

**Caritas Europa**

Rue de Pascale, 4, 1040 Brussels

**CCME – Churches’ Commission for Migrants in Europe**

Rue Joseph II, 174, 1000 Brussels

**COMECE – Commission of the Bishops’ Conferences of the European Community**

Square de Meeus, 19, 1040 Brussels

**ICMC – International Catholic Migration Commission**

Rue de la Charité, 1210 Brussels

**JRS-Europe – Jesuit Refugee Service, European Regional Office**

Rue du Progrès, 333, 1030 Brussels

**QCEA – Quaker Council for European Affairs**

Square Ambiorix, 50, 1000 Brussels

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**Comments on the European Commission’s Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection in one of the Member States by a third-country national or stateless person  
(COM 2008/820/COD)**

***Summary***

Our organisations welcome the Commission’s proposal amendments for the Dublin Regulation. While we still take the position that the Dublin system, *per se*, harbours serious shortcomings, we are highly encouraged by the Commission’s attempts to address the many protection gaps that are found within the current system. In particular we welcome:

- A new *legal right to information* for asylum seekers;
- An entire article regulating the imposition of *detention*, and its *legislative coherence* with the Reception Conditions Directive;
- A right to a *personal interview* for each asylum seeker in the Dublin procedure;
- A mechanism to temporarily suspend transfers to Member States with a weak asylum capacity;
- A new set of *judicial remedies* that allow asylum seekers to challenge their transfer decision;
- Stronger protections for *vulnerable persons and persons with special needs*, and also for *unaccompanied minors*;
- An expanded definition of *‘the family’* and the linkage of the discretionary clauses to dependent relatives.

Alongside our support for these protection-oriented amendments, our organisations ask the Commission, Parliament and the Council to ensure that:

- Asylum seekers are not detained for the sole reason that they are applicants for asylum, and that the grounds for detention should be sufficiently narrow and allow for its use only in the last resort;
- Asylum seekers who are detained are given access to legal representatives, their families, UNHCR and relevant regional and international monitoring organisations;
- Temporary suspensions of transfers to certain Member States are accompanied by concrete measures that address the long-term protection gaps in those States and their obligation to provide adequate asylum reception and procedural conditions.

## Introduction

Our organisations represent Churches throughout Europe – Anglican, Orthodox, Protestant and Roman Catholic – as well as Christian agencies particularly concerned with migrants, refugees, and asylum seekers. As Christian organisations we are deeply committed to the inviolable dignity of the human person created in the image of God, as well as to the concepts of the common good, of global solidarity and of the promotion of a society that welcomes strangers.

The organisations welcome the opportunity to contribute to the debate on the challenges of ensuring that Europe remains a place of protection for those who need it. As social service providers, our member organisations provide legal support, pastoral care, vocational assistance, accompaniment and friendship to refugees and asylum seekers throughout Europe.

Drawing from our long-standing experience of the realities that refugees and asylum seekers encounter day to day, we would like to express some considerations that we find to be particularly important within the context of this Commission proposal.

Firstly, our organisations seek to reiterate the position that the Dublin system, *per se*, harbours serious shortcomings. Its implementation continues to demonstrate that it does not efficiently process asylum applications, does not support the notion of a *Common European Asylum System* and nor does it uphold a sense of justice and dignity for asylum seekers. Our experience shows that the system penalises asylum seekers through the frequent use of detention, its tendency to separate families and its negative impact towards asylum seekers with special needs. Its other serious shortcoming is its underlying assumption that reception conditions across the EU are equal. In practice, the Dublin system pushes asylum seekers away from the centre to the periphery, which has the negative consequence of unevenly distributing asylum seekers across Europe.<sup>1</sup> To the misfortune of affected asylum seekers, some of these border Member States do not have the capacity to provide adequate reception conditions and asylum procedures. This means that a significant number of persons who seek asylum in Europe are left without the protection they need.

In spite of this, our organisations acknowledge that the Commission's proposal contains many new provisions that would significantly improve upon the Dublin's systems current shortcomings. We appreciate and applaud the Commission's willingness to seriously address the needs of asylum

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<sup>1</sup> In 2007 Germany, France and the UK reported the lowest levels of asylum applications in decades, whereas Italy, Sweden, Greece, Spain, Malta and Poland registered large increases. See UNHCR, 18/03/2008, *Asylum Levels and Trends in the Industrialized Countries, 2007*.

seekers, and we are encouraged by the proposal's potential to raise the EU's protection standard for all those who are affected by the Dublin system.

