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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**ON THE APPLICATION OF DIRECTIVE 2004/83/EC OF 29 APRIL 2004 ON  
MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD  
COUNTRY NATIONALS OR STATELESS PERSONS AS REFUGEES OR AS  
PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION AND THE  
CONTENT OF THE PROTECTION**

# REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

## ON THE APPLICATION OF DIRECTIVE 2004/83/EC OF 29 APRIL 2004 ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS OR STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION AND THE CONTENT OF THE PROTECTION

### 1. INTRODUCTION

Council Directive 2004/83/EC of 29 April 2004, 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 (the "Qualification Directive" or "Directive")<sup>1</sup> is one of the "building blocks" of the first phase of the Common European Asylum System, called for by the European Council in its 1999 Tampere Conclusions. It is applicable to all Member States except Denmark<sup>2</sup>.

This report meets the Commission's obligation under Article 37 of the Directive. It gives an overview of the transposition and implementation of the Directive by Member States and identifies possible problematic issues. It is based on a study conducted on behalf of the Commission<sup>3</sup> and on information from other studies<sup>4</sup>. It must be read in conjunction with the Impact Assessment conducted for the purposes of the recast of the Qualification Directive<sup>5</sup>.

For those Member States<sup>6</sup> which had not adopted the necessary transposing legislation at the time of preparation of the report, relevant information was gathered on the basis of draft legislation available at that time and fragmentary information obtained since the adoption of the transposing legislation<sup>7</sup>.

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<sup>1</sup> OJ L 304, 30.9.2004, p. 12

<sup>2</sup> In this report "Member States" means the Member States bound by the Directive.

<sup>3</sup> September 2008 - study contracted to the Academic Network for Legal Studies on Immigration and Asylum in Europe "Odysseus".

<sup>4</sup> Further studies include: UNHCR, "Asylum in the European Union, A study on the implementation of the Qualification Directive", November 2007 (the "UNHCR study"); ELENA/ECRE, "The impact of the EU Qualification Directive on International protection", October 2008; ECRE "Complementary Protection in Europe", July 2009, France Terre d'Asile, "Asile La protection subsidiaire en Europe: Un mosaïque de droits", Les cahiers du social no 18, Septembre 2008; Dutch Refugee Council/ECRE, 'Networking on the Transposition of the Qualification Directive', December 2008, ; Nijmegen University, "The Qualification Directive: Central themes, Problem issues, and Implementation in selected MS", Karin Zwaan (ed), 2007

<sup>5</sup> Proposal for a Directive 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 (recast) adopted on 21 October 2009, COM(2009)551, accompanied by the Impact Assessment, SEC(2009) 1374. The documents are available at [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=198704](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=198704)

<sup>6</sup> FI, EL, ES, HU, IT, LV, NL, PL, PT, SI, SE

<sup>7</sup> The Odysseus report addresses all Member States bound by the directive except for MT.

## 2. HISTORICAL AND POLITICAL CONTEXT

The Qualification Directive was designed to define common criteria for the identification of persons in need of international protection and to ensure that at least a minimum level of benefits is available for these persons in all Member States. The objective to be pursued for the creation of the CEAS is the establishment of a common asylum procedure and a uniform status valid throughout the Union.

The Hague Programme invited the Commission to conclude the evaluation of the first phase instruments and to submit the second phase instruments with a view to their adoption by the end of 2010. In the Policy Plan on Asylum<sup>8</sup> of 17 June 2008, the Commission proposed the completion of the second phase of the CEAS through raising the standards of protection and ensuring their consistent application across the EU. The European Pact on Immigration and Asylum of 16 October 2008 provided further political endorsement for this objective, by inviting the Commission to present proposals for establishing, in 2010 if possible and in 2012 at the latest, a single asylum procedure comprising common guarantees and for adopting a uniform status for refugees and the beneficiaries of subsidiary protection.

On 21 October 2009, the Commission presented a proposal for the amendment of the Qualification Directive, together with a Proposal amending Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (the "Asylum Procedures Directive")<sup>9</sup>, with the aim to ensure a higher degree of harmonisation and better substantive and procedural standards of protection, towards the establishment of a common asylum procedure and a uniform status.

## 3. MONITORING AND STATE OF TRANSPOSITION

Member States had to transpose the Directive by 10 October 2006. The Commission assisted the Member States in the process by holding regular meetings with national experts.

Following expiry of the deadline for transposition, infringement procedures were opened against all Member States which failed to communicate or to fully communicate their transposition measures. Subsequently, in accordance with Article 226 of the Treaty, the Commission addressed 19 letters of formal notice and 13 reasoned opinions. The decision to bring the cases before the Court of Justice was taken against 9 Member States. Five cases were withdrawn<sup>10</sup> and judgments were given for 4<sup>11</sup>. At present, the Directive has been transposed by all Member States<sup>12</sup>.

