enforcement of this Proposed Directive's provisions.

Residence permits

Member States shall provide family members admitted under the provisions of this Proposed Directive with a residence permit as proof of their right of residence. In the case of family members of a *temporary* resident principal, this residence permit shall be valid for the duration of the residence authorisation of the principal (and will terminate when his or her residence ends). For family members of a *long-term* resident principal, the residence permit shall be valid for not less than five years, and shall be automatically renewable and free of charge. In such cases, the family member's residence permit will still be dependent upon the residency of the principal, unless the family member acquires an independent right to remain (see below). However, where the principal dies, retires or suffers a disability or occupational illness, the family member will retain the same rights to stay as those accorded in such circumstances to family members of migrant European Community nationals.

Acquisition of independent residency rights

The Proposed Directive provides that family members admitted under its provi-

sions shall acquire the status of long-term resident in their own right if and when they meet the conditions to obtain such status set out in national or European Community law. It further provides that, even where family members have not yet acquired such status, they shall nevertheless retain a right of residence (and of employment or self-employment) following divorce, subject to the condition that they have been resident for a period of three consecutive years or are the parent of a legally resident minor child.

Social provisions

The Proposed Directive provides that family members admitted under its provisions shall enjoy equal treatment with European Community nationals with regard to access to employment, social advantages, housing, trade union participation, and education of children.

Exclusions on the grounds of public policy, public security and public health

Existing European Community legislation allows for the expulsion or refusal of entry of European Community nationals and their family members who provide grave threats to society, subject to detailed procedural and substantive rules. There is no convincing reason why family members admitted under the provisions of this Proposed Directive should be treated any differently, and so the Proposed Directive provides that they shall enjoy equal treatment with European Community nationals with regard to such rules.

Proposed Directive on Long-term Residents

II

Purpose

In October 1999, the European Council agreed the so-called 'Tampere Principles', concluding that long-term residents of the European Community should receive treatment based on equality with European Community nationals. These principles are welcome, but cannot be implemented without the adoption of European Community legislation on the matter. Accordingly, the purpose of this Proposed Directive is to safeguard the rights of long-term residents of the European Community who are nationals of third countries. It aims to do so through the implementation of the Tampere Principles in the light of human rights obligations, the European Community's anti-discrimination and social inclusion policies, and the effective development of the internal market.

Scope

The Proposed Directive applies to all third country nationals (that is, non-European Community nationals) resident in the European Community. However, this does not preclude the provision of more advantageous rights in other provisions of European Community or national law, or in treaties agreed by the European Community.

Acquisition of long-term resident status

The Proposed Directive provides that a third country national shall enjoy the right to the status of 'long-term resident of the European Union' after:

- three years'legal employment in a Member State; or
- three years' registered self-employment in a Member State; or
- five years' habitual residence in a Member State.

The Proposed Directive further provides that annual holidays, absences for rea-

sons of maternity or an accident at work, and short periods of sickness shall be treated as periods of legal employment. However, periods of unemployment and long periods of sickness shall not be treated as periods of legal employment.

Rights of long-term residents

The Proposed Directive provides that a long-term resident of the European Union, as well as members of his or her family resident with him, shall enjoy unqualified rights to:

- family reunion;
- security of status and equality with European Union citizens;
- free access to any paid employment or self-employment;
- receive services;
- study;
- reside after retirement; and
- reside for any other purposes in any Member State of the European Community.

Family reunion

The European Community's existing internal rules on the rights of European Community nationals who move to other Member States provide such individuals with an unqualified right to family reunion. There can be no justification whatsoever for treating long-term resident third country nationals any differently to European Community nationals who move to a Member State other than their own. Accordingly, the Proposed Directive provides that long-term residents shall enjoy an immediate right to family reunion (that is, without any qualifying period), and that such family members shall enjoy an immediate right to work (employment or self-employment). This right to family reunion covers the principal's spouse or unmarried partner and their children under the age of 21, as well any descendants over the age of 21 who are dependants. The term 'unmarried partner'encompasses both 'intended spouse'(that is, a person who enters a Member State in order to marry a resident within six months of entry), and 'cohabitee' (that is, the partner in a relationship akin to marriage).

Security of status and equality with European Union citizens

A long-term resident (and members of his or her family) shall enjoy the right to be issued with a 'Residence Permit for a Long-Term Resident of the European Union', as proof of the right of residence. This Residence Permit must be valid throughout the territory of the Member State which issues it, must be valid for at least five years from the date of issue, and must be automatically renewable. It may not be withdrawn solely on the grounds that the holder is no longer in employment, regardless of whether this is because he or she is temporarily incapable of work as a result of illness or accident, or because he or she is involuntarily unemployed. The financial charge for the issuing and renewal of this Residence Permit shall not exceed the amount charged for the issue of identity cards to nationals of the Member State in question.