### **Asylum seekers' right to information**

1. Our experiences show that people who are forced to seek refuge in Europe know very little about the Dublin procedure. For these asylum seekers, the perception of being “transported all over Europe” without any clear reason is all too real.<sup>2</sup> Asylum seekers who do know something about the Dublin procedure generally are not aware of its specific details and potential outcomes. The severity of this situation is compounded by misinformation that is sometimes given to asylum seekers from Member State asylum authorities. The current Regulation only contains a short, yet broad, provision that requires Member States to inform asylum seekers about the procedure.<sup>3</sup>
2. Thus we strongly support the Commission's inclusion of an article granting asylum seekers who are in the Dublin procedure with a legal *right to information*.<sup>4</sup> We believe that the inclusion of this important basic guarantee addresses a wide gap in protection that currently exists. It can serve to ease the strain of the Dublin procedure upon asylum seekers and their families by keeping them aware of what steps lay ahead of them. Specific improvements within the Commission's proposal include increasing asylum seekers' awareness of the potential consequences of the procedure, the possibility to challenge a transfer decision and on the right to access their data that is exchanged between Member States.<sup>5</sup>
3. The Commission's proposal for a *common leaflet*<sup>6</sup> is a promising one, as it would oblige Member State authorities to adopt a format that could systematically inform asylum seekers about the Dublin procedure. In order for a common leaflet to be truly useful it would need to be regularly updated, accessible and thorough in the information it provides. It should be published in languages that asylum seekers can understand, and it should include all of the relevant contact information for Member State officials that asylum seekers could refer to in case they have questions that are not answered by the common leaflet. The leaflet should also contain the contact information of the local UNHCR branch and local NGOs who provide social, legal and spiritual accompaniment to asylum seekers. Furthermore, a common leaflet should contain information on all of the basic guarantees and procedural rights an asylum seeker can exercise within the Dublin procedure.

### **The personal interview**

4. The current Regulation does not oblige Member States to personally interview asylum seekers who are in the Dublin procedure. Our experience demonstrates that this leaves little room for asylum seekers to express the particular circumstances of their cases. In general this situation has led to very negative consequences for asylum seekers, and it prevents Member States from assessing any special needs or vulnerabilities asylum seekers might have.

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<sup>2</sup> See JRS-Europe, October 2008, *Dublin II: A summary of JRS experiences in Europe*, p. 3

<sup>3</sup> Art 3(4) of COUNCIL REGULATION (EC) 343/2003, “The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.”

<sup>4</sup> Art 4 of EC proposal COM 2008/820/COD

<sup>5</sup> Id., Art 4(1)(d), 4(1)(e) and 4(1)(g), respectively

<sup>6</sup> Id., Art 4(3)

5. Therefore we find the Commission's inclusion of a new article guaranteeing asylum seekers a *personal interview*<sup>7</sup> to be a significant improvement in protection. Providing an opportunity for a personal interview is critical as it allows the asylum seeker to orally present the details of their situation and any special needs that they may have. It allows Member State officials to determine whether the asylum seeker they are interviewing has any vulnerability or requires any special assistance. Insisting that the interview occur "in a timely manner" or "in any event, before any decision is taken to transfer the applicant to the responsible Member State," is a good step because it should allow for a proper and full assessment of the asylum seeker's condition, and it would allow the asylum seeker to present details that might affect their case.<sup>8</sup> It is also a good practice to provide a "short written report"<sup>9</sup> to the asylum seeker, as this encourages procedural transparency and keeps the asylum seeker informed.

### Legislative coherence

6. We praise the Commission for extending the scope of the regulation towards applicants and beneficiaries of subsidiary protection.<sup>10</sup> Doing so brings the scope of the regulation in better alignment with the Qualification Directive,<sup>11</sup> especially since Member States are increasingly granting applicants with subsidiary protection as opposed to Geneva Convention protection.<sup>12</sup> Moreover, it is a necessary step toward the EU's ongoing establishment of a *Common European Asylum System*, which requires a coherent base of legislation.
7. We are also pleased to observe that the proposal mainstreams the Dublin procedure with the Reception Conditions Directive,<sup>13</sup> notably in regards to detention.<sup>14</sup> This coherence is especially important in cases where Member States detain asylum seekers during the Dublin procedure, since the current Regulation provides no basic guarantees and procedural safeguards for persons in these situations. This exclusion holds very negative consequences for asylum seekers in detention, and it has sustained an impression of the Dublin system as one that penalises persons for simply applying for asylum.