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<sup>8</sup> Policy Plan on Asylum 'An integrated approach to protection across the EU' COM(2008) 360

<sup>9</sup> OJ L 326, 13.12.2005, p.13

<sup>10</sup> Cases C-2008/220, C-2008/190, C-2008/19, C-2008/269, C-2008/543

<sup>11</sup> Case C-293/08, judgment of 5.02.2009, *Commission v Finland*; Case C-256/08, judgment of 30.04.2009, *Commission v United Kingdom*; C-322/08, judgment of 14.05.2009, *Commission v Sweden*; C-272/08, judgment of 9.07.2009, *Commission v Spain*

<sup>12</sup> SE was the last Member State to fully transpose the Directive by a law which entered into force on 01 January 2010

## **4. GENERAL PROVISIONS**

### **4.1. Definitions**

The provisions of 2(c) and (e) are binding for Member States in so far as Articles 13 and 18 impose the obligation to grant status to "refugees" and "persons eligible for subsidiary protection" who qualify in accordance with the Directive. However, domestic law in several Member States does not require the grant of status in obligatory terms, either as regards refugee status (EE, EL, LV) or as regards subsidiary protection (EE, EL, LV, LT, RO). The transposing legislation in FI defines international protection as including not only refugee status and subsidiary protection but also a residence permit granted on the basis of humanitarian protection.

## **5. SPECIFIC PROVISIONS**

### **5.1. Assessment of application for international protection**

#### *5.1.1. Assessment of facts and circumstances (Article 4)*

Pursuant to Article 4(1), first clause, Member States have the possibility to consider it the duty of the applicant for international protection to submit as soon as possible all elements needed to substantiate the application. This provision was transposed by all Members States except for BE, CZ, CY, FI, HU, LT and RO.

The obligation to submit elements "as soon as possible" has divergent meanings in the Members States which elaborated on this term. A definite period of time is set in some Member States (ES, FR, PT). BG requests that the submission be made "immediately" after illegal entry or "within a reasonable period of time" after legal entry. When these time-limits are not complied with, the application can be declared manifestly unfounded (BG), be subject to a special "inadmissibility" procedure (ES) or be rejected if no justification is given (PT). Furthermore, the credibility of the applicant may be affected (AT, IE, SE) or the elements submitted after the first interview need not be addressed by the authorities (DE, NL, SK).

Member States applying Article 4(1), first clause, must also apply Article 4(5), according to which the applicant's statements which are not supported by evidence shall not need confirmation if several conditions are met. This rule was not transposed in three Member States (EE, ES, PL), whereas two Member States (AT, FR) rely on general principles which appear too broad. As regards the 'general credibility' of the applicant, domestic law in some Member States (EL, UK) is more restrictive because it raises the standard of the level of credibility required by Article 4(5).

Article 4(1), second clause, requires Member States to assess relevant elements "in cooperation with" the applicant. Transposing legislation of different Member States<sup>13</sup> requires the authorities to inform the applicant about the assessment, to conduct an interview, to indicate to the applicant the points requiring clarification, to offer the applicant the opportunity to comment on a draft decision and/or the duty of authorities to assess relevant facts *ex officio*. Some Member States (AT, DE, SK, SI) require that only 'certain' (instead of 'relevant') elements be assessed *ex officio*, whereas in RO this is only a faculty for national

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<sup>13</sup> AT, BE, EE, FI, DE, HU, LU, LV, PL, PT, SK, SI

authorities. Two Member States (BG and LT) did not transpose this provision at all whereas others (e.g. CY, CZ, FR, RO) transposed it only as regards some of the elements mentioned in Article 4(2) and (3).

The relevant elements to be assessed are enumerated at Article 4(2). Only one Member State did not transpose this provision (BE), one addresses the issue in a too general way (BG) and one only introduces a general obligation of cooperation without specifying its scope (ES).

Pursuant to Article 4(3), the assessment of an application is to be carried out on an individual basis and includes taking into consideration a list of facts, documents and circumstances set out in the provision. Some Member States (AT, NL, PL, SE) rely on relevant general principles of domestic law. The transposing legislation of a number of Member States (e.g. BE, FI, DE, HU, LT, SI) contains a different list. In the legislation of some Member States certain elements of this provision are omitted or incorrectly transposed: 4(3)(c) regarding the individual position and personal circumstances of the applicant (e.g. LV, SI), 4(3)(d) regarding the purpose of the applicant's activities since leaving the country of origin (e.g. EE, FI, LT, SI) and 4(3)(e) regarding the possibility for the applicant to avail himself of the protection of an another country (e.g. FI, SI). Domestic law in several Member States is incomplete and ambiguous (BE, BG, CZ, EE, ES, FR, LT, SI), whereas in other Member States it introduces additional requirements such as to request comments of the national intelligence service (SK) or to assess the position in the country of return (UK).

Article 4(4) obliges Member States to consider previous persecution or serious harm as a serious indication of future persecution or serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. A number of Member States did not transpose this provision (AT, BE, BG, HU, PL, ES, SE) or transposed it incorrectly (CY, CZ, FR, LT).