A long-term resident, as well as members of his or her family, shall continue to enjoy his or her status and the associated rights after leaving and returning to the territory of the European Community, so long as the absence does not exceed three consecutive years.

A long-term resident, as well as members of his or her family, shall enjoy equal treatment with European Community nationals with regard to the right to employment or self-employment, to receive services, to study, to reside after retirement, and to reside for other purposes in any Member State.

In addition, the Proposed Directive provides that a third country national working legally in a Member State but who has not yet acquired the status of long-term resident shall enjoy the right, after one year's legal employment, to renewal of his or her permit to work and reside in that Member State. Furthermore, such persons shall enjoy the right, after two years' legal employment, to free access to any paid employment of his or her choice in that Member State.

Movement of long-term residents between Member States

Although long-term resident status will be issued by one Member State in respect of residence in its territory, a person with such status shall enjoy the right to move freely to other Member States. To this end, the Proposed Directive pro-

vides that a long-term resident can only be refused entry by a Member State for the same reasons as European Community nationals - that is, on grounds of public policy, public security or public health - and also that he or she shall enjoy the same procedural rights in such circumstances. Furthermore, Member States shall allow long-term residents to enter and reside in their territory simply on production of a valid passport and the residence permit referred to above. Member States may not demand an entry visa or equivalent document, and - so as to give practical effect to the right to employment in another Member State - shall not use the completion of formalities for the issuing of a residence permit to hinder the immediate beginning of employment under a contract concluded by the applicants.

In order to ensure that a long-term resident does not lose his or her status simply by virtue of his or her free movement between Member States, the Proposed Directive further provides that long-term residents who move to another Member State shall retain their status as a long-term resident in the first Member State for a period of three years. During this three-year period, the second Member State shall issue a residence permit to the long-term resident, valid for three years. After the expiry of the three-year period, the second Member State shall recognise the status of the long-term resident (and his or her family members) and shall accord to them the rights set out in this Proposed Directive.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status. Furthermore, Member States shall comply fully with, and without derogation from, the United Nations Convention on the Rights of the Child.

Judicial enforcement

Member States shall ensure that all those who consider themselves wronged by a failure to grant the status of long-term resident shall have access to the courts with effective powers of enforcement of this Proposed Directive's provisions.

Protection from expulsion on the grounds of public policy, public security and public health

Existing European Community legislation allows for the expulsion or refusal of entry of European Community nationals and their family members who provide grave threats to society, subject to detailed procedural and substantive rules. There is no convincing reason why persons with long-term resident status should be treated any differently, and so the Proposed Directive provides that they shall enjoy equal treatment with European Community nationals with regard to such rules.

Social and cultural rights

Member States shall cooperate in appropriate schemes to promote the social and cultural advancement of long-term residents and their family members, particularly literacy campaigns and courses in the language of the host State, and access to vocational training. In addition, Member States shall provide encouragement and support for the maintenance of cultural and linguistic links with the country of origin of long-term residents and other third country nationals, and for projects aimed at increasing cultural diversity.

Proposed Directive on Visas and Border Controls

II

Purpose

To date, the European Community has failed to take the steps necessary to ensure free movement of persons within the 'internal market'. Although for most Member States the goal of abolishing internal frontiers has been met through implementation of the Schengen Convention of 1990, that Convention is deeply flawed. It allows Member States considerable latitude not to abolish border controls at all, and attaches a number of conditions to the free movement of persons within the Schengen states. Furthermore, it establishes the Schengen Information System, a system which is highly problematic for human rights and civil liberties.

The purposes of this Proposed Directive, therefore, are to give greater effect to the principle of free movement of persons, whilst safeguarding the rights of third country nationals within the European Community; to ensure that control of external borders is exercised only to the extent necessary; and to reform the Schengen Information System so as to balance public security with individual rights.

Scope

To this end, the Proposed Directive establishes the right of *all* persons, be they citizens of the European Community or third country nationals, to cross *internal* borders within the European Community without any controls, and sets out conditions for the exercise of the right to cross the *external* borders of the European Community.

At the same time, the Proposed Directive sets out conditions for the exercise of the right of entry and residence of third country nationals, and for the right to a long-term visa or residence permit. However, this does not in any way limit addi-

tional rights granted to third country nationals under other provisions of European Community or national law, or in treaties agreed by the European Community. More particularly, the Proposed Directive is subject to the right of asylum as defined in national and European Community law, and in regional and international treaties.