### Temporary suspension of transfers

8. Our organisations are pleased with the Commission's proposal to offer a legal mechanism to *temporarily suspend transfers*,<sup>15</sup> which has the potential to address another wide gap in protection that exists within the current Regulation. Given the level of monitoring undertaken by non-governmental organisations and the Commission towards Member States' asylum procedures and reception conditions, it is no longer excusable for one Member State to transfer an applicant to another with known deficiencies in its protection capacity. As demonstrated in the oft-

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<sup>7</sup> Id., Art 5

<sup>8</sup> Id., Art 5(3)

<sup>9</sup> Id., Art 5(6)

<sup>10</sup> Id., recital 8

<sup>11</sup> 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 refugees or persons who otherwise need international protection and the content of the protection granted

<sup>12</sup> The percentage of decisions granting subsidiary protection in the EU has tripled between 2003 and 2006. See European Commission, *Accompanying document to the Policy Plan on the Common European Asylum System: Impact Assessment*, p. 10.

<sup>13</sup> Recital 9 of EC proposal COM 2008/820/COD

<sup>14</sup> See Article 8 of the EC proposal to amend the Reception Conditions Directive, COM(2008)815, and Article 27 of the proposal being analysed in this memorandum.

<sup>15</sup> Art 31 of EC proposal COM 2008/820/COD

mentioned cases of Dublin transfers to Greece, it would have been useful if such a system were already in existence.

9. We believe that the Commission is in a good position to cease Dublin transfers between Member States when necessary because they should have a good overview of each Member States' reception capacities. Moreover since the Commission has been charged with establishing a *Common European Asylum System*, it is a logical step for the Commission to have the authority to temporarily suspend transfers to Member States that have lower reception standards than other Member States in order to keep the 'playing field' in balance.
10. We are also encouraged to see that the Commission's proposal would allow Member States to make an individual application for the temporary suspension of Dublin transfers to their territory,<sup>16</sup> as this would grant certain Member States the opportunity to strengthen their reception capacity. However the watermark for deciding on whether a Member State is truly experiencing an "exceptionally heavy burden" should be sufficiently high. Member States should not use this legal provision to derogate from their protection responsibilities.
11. Further, we should hope that such a mechanism is able to make a strong concrete impact. Temporarily suspending transfers to Member States with weak asylum systems may be a solution in the short term, but there should also be accompanying measures that can address the problem in the long term. In these situations we would envision a role for the European Asylum Support Office to provide operational and technical assistance to overburdened Member States.<sup>17</sup> If a Member State's asylum system does not improve despite pressure from the Commission and other Member States, then we would envision a need for an additional mechanism that re-allocates asylum seekers to different EU countries so asylum applications can continue to be processed.<sup>18</sup> While it may be suitable to temporarily suspend Dublin transfers to a Member State with an inadequate asylum system, it would not be suitable for the rest of the Member States to suspend their obligation to examine asylum applications made in Europe nor to suspend their responsibility to uphold the underlying principles of a *Common European Asylum System*.

## Detention

12. It is a common practice for Member States to detain asylum seekers who are in the Dublin procedure. While some countries expeditiously transfer applicants to responsible Member States, others do not. As a consequence asylum seekers can be detained for months at a time. The non-applicability of the Reception Conditions Directive to the current Regulation withholds important basic procedural safeguards and guarantees from those that are detained. This has made it difficult for detained asylum seekers to challenge their detention order, access legal assistance and to receive adequate material reception conditions.
13. Therefore we highly welcome the inclusion of an entire article on *detention*<sup>19</sup> within the Commission's proposal as a vast improvement from the current Regulation. We are encouraged

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<sup>16</sup> Id., Art 31(1)

<sup>17</sup> The Commission's proposal for a regulation establishing a European Asylum Support Office (COM (2009) 66 final) already foresees supporting Member States under particular pressure and practical cooperation on asylum.

<sup>18</sup> Any mechanism that re-allocates responsibility to examine asylum applications to other Member States should be based on existing connections between asylum seekers and Member States, such as familial ties, linguistic ties and matching skill sets with labour market availability.

<sup>19</sup> Id., Art 27

by the Commission's insistence that "less coercive measures" should be used first, that "alternatives to detention" should be considered and that its duration should be for "the shortest period possible."<sup>20</sup> Yet however positive it may be to regulate the use of detention, an amended regulation should not allow Member States to detain people solely because they are applicants for asylum. The proposal's criterion for detaining an applicant<sup>21</sup> based on their "risk of absconding" gives Member States too wide of an opportunity to impose detention, in particular since there is no data to demonstrate that the "risk of absconding" has any statistically significant correlation to the actual behaviours of asylum seekers.

