CHURCHES, RETURNS DIRECTIVE, AND THE IMMIGRATION ISSUES IN THE EUROPEAN UNION

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This article analyses the role of Christian churches in the European Union immigration policy with the special focus on the elaboration and adoption of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (the so-called 'Returns Directive'). The author briefly discusses the main developments of the European Union policy in the area of migration and asylum, and then identifies the key Christian organizations, which work in this sphere at the European Union level. This part of the article is followed by the detailed analysis of the process of adoption of the Returns Directive. It was the first legislative proposal made under the co-decision mechanism in the area of migration and asylum. Christian organizations were involved in this process almost from its beginning exercising their influence via statements and negotiations. Although many Churches' suggestions were not taken into account, this happened under the great diversity of opinions of the stakeholders, which made the promotion of Churches' perspective very complicated. Overall, the author considers necessary to admit that Christian organizations with all their experience and expertise proved to be respected partners of the European Union policy-making in the sphere of migration and asylum.

Key words: Christian churches; European Union; immigration; Returns Directive; religion; non-governmental organizations

In the European Union today the issues of migration and asylum are among the most controversial. Indeed, the number of people willing to enter the EU both legally and illegally does not always meet the Union's capacities (this became especially evident in the light of the 2015 refugee crisis). The issue of integrating migrants into the host societies is very acute, particularly of those of non-Christian background. These questions attract substantial attention of the mass media, political parties, and non-governmental organizations. Christian churches also are involved, in fact, their participation is logical and understandable since churches have been active in this field for several decades [6]. It is therefore impossible to ignore their contribution to the debates on the migration issues, especially when it comes with a high degree of professionalism as well as with the desire to be with the most vulnerable and suffering ones. This article analyses the contribution of Christian churches to the EU immigration policy with a focus on the adoption of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (the Returns Directive). The structure of the article is as follows: it starts with a short overview of the main developments in the immigration and asylum policy in the European Union and the description of Christian organizations working in this area; then comes the main part — the analysis of the process of elaboration and adoption of the Returns Directive.

EU IMMIGRATION POLICY AND RELIGIOUS ORGANIZATIONS

The starting point of the European Communities' cooperation in the area of immigration takes us back to the 1970s. Its beginning at that time was modest, and the de-

velopments afterwards were gradual, perhaps even slow. Although "from 1975 onwards intergovernmental cooperation was gradually established in the fields of immigration, the rights of asylum and police and judicial cooperation" [12], the European institutions were excluded from the process of regulating immigration and asylum. The decisions were taken at the intergovernmental level reflecting the "lowest common denominator". The path from intergovernmentalism to the supranational procedures was long and complicated. In fact, the turnaround in the European Union policy on immigration and asylum can be attributed to the entering into force in 1999 of the Treaty of Amsterdam, which "inserted new legal competences covering most dimensions of immigration law, ranging from external border controls and visas, to asylum and resident third country nationals" [4. P. 137].

From the Treaty of Amsterdam, the European Union gradually increased its competence in the sphere of immigration and asylum. The main developments in the area were grouped around the three principal stages: (1) the transitional period (1999—2004), when the power of the member states was largely preserved; (2) the period of the Hague Programme (2004—2009), when (since May 2005) the co-decision and qualified majority decision-making were used in the fields of asylum, immigration and the border control; (3) and the entering into force of the Treaty of Lisbon (December 2009) followed by the adoption of the Stockholm Programme for 2010—2014. During the first two stages the important legislative acts in the areas of migration and asylum were adopted including the ones defining the procedures for asylum seekers, the rights of legal immigrants and the measures for combating illegal immigration such as the return of migrants residing illegally in the European Union member states. The Lisbon Treaty extended the qualified majority voting and the co-decision procedures into some new areas such as legal migration, visa lists and visa formats. Under the Stockholm Programme the focus was mainly on reviewing and reforming existing legislation [9. P. 4]. After this programme was over, the Council of the European Union in June 2014 formulated "The strategic guidelines" for the legislative and operational work in the area of migration and asylum for subsequent years, and an "absolute priority" was given to the transposition and effective implementation of the Common European Asylum System [13].