The right to cross internal borders of the European Community

The Proposed Directive provides that all persons, whatever their nationality, shall enjoy the right to cross the internal borders of the European Community at any place, without such crossing being subject to any border control.

A Member State may, in the event of a serious threat to public policy or public security, reinstate some or all controls at its internal borders (that is, those with other Member States) for a period of not more than 30 days. However, other than in emergencies, controls may only be reinstated after prior consultation with other Member States and the European Commission. The reinstated controls may be maintained for renewable periods of 30 days, subject to prior consultation with and, after 60 days, the authorisation of the European Commission, but the controls and the period for which they are applied shall not exceed what is strictly necessary to respond to the serious threat in question.

The right to cross external borders of the European Community

The Proposed Directive provides that, for visits not exceeding three months, a third country national shall enjoy the right to enter the territory of the European Community, subject to he or she satisfying each of the following conditions:

- that he or she holds a valid passport or other travel document;
- that he or she holds a valid visa where required (see below);
- that he or she is able to substantiate the purpose of the visit;
- that he or she is has (or is in a position to acquire legally) sufficient means of support, both for the visit and the return journey;
- that he or she has not been reported as a person not to be permitted entry (see below); and

- that he or she is not considered a threat to the public policy or public security of any of the Member States.

The Proposed Directive provides that such cross-border movements at external borders shall be subject to checks by the appropriate authorities. These checks shall include not only the verification of travel documents and of the other conditions governing entry, residence, work and exit, but also checks to detect and prevent threats to the public policy and public security of the Member States.

The right to be issued with a short-term visa

The Proposed Directive provides for the establishment of a common list of third countries whose nationals shall be required to hold a visa when crossing the external borders of the European Community. However, a country may only be included on this list if it constitutes a threat to the security of the European Union or a qualified majority of its Member States, and Member States shall permit visa-free entry of the nationals of *all* other countries.

The Proposed Directive further provides that, for intended stays of no more than three months, a national of a third country included on the common visa list shall enjoy the right to be issued with a uniform visa to enter the territory of the European Community, subject to he or she satisfying each of the following conditions:

- that he or she holds a valid passport or other travel document;
- that he or she is able to substantiate the purpose of the visit;
- that he or she is has (or is in a position to acquire legally) sufficient means of support, both for the visit and the return journey;
- that he or she has not been reported as a person not to be permitted entry (see below); and
- that he or she is not considered a threat to the public policy or public security of any of the Member States.

In such cases, the visa may be either:

- a travel visa valid for one or more entries, provided that neither the length of

a continuous visit nor the total length of successive visits may exceed three months in any half year as from the date of first entry; or

- a transit visa allowing its holder to pass through the territory of Member States once, twice or (exceptionally) several times en route to a third country, provided that no transit shall last longer than five days.

Such visas may be issued at the diplomatic or consular authorities of a Member State, or at a Member State's external border.

Member States shall exempt from the above visa requirements those nationals of third countries holding a long-term visa or residence permit from a Member State. In addition, Member States shall exempt: civilian air and sea crew; flight crew and attendants on emergency and rescue flights and other helpers in the event of disaster or accident; and holders of diplomatic passports, official duty passports and other official passports.

The Proposed Directive further provides for the establishment of a common list of third countries whose nationals shall be required, when not already in possession of an entry or transit visa for the Member State in question, to hold an airport transit visa when passing through the international areas of airports situated within the territory of a Member State. Member States may not require an airport transit visa for nationals of third countries which are not included on this common list. Such visas may only be issued at the diplomatic or consular authorities of a Member State.

The right to be issued with a long-term visa

The Proposed Directive provides that a third country national shall enjoy the right to be issued with a long-term visa to enter the territory of the European Community, subject to he or she satisfying the conditions for the issue of that visa. However, the Proposed Directive does not set out these conditions, as such issues are addressed in the Proposed Directive on the Admission of Migrants.

The right to travel within the European Community

The Proposed Directive provides that third country nationals who are lawfully on

the territory of a Member State shall enjoy the right to travel in the territories of other Member States. More particularly, a third country national holding a uniform short-term visa (see above) may travel in the territories of the Member States throughout the period of stay permitted by the visa (that is, up to three months), provided that he or she holds a valid travel document bearing the valid visa. Similarly, a person holding a resident permit or long-term visa issued by a Member State (see above) may travel in the territories of the Member States for a period of not more than three months, provided that he or she holds a valid travel document and the valid residence permit or long-term visa, *and* that he or she has (or is in a position to acquire legally) sufficient means of support, both for the duration of the visit and to return to his or her country of origin (or to a third state). This last condition - which is, of course, a condition for the issuing of a uniform short-term visa - also applies to those who are exempted from the need to obtain a short-term visa (see above).