#### *5.1.2. International protection needs arising sur place (Article 5)*

Article 5(1) and (2) contains mandatory provisions, according to which events which have taken place and activities which have been engaged in by the applicant since he/she left the country of origin can form the basis for recognising a need for international protection. SK did not transpose both paragraphs, whereas EE and LT did not transpose the second one. LT excludes beneficiaries of subsidiary protection from the scope of Article 5(1) whereas CZ and PT limit the application of 5(2) solely to activities constituting the continuation of convictions or orientations held in the country of origin.

Article 5(3) allows Member States to determine that an applicant who files a subsequent application shall normally not be granted refugee status if the risk of persecution is based on circumstances which he/she created by his own decision since leaving the country of origin. This optional provision has been transposed by several Member States<sup>14</sup>, some of which (BG, PT, SI) apply this rule also to first applications, whereas two Member States (EL, SI) have rendered it mandatory.

#### *5.1.3. Actors of persecution or serious harm (Article 6)*

Article 6 obliges Member States to consider as actors of persecution or serious harm, in addition to States, parties or organisations controlling at least a substantial part of a State, as

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<sup>14</sup> AT, BG, CY, DE, EL, HU, LU, PL, PT, RO, SI

well as non-State actors, where the actors of protection defined in Article 7 are either unable or unwilling to provide protection. This definition has been transposed restrictively in the legislation of certain Member States: in BG, the recognition of non-State actors as actors of persecution pre-supposes that they dispose of an organisation as well as the existence of a State which is unable or unwilling to counteract them; the CZ legislation refers only to the 'inability' and not to the 'unwillingness' of the State to provide protection and covers only actors of persecution and not of serious harm, and the SK legislation restricts the notion of "parties" by adding the qualification "political" and does not include international organisations in the definition.

Non-State actors accepted as actors of persecution in the practice of different Member States are reported to include guerrillas and paramilitaries, terrorists, local communities and tribes, criminals, family members, members of political parties or movements.

#### 5.1.4. *Actors of protection (Article 7)*

Article 7(1) allows Member States to consider that protection can be provided not only by the State but also by parties and organisations, including international organisations, controlling the State or a substantial part of its territory. Paragraph 2 sets out the requirements for accepting that protection is provided, namely that the State or non-State actors take reasonable steps to prevent the persecution or serious harm and that the applicant has access to such protection. Paragraph 3 requires Member States to take into account in this context guidance provided in relevant Council acts.

Paragraph 1 was transposed by all but one Member States (RO). CZ transposed it only with regard to refugee status whereas in EE legislation there is a certain confusion between the terms "actors of protection" and "actors of persecution". Paragraph 2 was not transposed by 3 Member States (CZ, EE, RO) whereas LT did not transpose the requirement that the applicant should have access to the protection. Based on the use of the terms "inter alia" before the reference to the requirement of an effective legal system capable of detection, prosecution and punishment of acts constituting persecution or serious harm, this requirement has not been introduced in the legislation of BE, CY, LV and SE. Paragraph 3 was not transposed in 13 Member States<sup>15</sup>.

Practices regarding the implementation of Article 7 vary widely, which gives way to different rates of recognition of persons with the same background. RO does not recognise actors of protection which do not have the attributes of a state. FI and FR consider that no other parties and organisations, beyond international organisations, can offer protection. In several Member States<sup>16</sup> legislation and/or practice insist on assessing the accessibility, durability and effectiveness of the protection provided. FR legislation does not mention the requirements to be fulfilled for accepting the existence of protection. BE, CY, LU, LV, PL, and SE are ready to consider clans or tribes as capable of providing sufficient protection under certain conditions, whereas in BE, HU and the UK, NGOs have been considered as actors of protection with regard to women at risk of female genital mutilation and honour killings, to the extent that they diminish such risks. However, in practice, protection provided by these actors proves to be ineffective or of short duration.

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<sup>15</sup> AT, BG, EE, FI, FR, LT, NL, PL, PT, RO, SK, SI, SE

<sup>16</sup> CZ, FI, FR, HU, LU, MT, NL, PL, RO

### 5.1.5. *Internal protection (Article 8)*

Article 8(1) is an optional provision, allowing Member States to reject applications for international protection if the applicant has no well-founded fear of persecution or of serious harm in a part of the country of origin and he/she can reasonably be expected to stay there. Paragraph 2 requires Member States applying paragraph 1 to have regard to the general circumstances in that part of the country and to the personal circumstances of the applicant, whereas paragraph 3 allows them to apply the concept of internal protection despite the existence of technical obstacles to return.