Christian churches were active in the area of migration and asylum long before the European Union acquired the appropriate competence. In fact, they established special structures to deal with migration issues. All three Christian confessions — Orthodox, Catholic and Protestant — are well presented in the area, they work via such organizations, as the Churches' Commission for Migrants in Europe (CCME), International Catholic Migration Commission (ICMC), Jesuit Refugee Service Europe (JRS Europe), Commission of the Bishops' Conferences of the European Union (COMECE), Caritas Europa and the Quaker Council for European Affairs (QCEA). The strategy used by these organizations resembles that of the regular NGOs, but also reflects the specific ties of Christian NGOs with their churches. Apart from the letters and petitions (used both at the national and European levels) Christian organizations try to negotiate with the policy-makers. This seems especially efficient in the countries, where churches have close links with the authorities and their overall influence is high. However, their main role is in monitoring and assessment rather than in contribution to legislative work, although

the latter certainly takes place [20]. Indeed, even monitoring and assessment may prompt the European Union institutions to introduce some changes in legislative acts, although this is more of an indirect effect. For instance, quite recently this indirect effect could arise from strong criticism by the JRS Europe of keeping asylum-seekers in detention facilities, which, according to the JRS, shows "no response to the request of the protection" and fails to respect the dignity of the person [17. P. 3].

A direct effect is that Christian organizations endeavor to influence the content of legislation, sometimes from the early stages of its elaboration. Here churches can find themselves in the situation, where their aims and objectives substantially contradict the policy initiatives of their own countries. Even if this happens, it should not prevent the Christian community from being active in the field, especially due to the unique character of the experience, expertise and motivation of churches. An exact assessment of their influence may be almost impossible, but attempts to do this allow us to see precisely how Churches organise their work, and how they try to contribute to policy-making. One case of their contribution will be assessed through the analysis of the adoption of one of the European Union legislative acts — the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (the Returns Directive).

RETURNS DIRECTIVE: AN UNEASY STRUGGLE

The area of irregular (or illegal) immigration remains one of the most politicized, controversial, and considered in the manifestos of many political parties across Europe, although the approaches here range from negative to tolerant. Under "illegal immigrants" we understand those who either enter the European Union illegally, without appropriate entry documents, or come with relevant visas, but do not leave the European Union when they are obliged to do so (usually when their visas expire). The total number of irregular immigrants is unknown; according to the earlier Commission's estimates it ranges from 2 to 8 million people [4. P. 141]. In this area, "the EU's primary concern ... focuses on preventing the phenomenon, detecting and punishing those who facilitate it, and returning irregular migrants to their country of origin" [4. P. 141—142]. A number of measures have been taken in this field: sanctions and criminal persecution for those who assist in illegal entry or employ illegal immigrants, and the forcible return of immigrants to their country of origin [4. P. 142]. The procedures of return are now reflected in what is known as the "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". The process of its adoption was very controversial, with a substantial division among representatives of the European Union institutions, member states and non-state actors. This could hardly be surprising, since the Directive touched upon sensitive areas and national interests of most member states, particularly those that are heavily affected by irregular immigration.

The Returns Directive was the first legislative proposal made under the co-decision mechanism in the area of migration and asylum. Heli Askola claims that this Directive "has been widely seen as a key means of establishing the Union's credibility in this

field" [2. P. 160]. Emanuela Canetta considered the adoption process of the Returns Directive "as a test case of the functioning of the new co-decision procedure" [5. P. 446]. As Steve Peers explains, "the key feature of the co-decision process is the exercise of equal legislative powers as between the European Parliament and the Council" [22. P. 2]. Normally the process is conducted as follows: first, the Commission makes a formal proposal for the relevant legislation, which is examined simultaneously by both the European Parliament and the Council — both need to formulate their position on the text. At the initial stage it is possible to reach a deal on the text, which is known as a first-reading agreement. This requires negotiations among the representatives of the Parliament and the Council. These negotiations are often informal and are lacking transparency, even to the point that "sometimes not even the shadow rapporteurs are invited to the meetings, or when they are invited they often cannot take the stand" [1. P. 25]. If the deal is reached, it should be approved by the majority of votes of MEPs and the qualified majority voting in the Council. Otherwise, the European Parliament adopts its first reading opinion and the Council adopts a "Common Position". The process moves to the "second reading", when the Parliament needs to decide whether to accept the Common Position, to reject it, or to propose some amendments. If it rejects or proposes amendments, then the Council decides whether to accept the Parliament's amendments or not. If it fails, the process moves to the third reading. The third reading requires the convening of a "conciliation committee" composed of equal numbers of MEPs and the Council representatives. If it reaches a deal, then the final text is again voted by the Parliament (a majority of votes is required) and the Council (a qualified majority is necessary). If, however, the negotiations are not successful and the agreed position is not reached, the legislative process is terminated.