Member States may require persons exercising this right to travel to report their presence in their territory.

The European Information System

The Proposed Directive provides for the establishment and functioning of a computer-based European Information System (EIS), to replace the Schengen Information System and thereby assist Member States in the task of applying this Directive's provisions - that is, of co-ordinating national authorities'immigration control actions - while fully observing the rights to free movement, privacy and effective judicial protection. Accordingly, the Proposed Directive sets out rules governing:

- the inclusion of information on an individual in the EIS, and the listing of an individual as a 'person not to be permitted entry';
- the right of access to that information by national authorities;
- the use of such information by those authorities to grant or withhold a visa or residence permit;
- the disclosure of such information to the individual in question;

- the right of that individual to challenge and correct the information held on him or her in the EIS (and the related procedural remedies); and
- the deletion of such information.

The inclusion, use and deletion of information in the EIS

A person may only be listed in the EIS as a 'person not to be permitted entry'if the following substantive and procedural conditions are met:

- the person represents a fundamental threat to the public policy or public security of a Member State;
- his or her conduct would be subject to repressive measures throughout the European Community;
- the conduct in question led to a substantial criminal sentence, or would have led to such a sentence had it been the subject of criminal proceedings; and
- the above must have been demonstrated to the satisfaction of a court of competent jurisdiction.

Such information may be held in the EIS for a maximum period of three years, after which it must be destroyed. During this period, it may be released only to those national authorities responsible for border checks, the issuing of visas and residence permits and the administration of third country nationals. Member States shall prohibit any further access to information included in the EIS.

Rights of disclosure, challenge and correction

Because of the potentially severe effects of listing a person in the EIS, the Proposed Directive provides that a Member State intending to report (to the EIS) a person as a 'person not to be permitted entry'must inform the person concerned of this intended inclusion in the EIS, of the information to be included, and of his or her rights and remedies. However, the Member State is free to disclose this information at the same time as issuing an exclusion order or other similar document. The person concerned shall enjoy the right to bring a challenge to the intended inclusion within three months of the notification, and any such challenge shall have suspensive effect on the inclusion. Furthermore, he or she shall

enjoy the rights to prevent the inclusion if the criteria for inclusion (see above) are not met, to prevent the inclusion of factually or legally incorrect information, and to have factually inaccurate information corrected or to have legally inaccurate information deleted.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Judicial enforcement

Member States must disclose the detailed reasons for any decision to refuse the rights set out in this Proposed Directive. Furthermore, Member States shall ensure that all those who consider themselves wronged by a failure to grant these rights shall have access to the courts with effective powers of enforcement of the Proposed Directive'sprovisions.

Proposed Directive on the Admission of Migrants

II

Purpose

The principal purpose of this Proposed Directive is to define the circumstances in which third country nationals may enter and reside in the European Community to undertake economic activity (that is, employment or self-employment), to study or for other purposes. It also sets out the procedures which Member States should follow in dealing with applications to enter on such grounds.

Scope

The Proposed Directive applies to all third country nationals. In addition, it applies to those citizens of a Member State who are designated by that State as having a special or second class citizenship which does not allow them to enjoy rights as citizens of the European Union.

Admission for employment

The Proposed Directive provides that a third country national shall enjoy the right to enter a Member State for the purposes of paid employment if he or she is:

- a person employed in the Member State but resident in a third country, and who habitually returns to that third country each day (or at least once a week);
- a person being temporarily transferred to an office, branch or subsidiary of a company based in a third country but providing a commercial service within the European Community;
- a candidate to fill a job vacancy in a Member State that has been vacant after inclusion for one month in the Eures employment clearance system, subject to him or her having already received the offer of a work contract;
- an au pair fulfilling the conditions of a legal au pair scheme; or
- a trainee, apprentice or intern, subject to him or her holding a training or

apprenticeship agreement with a host establishment that guarantees sufficient means of support.

In addition, Member States remain free to admit non-resident third country nationals who are seeking entry to transact business without entering into employment.

In the case of trainees, apprentices and interns, the duration of the residence authorisation shall be limited to one year. However, if the time required to complete the agreement is more than one year, the authorisation shall be extended annually.

Admission for self-employment

The Proposed Directive provides that a non-resident third country national wishing to undertake self-employment in a Member State shall enjoy the right to enter that Member State, subject to him or her having sufficient resources to establish the proposed business.

In such cases, the residence authorisation shall be for a renewable period of at least two years. Furthermore, it shall allow for the person concerned to move into another line of business altogether after two years if, for example, the initial business proves unpromising or the business environment changes.

In addition, the Proposed Directive provides that a non-resident third country national shall enjoy the right to provide professional services on an independent basis within a Member State, subject to him or her showing evidence of a contract for the provision of such services.