Paragraph 1 has been transposed by all Member States with the exception of IT and ES; paragraph 2 has not been transposed by IT, ES, BG, EE, LT, RO and SE. BG, CZ, EE, LT and PT have not transposed the requirement that the applicant can 'reasonably' be expected to stay in the relevant part of the country whereas others have provided specific guidance on its implementation: RO requires that the existence of internal flight is recognised by UNHCR and SE that the applicant has an actual possibility to live a life without unnecessary suffering or hardship. The requirement to consider the "general circumstances" is not transposed in BG and CZ whereas the requirement to consider individual circumstances is not transposed in BG, CZ, SI. FR legislation, on the other hand, provides two additional requirements: that the applicant should have access to protection and that the authorities should have regard to the actor of persecution, which prevents the use of the internal protection alternative in cases where the author of persecution is the State or a national institution.

Paragraph 3 has been transposed by only 8 Member States<sup>17</sup>. Technical obstacles are generally defined as: lack of valid travel documents, impossibility to travel to the country of origin and lack of cooperation of authorities in the country of origin and physical inability of the applicant illness or pregnancy. Applicants falling within the scope of this paragraph are often not given any legal status or only a tolerated status with limited social rights.

Available information shows considerable divergences in the implementation of Article 8 and in particular in the criteria to be used for the assessment of the general circumstances in the country of origin and the accessibility and nature of the protection available. Thus, some Member States (FR, SE) generally do not apply the concept in the cases of Chechen applicants, whereas in others (e.g. DE) most parts of Russian Federation are accepted as possible internal protection alternatives. Several Member States<sup>18</sup> apply the concept where the State is the actor of persecution, whereas others, such as FR, do not.

## 5.2. **Qualification for being a refugee**

### 5.2.1. *Acts of persecution (Article 9)*

Article 9(1) defines acts of persecution within the meaning of Directive, whereas Article 9(2) lists examples of such acts. FR did not transpose literally Article 9. EE transposed only the first subparagraph of Article 9(1) whereas CZ used a different definition. The second paragraph was transposed literally by most Member States; in 1 Member State (SI), the list was transposed as an exhaustive one.

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<sup>17</sup> CY, DE, HU, IE, LU, MT, NL, PT, SI, UK

<sup>18</sup> AT, BE, BG, DE, IE, NL, PL, RO, SK, SI, UK



Article 9(3) requires a causal link between the reasons for persecution listed in Article 10(1) and the acts of persecution. This provision was not transposed in several Member States (e.g. BG, CZ, FR, EL, ES, LU, NL, PL, SK), some of which rely on relevant practice. This lack of transposition can be understood as a more favourable standard within the meaning of Article 3. It appears that, in some Member States, courts have ruled that this requirement is also fulfilled where there is a connection between the acts of persecution and the absence of protection against such acts<sup>19</sup>.

### 5.2.2. *Reasons for persecution (Article 10)*

Article 10(1) offers guidance for the interpretation of the reasons of persecution provided in the Geneva Convention relating to the status of refugees<sup>20</sup>, by setting a non-exhaustive list of elements to be taken into account when assessing these reasons. Article 10(2) specifies that it is immaterial whether the applicant possesses the characteristic which attracts the persecution if such a characteristic is nevertheless attributed to the applicant by the actor of persecution. Article 10 was transposed by all but 2 Member States (CZ, EE), whereas 1 (SI) did not transpose Article 10(2).

Problems were reported with regard to the implementation of Article 10(1)(d) concerning the criteria for assessing whether a person is member of a particular social group. This ground for protection is defined by reference to two criteria: that the members of this group share an innate characteristic or one that is so fundamental to identity or conscience that cannot reasonably be changed; and that they are perceived by society as a distinct group. These criteria are applied as cumulative requirements by some MS<sup>21</sup>, but as alternative ones by others<sup>22</sup>. A few Member States (BE, HU, SI, UK) did not transpose the last clause of Article 10(1)(d) regarding the relevance of gender-related aspects. In a number of Member States<sup>23</sup> this provision is applied broadly, allowing for a definition of a particular social group based solely on gender-related aspects, whereas DE provides this explicitly in its legislation.

## 5.3. **Qualification for subsidiary protection**

Article 15, read in conjunction with Article 2(e), defines the criteria of eligibility for subsidiary protection. Divergences have been noted both in the transposition of Article 15 and in its interpretation across Member States and within national jurisdictions.

Some Member States (BE, CY, HU and SE) have omitted the qualification "in the country of origin" in the transposition of Article 15(b); AT legislation defines the grounds for subsidiary protection provided for in Article 15(a) and (b) by referring to Articles 2 and 3 of the European Convention on Human Rights and to Protocols No 6 and 13 to this Convention; the UK legislation provides for "unlawful killing" as an additional ground for subsidiary protection.

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<sup>19</sup> AT, BE, BG, DE, EE, HU, LT, NL, SI, SE

<sup>20</sup> Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967

<sup>21</sup> AT, BE, BG, CZ, DE, ES, FI, FR, PL, PT, SI SK, UK

<sup>22</sup> EE, EL, ES, HU, IE, LV, LU, NL, RO, SE

<sup>23</sup> BE, BG, CZ, FI, FR, HU, IE, LU, ES, SE

Regarding the transposition of 15(c), 8 Member States<sup>24</sup> have omitted the qualification 'individual' when transposing the requirement of a "serious and individual threat", whereas FR added the requirement that the threat should also be "direct". The DE legislation omits completely the notion of indiscriminate violence. Moreover, in some MS (e.g. FR, DE and SE), the requirement of an individual threat, read in conjunction with the notion of 'indiscriminate violence' and recital 26, has been interpreted as requiring that the applicant demonstrates that he/she is at a greater risk of harm than the rest of the population, or sections of it, in his or her country of origin.