Obviously, civil society organizations are not directly involved at any stage of the process unless there is a will of the Council or the Parliament to invite them. In addition, the NGOs may try to exercise their influence via friendly MEPs or (exceptionally) friendly government ministers. However, since the ministers are often less accessible, lobbying via MEPs can be more widespread, but we need to remember that successful passing of the amendment via Parliament will require the ability to convince a substantial number of its members.

The work on the Returns Directive was preceded by preliminary steps taken much earlier than the appearance in 2005 of the draft of the Commission's proposal. In 2001, in the Communication on a Common Policy on Illegal Immigration (15 November 2001), the Commission "pointed out that return policy is an integral and crucial part of the fight against illegal immigration" [10. P. 2]. Three elements were identified as a foundation of the return policy: common principles, common standards and common measures [10. P. 2]. In February 2002, the Council adopted the Action plan to combat illegal migration.

The involvement of Christian organizations in the process was registered almost from the very beginning albeit on the level of public statements and declarations. The starting point was the publication of a joint comment: in May 2002 Caritas, CCME, COMECE, ICMC, JRS Europe, and QCEA expressed their view on this issue suggesting

some humane measures to combat illegal immigration. In particular, they spoke about the necessity to open more opportunities for legal channels of immigration into the European Union (in order to decrease the illegal one), and not to exclude the possibility of regularization for those who reside illegally. Christian organizations pointed to the poor and unstable conditions for many illegal immigrants, who "work under unprotected conditions, many in the rural and agricultural sectors, providing domestic cleaning and care services, as well as employing their skills on building and construction sites, in restaurant and hotel services" [18. P. 5]. Commenting on the return measures Christian organizations expressed their support for the softer, more tolerant measures, such as "the principle of the priority of voluntary return over forced return" as well as "the necessity to consider the human rights situation in the country with which the readmission agreement is planned for conclusion" [18. P. 5].

In April 2002, the Commission presented the Green Paper on a Community Return Policy. Based on the Paper a public hearing was organized in July 2002 with the COMECE and CCME representatives taking part. Christian organizations again underlined the necessity for "clear, accessible and open procedures for legal labour migration into the EU" and "an improved efficiency and quality of asylum procedures, and an asylum policy which would make it possible to reach the territory of the Union in a legal way" [8. P. 2]. The necessity for the priority of voluntary return was highlighted, and it was clearly articulated that all measures need to "uphold the dignity of each person" [8. P. 5]. The representatives of churches spoke about the necessity of fairness and justice in order for the interests of the European Union member states not to take the precedence over the interests of suffering people. In the explanatory notes, which were attached to the draft Directive, the Commission summarised the main proposals from "NGOs", although Churches were not specifically mentioned. This public hearing was the only event when civil society organizations were able to interact directly with the Commission in the consultation format.

The further work of the Commission on the Returns Directive was conducted in a more closed manner, only with the consultations in the second half of 2004, with the "Member States experts active in the field of return" [10. P. 3]. As a representative of Caritas Europa noticed, "it was impossible to get any information on the draft until it was published" [16]. Therefore, only the appearance of the draft in the public domain in 2005 allowed Christian organizations to express their visions and concerns. Diego Acosta points out six main elements in the original proposal: scope, voluntary departure, re-entry ban, remedies, detention and unaccompanied minors [1. P. 26—27]. In terms of scope, the Directive could apply to any illegally staying third-country national unless member states chose not to apply it to those who were refused entry in transit zones. The option of voluntary return was given a priority with a time limit of up to four weeks. The Directive allowed the introduction of a re-entry ban of up to five years. Also it gave to the illegal immigrants the right of access to effective judicial remedy (including those who lacked adequate resources). Finally, the use of temporary custody of up to six months was allowed, and extra guarantees were given to minors in view of the best interests of the child [1. P. 26—27].