Admission for education

The Proposed Directive provides that a third country national shall enjoy the right to enter a Member State as a student if he or she has been admitted to a State or State-recognised establishment of higher education to pursue a course of study, prepare a doctoral thesis, or undertake research as part of vocational education.

In addition, it provides that a third country national shall enjoy the right to enter

a Member State as a primary or secondary school pupil if he or she has been admitted to a private (but State-recognised) school.

In such cases, the residence authorisation shall be for the duration of enrolment at the education establishment in question, and may be renewed annually. Furthermore, those so admitted shall enjoy the right to take up part-time or short-term work, including seasonal work, provided that this does not interfere with their studies.

Admission for other purposes

The Proposed Directive provides that a third country national not covered by the above provisions shall nevertheless enjoy the right to admission to the territory of a Member State, subject to he or she satisfying each of the following conditions:

- that he or she has sufficient means of lawful support without engaging in gainful employment or self-employment;
- that he or she shall enjoy social security cover that is valid in the Member State;
- that he or she provides evidence of health cover for all risks, if required by the Member State's national legislation; and
- that he or she has, or can demonstrate the ability to acquire, accommodation.

In such cases, the initial right of residence shall be limited to one year. Furthermore, those so admitted shall be allowed to undertake voluntary (that is, unpaid) work in the host Member State and elsewhere.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status.

Examination of applications

Applications for admission under the provisions of this Proposed Directive may

be made by persons outside the European Community, and by those legally present in the European Community after being admitted for a period of less than three months.

The Member State to which the application is made shall make a decision as soon as possible and within six months at most, and shall grant the right to admission if the relevant conditions are met. If the applicant is already legally present in the Member State at the time of application, then he or she shall be allowed to remain pending the decision.

The Proposed Directive provides that Member States shall admit a third country national for up to six months for the purposes of seeking an employment contract, examining the possibility of establishing a business, or seeking a contract to provide professional services. Similarly, Member States shall temporarily admit a third country national for the purpose of investigating the possibility of pursuing education. In all such cases, the person concerned must satisfy the conditions for Admission for other purposes, above.

Renewal of residence authorisation

Member States shall renew the residence authorisation of a third country national admitted under the provisions of this Proposed Directive, subject to the relevant conditions being met.

Member States may only refuse to admit, refuse to renew the residence authorisation of, or withdraw the residence authorisation of a person who has the right to enter and reside in the European Community under the provisions of this Proposed Directive:

- where the conditions for exercising the right to enter are no longer met; or
- on grounds of public policy, public security or public health.

Where a Member State has refused to grant initial admission to a person who is already legally present there, or has refused to grant the extension of a residence authorisation, the person in question cannot be required to leave that Member State until any appeal against that decision has been concluded.

Proposed Directive on Irregular Migrants

II

Purpose

Although most international and regional human rights law on the question of expulsion relates to persons lawfully present in the territory in question, even persons who are unlawfully present - or whose lawful presence is disputed - have fundamental rights that must be protected. In the absence of legislation securing such rights, there is a risk that the rights of such 'irregular migrants'will be overlooked and indeed breached. Accordingly, the purpose of this Proposed Directive is to ensure the protection of the fundamental human rights of persons in an irregular situation in the European Community. In particular, it sets out a limited number of circumstances in which an irregular migrant cannot be expelled, and provides for effective procedural protection against expulsion.

Scope

The Proposed Directive applies to all third country nationals who are present in the territory of the European Community without any right or authorisation to be there (with the exception of asylum applicants, rejected asylum applicants and recognised refugees, who are covered by separate proposals for legislation in this project). However, its provisions shall not in any way limit additional rights granted to such persons in treaties agreed by the European Community or its Member States or in more favourable provisions of the national law of Member States.

Expulsion from the European Community

The Proposed Directive sets out three substantive limitations on a Member State's ability to expel irregular migrants. Firstly, the Proposed Directive prohibits collective expulsion of irregular migrants, and provides that each case of expulsion of an irregular migrant shall be examined and decided individually.

Secondly, it prohibits the expulsion of those persons whose position is irregular only because of an accidental or inadvertent breach of national or European Community law, such as the late submission of an application for renewal of a residence permit due to illness. And thirdly, it prohibits expulsion on the grounds that the person's residence authorisation was obtained by fraud, unless the allegation of fraud has been tested and confirmed by a court.

Procedural rights during the expulsion process

The Proposed Directive provides that Member States shall clearly set out their rules governing expulsion in either criminal or administrative law, and that all decisions relating to expulsion must be reached in accordance with such law. More particularly, it provides that notification of any decision to refuse the issue or renewal of a resident permit, or to expel, shall be given to the person concerned in writing in a language that he or she understands and the language of the Member State. The notification must disclose detailed reasons for the decision in question, and must be accompanied by information on the rights and remedies available to the person concerned.