The requirement of the existence of a "serious and individual threat" in Article 15(c) was interpreted by the Court of Justice in its judgment of 17 February 2009, C-465/07. The Court clarified the conditions under which such a threat can be exceptionally considered as established in the case of an applicant who is not specifically targeted by reason of factors particular to his/her personal circumstances and provided guidance on the use of the degree of indiscriminate violence characterising the armed conflict as a criterion for assessing the existence of a serious and individual threat<sup>25</sup>.

#### **5.4. Revocation of, ending of or refusal to renew refugee status and subsidiary protection status (Articles 11, 12, 14, 16, 17 and 19)**

The provisions of Articles 11 and 12, read in conjunction with Articles 14(1) and (3), regarding cessation of and exclusion from refugee status, and the provisions of Articles 16 and 17(1) and (2), read in conjunction with Article 19(1) and (3), regarding cessation of and exclusion from subsidiary protection, are phrased in mandatory terms. However, legislation in a number of Member States merely allows for termination of status on the grounds referred to in these provisions instead of requiring it<sup>26</sup>. The optional ground for exclusion from subsidiary protection in Article 17(3) has been transposed by 13 Member States<sup>27</sup>.

On the other hand, certain Member States have introduced additional grounds or overly wide grounds for cessation<sup>28</sup> and for exclusion<sup>29</sup>. In some Member States, cessation of refugee status is not possible if protection is offered by non-State actors or within only in a part of the country of origin<sup>30</sup>. In other Member States, cessation of refugee status (DE, HU, SK) or of

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<sup>24</sup> AT, BE, CZ, DE, EL, ES, HU, LT

<sup>25</sup> The Court was asked to give a preliminary ruling on whether the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances and, if not, to indicate the criterion on the basis of which the existence of such a threat can be considered to be established. The Court found that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances. It further indicated that the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

<sup>26</sup> BE, IE, UK in the case of cessation and BE and PL in the case of exclusion from refugee status

<sup>27</sup> BG, CY, CZ, EE, IE, LU, LV, PL, SK, SI, ES, SE, UK

<sup>28</sup> With regard to Article 11: BG, CZ, EE, ES, LT, PT; with regard to Article 16: BG, DE, LT, PT, SI

<sup>29</sup> Article 12: DE, IT, PT, SK, SI, FI, LT, RO, UK; Article 14(3): CZ, PL; Article 17: EE, FR, LT, PT, SK, SI, UK

<sup>30</sup> AT, BE, CY, CZ, FR, EL, IE, LV, NL, PL, RO, SK, SI, ES

subsidiary protection (HU) is not possible if there are compelling grounds resulting from previous persecution or serious harm.

If the refugee has been granted permanent residence, the termination of status is restricted or prevented in some Member States, despite the fulfilment of the conditions for cessation<sup>31</sup> or exclusion<sup>32</sup>. Several Member States do not issue an alternative status following termination because of cessation<sup>33</sup> or exclusion<sup>34</sup>. In other Member States, an exceptional leave to remain may be granted in certain circumstances such as ill-health or danger of refoulement in case of cessation<sup>35</sup> or exclusion<sup>36</sup>.

Article 14(4) and (5) allows Member States, under certain conditions, to revoke, end or refuse to renew the status granted to a refugee and not to grant status to a refugee, where such a decision has not yet been taken, in cases where a person is a danger to their security or community. Article 14(6) requires Member States making use of one or both of these options to grant the persons concerned at least certain basic rights set out in the Geneva Convention. However, several Member States implementing one of or both these optional provisions have failed to transpose Article 14(6)<sup>37</sup>, although some are reported to afford the Geneva Convention rights as a result of the "direct effect of the Geneva Convention" (BE) or for other non-specified reasons (AT) which does not constitute sufficient transposition of the Directive provision. Only where it is possible for the beneficiaries to effectively claim such rights before the courts or administrative bodies in a given Member State, this can be said to be in line with the Directive.

Regarding procedural rules, the burden of proof lies with national authorities, which must "demonstrate on an individual basis" that a person has ceased to be or has never been a refugee or a person eligible for subsidiary protection, as required by Articles 14(2) and 19(4). A number of Member States<sup>38</sup> failed to implement these provisions, or implemented them only partially.