14. As already stated, we are pleased with the proposal's coherence on detention with the Commission's proposal amendments for the Reception Conditions Directive.<sup>22</sup> This provision would fill a wide protection gap that currently exists due to Member States' tendency to regularly detain asylum seekers in the Dublin procedure without access to reception conditions. However the Commission's Dublin Regulation proposal continues to be incoherent from their Reception Conditions Directive proposal in one important aspect: in the Dublin proposal there is no obligation for Member States to ensure that detained asylum seekers can receive visits by UNHCR, non-governmental organisations and other regional and international monitoring bodies.<sup>23</sup> Even with an improved legal provision on detention, asylum seekers may still be detained for a long period while awaiting a Dublin transfer. Thus it is all the more imperative that these detained asylum seekers have access to their lawyers, families, UNHCR, non-governmental organisations and other relevant stakeholders in the 'outside world' who can independently monitor their situation in detention.

### **Vulnerable persons and persons with special needs**

15. We are especially encouraged to see the proposal's strengthened focus towards vulnerable persons and persons with special needs. Specifically, the inclusion of a legal provision that facilitates the exchange of information before transfers are carried out would allow Member States the opportunity to assess existing any vulnerabilities and special needs asylum seekers may have.<sup>24</sup> However knowing that vulnerable persons may be reluctant to discuss their experiences and special needs due to trauma, Member States should seriously take into consideration relevant details that vulnerable asylum seekers offer at any stage of the Dublin procedure.
16. Of particular interest within the Commission's proposal is the notion of being "fit for transfer"<sup>25</sup>, which implies that there are persons with certain vulnerabilities or special needs who would not be suitable for transfer between Member States. While this notion may hold positive consequences for asylum seekers, the Commission unfortunately does not offer a more specific set of criteria for determining who may or may not be fit for transfer. Although the courts could further circumscribe this notion, the wide interpretation it may invite from the Member States could weaken it to a large extent.

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<sup>20</sup> Id., Art 27(2), (3) and (5), respectively

<sup>21</sup> Id., Art 27, "Member States may detain an asylum seeker ... only if there is a significant risk of him/her absconding."

<sup>22</sup> Article 8 in EC proposal COM(2008)815

<sup>23</sup> Article 10.2 of EC proposal COM(2008)815 states "Member States shall ensure that asylum seekers in detention have the opportunity to establish contact, including visitation rights, with legal representatives and family members, UNHCR and other relevant and competent national, international and non-governmental organisations and bodies shall also have the opportunity to communicate with and to visit applications in detention areas." The Commission's proposal for the Dublin Regulation does not include any similar provision.

<sup>24</sup> Art 30 in EC proposal COM 2008/820/COD

<sup>25</sup> Id., Art 30(1)

17. Another improvement over the current Regulation is the listing of known types of vulnerability and special need, and the requirement that Member States transmit such information to the Member State responsible.<sup>26</sup> The requirement that the processing of “personal health data” be done only by a “health professional subject under national law” is a sensible one, as immigration authorities are not qualified to assess and determine such data.<sup>27</sup>
18. We are encouraged to observe that the situation of unaccompanied minors is better addressed in the Commission’s proposal. In particular we welcome the insistence that unaccompanied minors should never be detained.<sup>28</sup> We also welcome the Commission’s assurance towards maintaining the best interests of the child as a primary consideration for Member States with respect to all of the Regulation’s procedures.<sup>29</sup> Additionally we welcome the Commission’s elaboration of the aspects Member States must account for when assessing an unaccompanied minor’s best interests,<sup>30</sup> and the new obligation for Member States to trace an unaccompanied minor’s family members or other relatives.<sup>31</sup> Finally, we are encouraged to see that unaccompanied minors may not only be reunified with their nuclear family, but also with relatives present in other Member States, as long as it is in the best interests of the child.<sup>32</sup> This is an improvement because it removes the discretionary element Member States have in the current system by making this type of family reunification for unaccompanied minors obligatory.<sup>33</sup>

## Family unity

19. A particular negative consequence of the current Regulation is the threat it poses to asylum seeking families. In some situations there have been Member States who picked apart families by transferring only one parent or relative and leaving the rest behind. Indeed, asylum seekers have reported that family separation is one of the most negative aspects of the current Regulation.<sup>34</sup> As a coalition of Christian organisations we believe that family unity is paramount, especially for those families who are fleeing from life-threatening situations.
20. Thus we are encouraged to see that the concept of *family unity* is strengthened within the Commission’s proposal. The requirement that Member States use family unity as a binding criterion for accepting responsibility of an asylum applicant may reduce the rate of separation many families experience as a result of the current Regulation.<sup>35</sup> The widened scope of the definition of the concept of family members beyond the ‘nuclear family’<sup>36</sup> is also an important step forward from the current Regulation. This takes into account the fact that in different

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<sup>26</sup> Id., Art 30(4), (5)

<sup>27</sup> Id., Art 30(6)

<sup>28</sup> Id., Art 27(11)

<sup>29</sup> Id., Art 6(1)

<sup>30</sup> Id., Art 6(3)(a-d). Our organisations are especially encouraged to observe that alongside the unaccompanied minor’s family, safety and his or her own views, the minor’s well-being and social development – including their ethnic, religious, cultural and linguistic background – shall also be taken into account as a Member State determines what the minor’s best interests are.