The Proposed Directive further provides that all such decisions shall be subject to appeal to a judicial authority with effective powers to provide an effective remedy, and with suspensive effect on expulsion. Where an appeal against expulsion is successful, the person concerned must be granted a renewable residence permit not later than six months after the date of application for such permit.

The Proposed Directive additionally provides that a person subject to an expulsion decision shall enjoy the rights to the services of an interpreter, whenever necessary, and to qualified and competent legal advice or assistance throughout the procedure; all such assistance must be paid for out of public funds, subject to the means of the person concerned.

In the case of expulsion, the person concerned must have a reasonable opportunity to settle any outstanding claims for wages and other entitlements, and shall have the right to transfer his or her earnings, savings, personal effects and belongings. All expulsions must be carried out in strict compliance with the rel-

evant provisions of national or international human rights law, and Member States shall ensure adequate training of all officials involved in carrying out expulsions.

Where a Member State fails to carry out an expulsion within six months of the notification of the expulsion decision to the person concerned or, where that decision is challenged at appeal, within six months of the notification of the appeal result, then the decision to expel shall be null and void. Furthermore, where an expulsion has been carried out but the decision to expel is subsequently annulled, the person concerned shall enjoy the right to seek compensation and the original decision shall not be used to prevent him or her from re-entering the European Community.

Detention during the expulsion process

The Proposed Directive provides that a person subject to an expulsion decision shall only be subject to detention where:

- such detention is prescribed by law for a specific reason (see below) and for a specific period, which must be as short as possible;
- such detention is used proportionately, after prior consideration of the alternatives to detention and the effect of detention in each individual case; and
- the detention of the person concerned is strictly necessary for compelling reasons relevant to his or her individual case.

More particularly, a person subject to an expulsion decision may only be detained in order to:

- ensure the application of a removal order; or
- protect public security or public order, where there is evidence to show that the person is likely to pose a risk to such principles.

Furthermore, Member States must ensure that all detention decisions are subject to prompt, mandatory and periodic review by an independent and impartial body, that detainees are held humanely and separately from convicted prisoners or prisoners on remand.

Other provisions

Non-discrimination

The Proposed Directive provides that Member States shall apply its provisions without discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, language, political or other opinion, association with a national minority, birth or other status. Furthermore, Member States shall comply fully with, and without derogation from, the United Nations Convention on the Rights of the Child.

In particular, any checks carried out by the relevant authorities of a Member State to determine where persons are in an irregular situation shall be carried out in strict compliance with the following principles:

- they shall entail no discrimination based on racial or ethnic origin; and
- they shall only take place where there are reasonable grounds for suspecting that persons are in an irregular situation.

Sanctions

Member States shall not impose criminal or administrative penalties upon an employer of persons in an irregular situation unless it can be shown beyond reasonable doubt that the employer was aware of the person's lack of authorisation for employment. Furthermore, Member States shall take all practical steps to ensure that any sanctions imposed upon employers of persons in an irregular situation do not have a racially discriminatory effect.

Similarly, Member States shall not impose criminal or administrative penalties upon transporters or harbourers of persons in an irregular situation unless it can be shown beyond reasonable doubt that such persons trafficked in illegal migrants for financial gain *and* that they were aware of the irregular situation of the persons in question.

In any event, Member States shall not impose criminal or administrative penalties upon an employer, transporter or harbourer of a person in an irregular situ-

ation where that person was subsequently recognised as a refugee.

Employment rights

Member States must ensure that persons in an irregular situation are not deprived of any employment rights by reason of their situation. In particular, they must ensure that employers fulfil their legal and contractual obligations to such persons.

Social rights

In terms of access to social security, health care and education, Member States shall ensure that persons in an irregular situation and members of their families enjoy equal treatment granted to nationals of the Member State concerned in similar circumstances.

Judicial enforcement

In addition to the specific procedural rights set out above, Member States shall ensure that all those who consider themselves wronged by a failure to grant the rights set out in this Proposed Directive shall have access to the courts, with effective powers of enforcement.

III

Chapter III

Influencing the national and European policy debates

The making of European Union policies is a protracted and complicated enterprise which involves input from various European institutions and which must also balance the interests of the fifteen Member States. Non-governmental actors also have a role to play in the process, through their representatives in official organs of the European Union or their participation in hearings and consultations organised by the European Parliament and the European Commission.