The Court of Justice interpreted Article 11(1)(e)(f) and (2) on the 'ceased circumstances' cessation clauses in its judgment of 02 March 2010<sup>39</sup>. There are currently two pending

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<sup>31</sup> Regarding refugee status: AT, DE, NL, PL; regarding subsidiary protection: NL, PL

<sup>32</sup> Regarding refugee status: DE, NL, PL; regarding subsidiary protection: DE, NL, PL

<sup>33</sup> Regarding refugee status: BG, CZ, EE, EL, IT, LV, LT, LU, NL, PL, RO; regarding subsidiary protection: BG, CZ, EL, LV, LT, LU, NL, PL, RO.

<sup>34</sup> Regarding refugee status: BG, EL, LV, LT, LU, NL, PL, RO; regarding subsidiary protection: BG, EL, LV, LT, LU, NL, PL, RO

<sup>35</sup> BE, CY, FI, DE, HU, IE, PT, SI, ES, SE

<sup>36</sup> AT, BE, CY, CZ, FI, DE, HU, IE, PT, SK, SI, ES, SE, UK

<sup>37</sup> AT, BE, BG, IT, LV, LT, NL, UK – IE relies on general principle of internal law

<sup>38</sup> AT, BE, BG, CY, CZ, EE, FR, LV, IT, PT, ES, UK

<sup>39</sup> Joined Cases C-175/08, C-176/08, C-178/08 et C-179/08, *Salahadin Abdulla, Hasan, Adem and Rashi, Jama*: The Court mainly ruled that cessation of refugee status intervenes when, following a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which had justified the person's fear of persecution no longer exist and he has no other reason to fear being persecuted. The competent authorities must verify that the actors of protection referred to in Article 7(1) have taken reasonable steps to prevent the persecution. They must therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and ensure that the national concerned will have access to such protection if he ceases to have refugee status. The change in circumstances will be of a 'significant and non-temporary' nature when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. That implies that there are no well-founded fears of being exposed to acts of persecution amounting to 'severe violations of basic human rights'.

references for preliminary rulings regarding the interpretation of the provisions on cessation and exclusion. More specifically, these references regard Article 12 (1)(a) on the exclusion of persons falling within the scope of Article 1 D of the Geneva Convention<sup>40</sup>, and the provisions of Articles 12(2) and 14(3), on the conditions that need to be fulfilled for the application of exclusion and the relevant consequences<sup>41</sup>.

## **5.5. Content of international protection**

### *5.5.1. General rules (Article 20)*

The first paragraph of this Article provides that the Directive's Chapter VII, on the content of international protection shall be without prejudice to the rights laid down in the Geneva Convention. No cases have been identified of non-transposition of this paragraph as such, nor of legal (or practical) problems with regard to the transposition.

Paragraph 2 sets out the principle of equality between refugees and beneficiaries of subsidiary protection status with regard to the application of the said Chapter, unless otherwise indicated in the Directive itself. In LT and LV equal treatment is transposed formally, but in practice, equal treatment applies only during the social integration period, while beneficiaries of subsidiary protection do not have access to certain rights following the expiry of this period, as many general legislative acts grant such access only to permanent residents (which beneficiaries of subsidiary protection are not).

### *5.5.2. Vulnerable persons and minors - Article 20(3)(4)(5)*

Article 20(3) sets out the obligation to take the specific situation of certain vulnerable groups (set out in a non-exhaustive list) into account when implementing Chapter VII. A few Member States have not transposed Article 20(3) (BE, CZ, EE, LU, NL, RO, UK). The norms in some Member States, which either have formally transposed or apply pre-existing legislation (e.g. AT, DE, FI, LT, NL, SE), do not specifically mention all the categories listed in the provision. Moreover, in LT, vulnerable groups are mentioned only for the purpose of the social integration period, while the general social legislation does not always contain such provisions concerning refugees or beneficiaries of subsidiary protection. In SK, the situation of vulnerable groups is regulated in some fields, such as health care, solely by way of practice. In PT, rules on vulnerability stipulate only the obligation to take into consideration the situation of vulnerable persons in an adequate manner, except concerning unaccompanied minors. Inversely, ES, LT and NL have broadened the scope of the provision by including, respectively, victims of human trafficking, families with three and more minor children or with one or two children under 18 and persons with psychological problems.

Article 20(4) imposes an obligation for Member States to recognise the special needs of vulnerable persons for the purposes of applying paragraph 3 only after an individual evaluation of their situation. This provision has not been transposed in 12 Member States<sup>42</sup>.

Article 20(5), which sets out the principle that the best interest of the child should be a primary consideration for Member States when applying Chapter VII, has not been transposed by BE, ES, IE, NL and UK.

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<sup>40</sup> Case C-31/09, *Bolbol Nawras*; v. opinion of Advocate General Sharpston of 04 March 2010

<sup>41</sup> Cases C-57/09, *Cemalettin Polat* and C-101/09, *Ayhan Ciftci*

<sup>42</sup> BE, BG, CZ, EE, ES, IE, LT, LU, LV, NL, RO, UK

### 5.5.3. *Reduction of benefits – Article 20(6)(7)*

These two paragraphs allow Member States the discretion to reduce the benefits to be granted to refugees and beneficiaries of subsidiary protection, respectively, where the protection status has been obtained on the basis of activities engaged in for the sole or main purpose of obtaining protection. These provisions have been implemented only in BG, CY and MT.

