Brussels, 30/06/2010
C/2010/4427

Dear President,

Thank you for your letter of 16 February 2010 enclosing comments from the Senate of the States-General on the Commission's 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 {(COM (2009) 551} and the proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing international protection {COM (2009) 554}.

In line with the Commission's decision to encourage national parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments which are instrumental to the proceedings of the Commission. I enclose the Commission's reply and hope that these clarifications satisfactorily address the issues expressed in the Senate's submission.

I look forward to developing our policy dialogue further in the future.

Yours sincerely

/-/ Maroš Šefčovič

Mr Van der Linden
President of the Senate
Senate of the States-General
P.O. Box 20017
2500 EA The Hague

EUROPEAN COMMISSION

REPLY TO THE OPINION OF THE SENATE OF THE STATES –GENERAL OF THE KINGDOM OF THE NETHERLANDS ON

COM(2009)551 - PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MINIMUM STANDARDS ON PROCEDURES IN MEMBER STATES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION.

COM(2009)554 - PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS OR STATELESS PERSONS AS BENEFICIARIES OF INTERNATIONAL PROTECTION AND THE CONTENT OF THE PROTECTION GRANTED.

The proposals aim to ensure higher and more harmonised substantive and procedural standards on international protection with due regard to the Geneva Convention and other relevant treaties as well as EU obligations of Member States. The Commission considers that they would considerably reduce disparate procedural arrangements and divergent interpretation of common grounds of international protection between Member States, hence being instrumental in completing the second stage of a Common European Asylum System. These initiatives should not be considered in isolation from other EU measures. In particular, interpretation of more consolidated and streamlined standards by the Court of Justice and enhanced practical cooperation notably within the framework of the soon to be established European Asylum Support Office would lead to more consistent and uniform application of the asylum acquis across the Union. Together with effective solidarity measures and the development of the external dimension of the asylum policy, all these measures are crucial for achieving the objective of a Common European Asylum System (CEAS). Furthermore, the Commission is invited by the European Council in the Stockholm Programme to consider, if necessary, in order to achieve the CEAS, proposing new legislative instruments on the basis of an evaluation.

The first question raised in the Senate's contribution is whether Article 5(3) of the Qualification Directive should be amended insofar as it may mean that refugees 'sur place' are not protected from refoulement, for example because they have openly professed their religious belief or acknowledged a certain sexual orientation since fleeing their country of origin. The Commission would like to underline that the possibility for Member States not to grant refugee status in the above mentioned cases is strictly limited to subsequent applications on such grounds. Moreover, the wording of Article 5(3) ensures that cases where the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin are always assessed taking into account the Geneva Convention. Member States must in any case assess whether the requirements of the refugee definition are fulfilled by taking into account all the relevant facts surrounding the claim pursuant to Article 4 of the Directive. In particular, Article 4(3)(d) makes it clear that, when deciding on a 'sur place' claim, the test of the well-founded fear of persecution is based on an assessment of the

consequences that such an applicant would have to face if returned to the country of origin. Furthermore, Member States are under a general obligation to respect the principle of non-refoulement in accordance with Article 3 of the European Convention on Human Rights and Article 19 of the Charter of Fundamental Rights of the European Union. Therefore, the Commission did not consider that it was necessary to amend Article 5(3) of the Qualification Directive, as the safeguards provided are considered to be robust.

As regards the revocation of the right of residence of former beneficiaries of international protection to whom the cessation clauses apply, Articles 14(1) and 19(1) of the Qualification Directive are mandatory provisions which require the termination of status. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified. However, these provisions do not preclude Member States from granting a residence permit to persons who ceased to be refugees/beneficiaries of subsidiary protection, on the basis of national law, in order to take into account the interests of protected persons who have resided there for many years. The Commission had already proposed the extension to beneficiaries of international protection of the possibility to acquire a long-term resident status in a Member State. In view of the fact that, pursuant to the Lisbon Treaty, the co-decision procedure is applicable, the European Parliament has decided to appoint a rapporteur on this matter, whereas the future Belgian Presidency has already indicated that this will be one of its priorities. The Commission is hopeful that there will be an agreement in the future on this file.

The interpretation of Article 15(c) of the Qualification Directive in the Elgafaji case confirms that protection must be granted to these persons who should not be required to prove that they were at risk of serious harm because of their individual characteristics in cases where the degree of indiscriminate violence reaches such a high level that a civilian, by his/her mere presence in the given area, faces a real risk of serious harm. Consequently, all persons fulfilling the requirements of Article 15(c) should be granted subsidiary protection and no additional national protection is necessary or possible. Applications for subsidiary protection under Article 15(c) must be assessed on an individual basis, according to Article 4 of the Qualification Directive. As regards the possible alignment of national types of protection status which do not currently fall under the EU's regime of international protection, the Commission launched, in line with its commitment in the Policy Plan on Asylum, a study on the current practices and legislation of Member States which is currently being conducted by the European Migration Network.

The Commission underlines that Article 23 of the Qualification Directive does not make distinctions between members of the family of beneficiaries of international protection based on their respective nationalities. The only requirements are those specified in Article 2(h) that the family existed in the country of origin and that the members of the family are present in the host Member State in relation to the application for international protection. The Commission has not regulated the duration of residence permits for members of the family of beneficiaries of international protection. Therefore, Member States enjoy a wide margin of discretion in this respect subject to the obligation to respect human rights, in particular the principle of non-discrimination and the right to family life enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. In view of these principles, the Commission considers that difference in the duration of residence permits between members of the family according to their nationality would be problematic.