Differentiated integration

The European institutions' decision-making processes often involve compromises and delays, with the result that they sometimes do too little, too late. In some cases, a number of individual Member States, having grown impatient with such delays, have decided to move forward on specific issues. These states may not be willing to wait until all Member States are prepared to take further action, and decide to work more closely together on such issues. A well-known example is the co-operation within the framework of Schengen between five initial and twelve current Member States. These states wanted to make progress on the removal of internal border controls; whereas an increasingly small number of states did not show significant interest in the matter. Over the years, the co-operation between these twelve Member States has increased and, consequently, a separate legal framework was developed that has now been incorporated into the Union.

To prevent further such occurrences, the Amsterdam Treaty introduced the concept of closer co-operation. This enables some Member States to advance together on certain issues, within the single institutional framework of the European Union , even if the active participation of other states is lacking. This makes the process of co-operation between these Member States more transparent (subject to procedures spelled out in the Treaties), and the adopted measures more coherent (though necessarily consistent with measures adopted in related policy areas). The disadvantage, however, is that different rules can apply to the various combinations of Member States. Moreover, this pragmatic solution for political disagreements, in essence, challenges the principal purpose of the European Union: to estab-

lish an internal market and an area of freedom, justice and security for its citizens.

In a Protocol to the Amsterdam Treaty, Ireland and the United Kingdom have declared that they will not participate in the Council of Ministers' adoption of measures based on the new Title IV of the EC-Treaty. Consequently, no measure adopted within this context will be binding upon these two states. This does not prevent them, however, from informing the Council and Commission if they wish to accept an adopted measure. In such cases, the Commission will give its response within four months. These two states are also entitled to request their participation in the adoption of a certain measure, by which they are then bound. Another Protocol allows Denmark to abstain from decision-making on measures based on Title IV, with the exception of those concerning the common visa list and the uniform visa format. The Protocol then links this issue with the incorporation of Schengen into the Treaties, saying that Denmark will decide, no more than six months after the Council has agreed a proposal built on the Schengen *acquis*, whether it will implement this decision in its national law.

Non-governmental organisations usually favour measures that are adopted and applied across the Union, and which meet high standards in protecting the rights of EU-citizens, immigrants and minorities.

Although three Member States will not play a role in the decision-making process, they should nevertheless be encouraged to accept such measures after their adoption by the twelve other Member States. NGOs acting at the European level should therefore work to prevent the watering down of proposed measures, which is likely to occur when attempts are made to make such measures more acceptable to non-participating Member States.

It will be up to NGOs in Ireland and the United Kingdom to persuade their governments to participate in the decision-making process.

Decision-making procedures

Although the powers of the European Parliament have gradually been extended, they still do not match those of Member States' national parliaments. For instance, the European Parliament does not have the right to take

legislative initiatives. This power is reserved for the European Commission and, in matters related to Title IV, to both the Commission and Member States. On the other hand, the Parliament has considerable political leverage through its power to approve the European Community budget.

In addition, different decision-making procedures are applied according to subject matter. On matters related to the free movement of persons, services and capital (Title III of the EC-Treaty), the 'co-decision procedure' applies. This procedure was introduced by the Treaty on European Union and gives the Parliament the power to adopt measures jointly with the Council of Ministers (Article 251). The Treaty of Amsterdam has simplified the co-decision procedure in an effort to make it faster, effective and transparent. After the European Commission has submitted a proposal for an act, the Council of Ministers can adopt the proposal by a qualified majority after obtaining the Opinion of the Parliament. In those cases where the Council does not approve possible amendments contained in the Parliament's Opinion, the Council must notify the Parliament in a so-called Common Position. The Parliament may approve, reject or amend this Common Position by an absolute majority of its component members. The Council may then adopt the Parliament's position by a unanimous vote. If the Council does not approve the amendments, a Conciliation Committee will be convened. This Committee, composed of an equal number of Council and Parliament members, and assisted by the European Commission, must come to an agreement on a joint text. In those instances where agreement is not reached on a joint text, the proposed act is not adopted. In those cases where a joint text is produced, the Council and Parliament must adopt it by a qualified majority and an absolute majority, respectively. If either of the two institutions fail to approve it, the text is rejected. The whole procedure should be completed within one year.

A different procedure applies in matters relating to visas, asylum, immigration and other free movement-related policies (Title IV of the EC-Treaty). During a transitional period lasting five years, the Council must act unanimously on a Commission proposal or a Member State initiative.