### 5.5.4. *Protection from refoulement*

Article 21(1) stating that Member States shall respect the principle of non-refoulement in accordance with their international obligations has been transposed by all Member States. The optional provision in Article 21(2), reflecting the exceptions to the principle of non-refoulement provided for in the Geneva Convention, has been transposed in all but a few Member States (CZ, FI, FR, HU, IE, SK, SI) whereas BE has only transposed the optional exception under indent (a).

The optional provision in Article 21(3), which allows Member States to revoke, end or refuse to renew or to grant a residence permit of or to a refugee to whom the exceptions to the principle of non-refoulement enumerated in Article 21(2) apply, has been transposed by a small number of Member States (EE, ES, FI, LV, LT, UK).

### 5.5.5. *Information*

Article 22 requires Member States to provide beneficiaries of either protection status with access to information on the rights and obligations relating to the respective status as soon as possible after the status has been granted and in a language likely to be understood by them. It has not been transposed in AT, BE, FR, LT and RO. Also, the relevant national norms do not always specify that such access to information should be provided "as soon as possible" after the protection status has been granted (BG), that the information is supposed to be given in a language likely to be understood by the recipients of international protection (EE) or what the information provided should include (ES, FI).

### 5.5.6. *Maintaining family unity*

Article 23 lays down the rules on maintaining family unity for beneficiaries of international protection, i.e. on granting their family members who are already present in the territory of a given Member State certain rights and benefits. The personal scope of application of these rules is laid down in the provisions of Articles 2(h) and 23(5).

The persons who should be considered as family members of a beneficiary of international protection for the purposes of maintaining family unity are defined in Article 2(h). This provision imposes two general conditions: that the family already existed in the country of origin and that the family members are present in the Member State concerned. The first of these conditions has been transposed by a majority of Member States<sup>43</sup> whereas the second one only by BE, ES, LT, LU, NL.

For the purpose of granting the benefits referred to in Articles 24 to 34 of the Directive, some Member States do not consider unmarried partners in a stable relationship as members of the family (e.g. CY, HU, IE, LV, MT, PL, RO), whereas others do (e.g. BG, CZ, ES, FI, LT, LU,

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<sup>43</sup> AT, BE, BG, EE, ES, DE, LU, LV, LT, NL, PT, RO, SI, SK, SE, UK

NL, PT, SE, UK). Such divergences are allowed by the Directive, to the extent that the treatment of unmarried couples is determined by reference to the legislation or practice of Member States and provided that the implementing measures comply with fundamental rights, in particular the principle of non-discrimination explicitly referred to in recitals 10 and 11 and enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, including non discrimination on grounds of sexual orientation.

Article 23(5) allows Member States to adopt a broader definition of family members, covering also other close relatives who lived together as a family unit at the time of leaving the country of origin and who were wholly or mainly dependent on the beneficiary of international protection at that time. This provision has been formally transposed (BE, BG, CY, CZ, EL, FI, IE, PT) or by way of pre-existing norms (AT and SE).

For the purposes of maintaining family unity, some Member States include further categories, such as adult unmarried children, under several conditions, including dependence because of their physical or mental health (e.g. BG, EE, IE, SE) or absence of financial capacities (EL). Some include parents and/or grandparents who are financially dependent (e.g. CY, EE, EL, HU, IE, SE), siblings who are dependent and/or suffering from a mental or physical disability (e.g. HU, IE), other dependent member of the family (IE, ES), or parents of unaccompanied minors (e.g. CY, HU).

Reportedly, only one Member State makes use of the possibility provided by Article 23(2) to apply specific conditions for granting benefits to family members of beneficiaries of subsidiary protection (PL).

#### 5.5.7. *Residence permits – Article 24*

According to Article 24, refugees and beneficiaries of subsidiary protection are issued a residence permit, valid for at least 3 years or 1 year respectively and renewable, as soon as possible after the status has been granted, unless compelling reasons of national security or public order otherwise require.

A number of Member States are reported to provide for residence permits for refugees with a validity of more than 3 years (AT, BE, BG, FI, HU, IE, LT, SI, SE, UK). At least 7 Member States grant beneficiaries of subsidiary protection residence permits longer than the 1 year prescribed as a minimum by the Directive: 2 years (PL), 3 years (BG, IE, SI), 4 years or more (HU, LV, NL, UK).

#### 5.5.8. *Travel documents – Article 25*

Article 25(2) provides that Member States shall issue to beneficiaries of subsidiary protection who are unable to obtain a national passport documents which enable their holders to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require. Only 3<sup>44</sup> apply this limitation regarding the reasons for travelling (AT, ES, LU).