With respect to the question of whether a decision to make an exception to the right to remain in the Member State pursuant to Article 35 of the Asylum procedure Directive may be reviewed by a court prior to the expulsion, the Commission would like to make several observations. Article 35 (8) refers to an application submitted after a final decision to consider a subsequent application inadmissible or unfounded, hence making it clear that it applies only where the international protection needs have already been examined twice and the person concerned has had the possibility to challenge first instance decisions before a court or tribunal. This approach is informed by the findings of the European Court of Human Right in Sultani. In that case, no violation of Article 3 ECHR was found, and the Court, in particular, took account of the fact that the person's request for international protection had been examined twice by the determining authority and reviewed by courts. The Commission, therefore, considers that the proposed provisions on multiple subsequent applications adequately take into account the procedural requirements stemming from the principle of non-refoulement and are in line with the principle of res judicata. The proposed requirement for the determining authority to check whether there are possible risks of refoulement before making an exception to the right to remain is inserted as an additional safeguard, since the protection needs may arise sur place. Moreover, the possibility to seek remedies against removal is also provided for in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals. Recital 9 to Directive 2008/115/EC makes it clear that it applies to persons who have applied for asylum where a negative decision on the application or a decision ending the person's right to stay as an asylum seeker has entered into force. In accordance with Articles 5 and 13 of Directive 2008/115/EC, appeals against return decisions may be lodged on the ground that the return would be contrary to the principle of non-refoulement, and Article 13 (2) further provides that the appeal authorities or bodies reviewing return decisions must have the power to temporarily suspend their enforcement. Finally, the provisions of the directives must always be interpreted in conformity with the right to effective judicial protection, as a general principle of EU law.

Another question is asked to whether asylum seekers who have been registered but have not yet been able to lodge an application come within the scope of EU asylum instruments, including the Reception Conditions Directive. In this respect, Directive 2005/85/EC gives a wide margin of discretion to Member States as regards the modalities for ensuring access to the asylum procedure. The Directive lacks provisions regarding essential elements of the initial stage of the asylum process, such as the obligations of the authorities who first come into contact with persons seeking international protection and the time limits for completing necessary formalities. Furthermore, Member States may require that applications be made at a designated place. This implies that Member States enjoy a sufficient margin of procedural autonomy with regard to the organisation of access procedures. However, this discretion is not unlimited, since applicable procedural rules may not make access to rights conferred on individuals by EU law impossible or excessively difficult, and relevant procedural systems should be easily accessible . With a view to ensuring the consistent application of these principles in national asylum procedures, the Commission's recast proposal provides for completing all necessary formalities related to the lodging of an application for international protection within 72 hours from the moment a person has expressed his/her wish to apply for international protection to immigration, border control or law enforcement authorities. Once the application is registered, the request for international protection would be deemed to have

been made and the person concerned considered as an applicant for international protection.

With respect to the question of whether the proposed Article 27 (6) permits the Member States to decide on all asylum applications in an 8-day procedure, it should be underlined that this article would apply to cases where the determining authority establishes certain deficiencies in the applicant's statements or behaviour which may have negative impact on the results of the examination. This means that Article 27 (6) would apply only when a circumstance referred to in Article 27 (6) has been established in a particular case. This being said, neither the recast nor the current directive preclude the determining authorities from taking decisions within short time limits. Article 27 (2) (old Article 23 (2)) even requires Member States to conclude the examination procedure as soon as possible. The directive aims at ensuring efficient procedures. In this respect, the Commission does not consider it appropriate to lay down a minimum time limit for taking decisions on applications for asylum at EU level, since the time needed to complete an application depends on the complexity and particular circumstances of each specific case. However, the time limits allocated for taking decisions at first instance must not preclude an adequate and complete examination of the claim. While certain cases (e.g. simple cases or well founded cases) can be decided within short time frames, others may definitely require additional time and recourses. In this respect, the Commission takes note of the possibility to continue the examination of the application in an extended procedure, as referred to in the question.

A question is also raised on the appropriateness of the European safe third country notion provided for in Article 38 of the recast. In this respect, Member States would be allowed to apply this notion to a particular country only if it fully meets the substantive criteria set out in the directive. Notably, a third country should have in place an asylum procedure prescribed by law and observe its obligations pursuant to the European Convention on Human Rights, including the standards relating to effective remedies. Belarus, which is referred to in the Senate's contribution, would not qualify for this notion, since it is not a party to the European Convention on Human Rights. The requirement to observe in practice the provisions of the European Convention of Human Rights, in particular standards on effective remedies, would further limit the scope of the application of this notion. Moreover, pursuant to Articles 41 (1) (a) (iv) and 41 (5) of the recast, where a Member State decides to apply this notion to an applicant for international protection, it must always ensure access to an effective remedy, including the right to stay in the territory pending its outcomes.

As regards the recast provisions concerning the scope of review by a court or tribunal, the Commission, in particular, took account of the Wilson case in which the Court of Justice concluded that a directive provision guaranteeing the right to a remedy before a court or tribunal 'requires actual access within a reasonable period [...] to a court or tribunal as defined by Community law, which is competent to give a ruling on both fact and law' . It is also established practice of the European Court of Human Rights to carry out a full and ex nunc assessment of expulsion cases falling within the scope of Article 3 ECHR. Hence, in NA, the Court underlined the need 'to examine all the facts of the case' and assess 'the foreseeable consequences of the removal of the applicant to the country of destination'. In the opinion of the Court, such an assessment must cover the general situation in the country as well as the applicant's personal circumstances.