<sup>31</sup> Id., Art 6(4)

<sup>32</sup> Id., Art 8(2), (3)

<sup>33</sup> Art 8(2) of EC proposal COM 2008/820/COD, “Where the applicant is an unaccompanied minor who has a relative in another Member State who can take care of him or her, *that Member State shall be responsible* for examining the application provided that it is in the best interests of the minor.” [Emphasis added]

<sup>34</sup> The negative impact of the Dublin procedure upon families is documented by several non-governmental organisations. See, for example, the 2008 report by NOAS, the Norwegian Helsinki Committee and the Greek Helsinki Monitor on Greek asylum policy and the Dublin II Regulation, *A Gamble with the Right to Asylum in Europe*; 2008 report by ECRE, *Dublin Reconsidered*; 2008 report by Cimade, *Droit d’Asile: Les Gens de Dublin II*; 2008 report by JRS Europe, *Dublin II: A Summary of JRS Experiences in Europe*.

<sup>35</sup> Recital 11 and 13 of EC proposal COM 2008/820/COD

<sup>36</sup> Id., Art 2 (i), (i)-(v)

cultures, familial structures are often composed of extended networks of relatives who assume important caretaker roles. It is also important because persons who flee violence or persecution may need to rely upon extended networks of relatives for support, or even upon families that are founded during the flight to safety. We are also pleased that the Commission's proposal makes compulsory the reunification of dependent relatives, and that any decision to temporarily suspend transfers "shall take due account" of the need to ensure family unity.<sup>37</sup>

## Discretionary clauses

21. One of the biggest and most frequently cited criticisms levied by non-governmental organisations towards the current Regulation has been Member States' reluctance to use the derogatory clauses, otherwise known as the 'humanitarian' and 'sovereignty' clauses. As identified by the Commission's own research, Member States have rarely used these clauses, even for applicants with vulnerabilities.<sup>38</sup>
22. The Commission's new *discretionary clauses*<sup>39</sup> improve upon the current Regulation by using the 'family dependency link' as a criterion for Member States to assume responsibility for humanitarian reasons.<sup>40</sup> We also note with positive interest that asylum seekers can choose to either agree or disagree with a Member State's decision to implement the discretionary clauses. Indeed, this step can serve to empower asylum seekers within a procedure that has fundamentally left them without any power. However we regret to observe that despite a change in the wording, the new discretionary clauses do not include a stronger obligation for Member States to implement them on a more frequent basis. For instance, although the introduction of a 'family dependency link' as a criterion for the implementation of the discretionary clauses is an important step, we would ultimately argue that family unity should be necessary and not merely discretionary.

## Judicial remedies

23. Finally, our organisations are especially pleased that the Commission's proposal includes an entire article on judicial remedies.<sup>41</sup> The inclusion of this important right is a vast improvement over the current Regulation, which does not elaborate in detail the right of an asylum seeker to appeal a transfer decision.<sup>42</sup> It is of the utmost importance that asylum seekers are able to challenge – in front of a judicial authority – the procedures they are faced with and orders that are imposed on them. Moreover we are pleased that the Commission's proposal states that "no transfer shall take place" before a decision on an appeal is made.<sup>43</sup> The ability of an asylum seeker to launch an adequate appeal depends on their access to legal advice and legal representation. In this regard we are encouraged that the proposal obligates Member States to ensure that such assistance is granted, and is free of charge for those who cannot afford the costs involved.

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<sup>37</sup> Id., Art 31(6)

<sup>38</sup> COM (2007) 299 final, *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system*.

<sup>39</sup> Art 17 of EC proposal COM 2008/820/COD

<sup>40</sup> Id., Art 17(2)

<sup>41</sup> Id., Art 26

<sup>42</sup> Art 19.2 of COUNCIL REGULATION (EC) No 343/2003, "This decision [of a transfer] *may* be subject to an appeal or a review." [Emphasis added]

<sup>43</sup> Art 26 of EC proposal COM 2008/820/COD