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<sup>44</sup> amongst the 19 Member States which replied to the survey conducted by the Commission

#### 5.5.9. *Access to employment – Article 26*

A vast majority of Member States authorise access to the labour market not only for refugees but also for beneficiaries of subsidiary protection. Only 3 Member States (CY, DE and LU) are reported to make use of the possibility to apply the limitation allowed by Article 26(3). Several problems are reported with regard to access of beneficiaries of subsidiary protection to employment-related education opportunities for adults, vocational training and practical workplace experience (CY, CZ, EE, LT, SK, SI, UK). On the other hand, some Member States ensure the same rights for beneficiaries of subsidiary protection and refugees as for nationals (e.g. FI, IE, RO).

#### 5.5.10. *Access to education – Article 27*

According to Article 27(3), refugees and beneficiaries of subsidiary protection should enjoy equal treatment with nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications. Several Member States did not transpose this provision (e.g. BG, LT, UK). In practice, recurrent difficulties have been reported due to the fact that beneficiaries of international protection often lack the documentary evidence of their qualifications.

#### 5.5.11. *Social welfare – Article 28*

Reportedly, some Member States<sup>45</sup> use the possibility to reduce the access of beneficiaries of subsidiary protection to social welfare to core benefits according to Article 28(2). LT excludes beneficiaries of subsidiary protection from social welfare due to the temporary nature of their residence permit. DE imposes an additional criterion of 3-year legal residence in relation to support grants for children and education awarded to beneficiaries of subsidiary protection.

#### 5.5.12. *Healthcare – Article 29*

Only LT and MT appear to apply the possibility provided by Article 29(2) to reduce the access of beneficiaries of subsidiary protection to healthcare to core benefits. In AT, due to the federal system, the level of benefits granted to beneficiaries of subsidiary protection depends on the region they are hosted by. In DE, in cases of subsidiary protection, there is no access to some specific benefits concerning medical treatment. Reportedly, several Member States (e.g. BG, EE, CZ, UK) did not transpose the obligation set out in Article 29(3) to provide adequate health care to beneficiaries of international protection who have special needs, while its implementation seems problematic in others (e.g. LV, LT, IE, ES, RO).

#### 5.5.13. *Access to accommodation – Article 31*

Several Member States (e.g. AT, IE LV, PL, SI) appear to provide more favourable standards, with a view to providing the standards required in Article 21 of the Geneva Convention, which calls for "treatment as favourable as possible". Beneficiaries of international protection are given the same rights as nationals concerning accommodation in some Member States (e.g. IE, RO and SE).

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<sup>45</sup> e.g. AT, DE, LU, LV, PT, SK

#### 5.5.14. Access to integration facilities – Article 33

At least 16 Member States<sup>46</sup> do not differentiate between refugees and beneficiaries of subsidiary protection with respect to access to integration facilities. However, the integration programmes provided for are sometimes very limited and may cover only language training or financial loans. In HU, access of beneficiaries of international protection to integration programmes is reported to be granted on a discretionary basis and to be ineffective due to the absence of implementation measures. Legal provisions in BG are vague and do not guarantee sustainability of the programmes. Several Member States (e.g. EE, IE, LV) do not formally provide for integration programmes for beneficiaries of international protection. However, both protection groups are reported to have access to integration facilities in some of them (e.g. IE).

## 6. CONCLUSION

Several issues of incomplete and/or incorrect transposition of the Directive have been identified. This includes the implementation of standards lower than those established by the Directive. Deficiencies were identified in the provisions of the directive themselves, the vagueness and ambiguity of several concepts such as actors of protection, internal protection, membership of a particular social group leaving room for widely divergent interpretations by the Member States. Thus, important disparities subsist among Member States in the granting of protection and the form of the protection granted. Furthermore, an important share of decisions at first instance based on criteria which are insufficiently clear and precise are overturned on appeal.

The evaluation of the implementation of the Directive shows that in practice few Member States make use of the possibility to differentiate between refugees and beneficiaries of subsidiary protection in terms of the content of the protection granted. On the other hand, the level of protection granted in different Member States differs, which affects asylum flows and is a cause of secondary movements.

The present report shows that the objective of creating a level playing field with respect to the qualification and status of beneficiaries of international protection and to the content of the protection granted has not been fully achieved during the first phase of harmonization.

The Commission will continue to examine and pursue all cases where problems of transposition and/or implementation were identified, so as to ensure the correct application of the common standards set by the Directive in particular with regard to the full respect of the rights laid down in the EU Charter of Fundamental Rights as well as to reduce the scope for divergences. The divergences in the implementation by Member States of the Directive which are due to the vagueness and the ambiguity of the standards themselves could only be addressed by the legislative amendment of the relevant provisions. On the basis of a thorough evaluation of the implementation of the Directive, the Commission adopted on 21 October 2009 a proposal to recast the Qualification Directive in order to remedy to the deficiencies identified.

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<sup>46</sup> BG, BE, ES, FR, HU, IE, IT, LT, LU, NL, PL, PT, RO, SI, SE, UK