A qualified majority is sufficient, however, in matters pertaining to the visa list and uniform visa rules. While the Council must consult the European Parliament and take its views into account, it is not bound by the Parliament's position. After five years, the Council shall take a decision by unanimous vote after consulting the Parliament on applying the co-decision procedure to all or parts of the areas covered by Title IV (Article 67). Unlike the case of the co-decision procedure, there are no time limits set for the consultation procedure. In other words, the Council may either act quickly or prolong the decision-making process as it sees fit. There is, however, one other time limit, which requires the Council to take measures within a period of five years in all areas of Title IV, except on matters of conditions of entry and residence, long-term visa and residence permits, and free movement of third-country nationals (Article 63).

In order to influence the decision-making process, and irrespective of the procedure followed, NGOs ought to engage themselves in an ongoing dialogue with the European Commission, the European Parliament and the Council of Ministers. The decision-making procedure should nevertheless influence the amount of time and attention which is given to these dialogues with the Commission, Parliament and Council.

Regulations and Directives

In Community law a distinction is made between a Regulation, a Directive, a Decision, a Recommendation and an Opinion (Article 249).

A Regulation is a piece of legislation that is binding in its entirety and applicable in all Member States. Thus a Regulation is normally precise and limited in scope and is used to introduce uniform measures in all Member States. A Directive is binding upon each Member State, as a result to be achieved, but leaves decisions about the forms and methods of implementation to the national authorities. It is used to promote harmonisation of Member State policies in certain areas by defining goals, while maintaining flexibility as to how to achieve them. A Decision is binding in its entirety upon those Member States to which it is addressed. Finally, Recommendations and Opinions have no binding force.

Member States most often prefer a Directive over a Regulation. The Protocol to the Amsterdam Treaty on 'The application of the principles of subsidiarity and proportionality' states that Directives will be preferred to Regulations, and framework Directives to detailed measures. It can be argued, however, that it is not only the preference of Member States, but also the issue at hand that determines the type of measure chosen. For example, Regulations are used for the establishment of free movement of workers within the Community and the right to remain in a Member State after having been employed in that state. Directives are used to elaborate on these rights. Thus, there are, for example, separate Directives on the elimination of restrictions on movement and residence of workers, self-employed persons, service providers and members of their families; on the renewal of residence permits and matters related to expulsion on grounds of public policy, public security or public health; and on the extension of free movement rights to categories other than workers.

Non governmental organisations argue that for the sake of consistency and equality, third country nationals should be regulated along the same lines as EU citizens.

Taking the initiative

The Amsterdam Proposals can be used to stimulate a well-informed policy debate in the Member States and at the European level. Local, national and European organisations can act simultaneously and in coordination. If *The Amsterdam Proposals* are promoted across the European Union, then there is a greater chance that non-governmental actors will be able to influence the policy agenda, and therefore shape the ultimate decision-making in accordance with their own ideas.

A first step is the distribution of the Amsterdam Proposals among governmental and non-governmental actors. A second step is the rallying of support for the proposals from a wide range of interested parties (including trade unions, welfare organisations, churches and NGOs). A third step is engaging national and European governmental offices and parliaments in the debates.

Acting at all levels

The next phase begins when an official proposal for a Directive or Regu-

lation (either from the Commission or a Member State) is presented to the European Parliament and the Council of Ministers.

In cases where the co-decision procedure must be followed, the European Parliament plays an important role. Members of the relevant Committee should be briefed on the NGO position and NGOs may even assist Members of Parliament in drafting their Resolutions. It is equally important that MEPs are reminded of the wide support that exists for many of the ideas and proposals put forth by NGOs. This is best achieved by approaching MEPs through their constituencies and by as many organisations as possible. Where the consultation procedure applies, less time needs to be spent on briefing the European Parliament.

It is therefore important that NGOs work closely and consistently with the responsible Parliamentary Committee and its members.

At the same time, the Council of Ministers must be approached in Brussels, where the Council meets, where its Secretariat is based, and where the Member States' representatives assist the Committee of Permanent Representatives (COREPER). Consultations should also take place in the capitals of the fifteen Member States, since it is there that the political will to act at the European level is generated and decisions on European measures are prepared. Governments are often more responsive to pressure from within their own countries than from Brussels-based international organisations.

The European Commission plays a crucial role in all stages of the decision-making process. The Commission tries to reconcile the varying and often conflicting interests of the Member States. The Commission also values the opinion and expertise of non-governmental actors.

The Amsterdam Proposals can be used to judge official proposals. They can also be used, at each stage of the decision-making process and at all levels, to press for amendments to the official proposals.

To summarise, European policy-making is a complex and protracted process involving several major European institutions. In order to influence the implementation of the Amsterdam Treaty's Title IV, non-governmental

actors can expect to embark on a process of at least five years. They will become engaged in a debate that is at times quite legal and, at other times, quite political. The achievement of effective results in this process will require the co-ordinated intervention of many organisations at both the national and European levels.

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