The first public statement of the Christian groups related to the important issues raised by the Directive was made on 31 August 2005, when Churches together with some secular organizations published "Common principles on removal of irregular migrants and rejected asylum seekers". The signatories represented very different organizations on the various sides of the values' spectrum. On the Church side, there were Caritas Europa, JRS Europe, CCME, the Quaker Council for European Affairs, the Spanish Evangelical Church, Cimade, and the Federation of Evangelical Churches in Italy, and on the secular side — Amnesty International, European Council on Refugees and Exiles, Human Rights Watch, the Platform for International Cooperation on Undocumented Migrants, Save the Children, and Sensoa. The "common principles" referred inter alia to the priority of voluntary return, the guarantee of access to effective remedies, prohibition of the re-entry ban and respect of the family unit [11]. The above mentioned principles were taken as a reference point for the Joint Comments published in March 2006, in which the issues for concern were explicitly identified. First, Churches expressed their regret that the member states may be allowed not to apply the Directive in the transit zones [19. P. 3]. Secondly, the provisions for voluntary return were found inadequate. Christian organizations mentioned that the time period of four weeks "is not sufficient to organise a voluntary return in a fair and proper way" [19. P. 3]. The term "absconding" was also criticised as having negative connotations derived from the criminal law. It was suggested to use a more neutral term. The possibility of issuing the return decision together with the removal order was found unacceptable because it "will put such pressure on migrants that they will not be able to properly consider voluntary return" [19. P. 4]. Also the very fact that the assessment of the risk to abscond was left entirely to the member state (as well as the opportunity to force such person "to stay at a certain place") would, according to the Christian organizations, "lead to a systemic use of detention" [19. P. 5].

Christian organizations expressed severe criticism on the provision of re-entry ban, which, in their view, "should be deleted from the directive" [19. P. 6]. If left it should be of no more than one year (instead of the suggested five) and for adults only. Churches pointed out the vagueness of the notion "threat to public policy" so that in practice "every migrant with no permit may be considered as a threat to public policy" [19. P. 6]. The very fact that only the "main elements of the return and/or removal order" will be translated for the irregular immigrant (and not the whole document) was also perceived with regret. In addition to that the absence of the automatic suspensive effect of appeals against return and removal orders was criticised, as well as the maximum duration for detention ("temporary custody") of six months. Christian organizations stated: "Six months as a maximum duration of detention is too long for an administrative measure which applies to persons who are not criminals. Because of its gravity, detention should be as short as possible and should be limited to the time necessary to organize return with due diligence of the administration" [19. P. 8]. Churches were also concerned that the detention of minors was not forbidden. In summary, they articulated the following requests: "We call for the Return Directive to be: applicable in transit zones; to establish a clear preference for voluntary return; to promote the two-step procedure;

to assure better protection for vulnerable people and prevention of detention of minors in accordance with international obligations; to abandon or at least restrict re-entry bans; to provide for the proper translation of documents and effective judicial remedy; to apply the same minimum standards to return and removal as to the reception of asylum seekers; to avoid detention and to guarantee fair treatment in detention" [19. P. 10].

THE PROCESS OF ADOPTION AND THE CHURCHES' ROLE

The process of the Directive's adoption passed through several stages with the participation of three main European institutions, but mainly the Council and the Parliament. The draft Directive was discussed in the Parliament and the Council. In October and November 2006, the Finnish Presidency offered compromise suggestions. The Council text made the Directive's provisions more restrictive, and the German Presidency (first half of 2007) wanted even more restrictive measures. The European Parliament adopted its Report in September 2007, and a series of informal meetings began in November 2007 (the Portuguese Presidency) to achieve a first-reading agreement. A series of negotiations took place in the first half of 2008 (Slovenian Presidency, Commission and EP Rapporteur). These complex negotiations with the various drafts on the agenda resulted in the final text that was politically endorsed by the Council on 5 June 2008, and approved by the Parliament on 18 June. During the negotiations it became clear that such countries as Luxembourg, the Netherlands, Spain and Sweden kept to a less restrictive position, while Czech Republic, France, Hungary, Austria, Germany, Latvia and Greece preferred more restrictive elements of the Directive.

During this legislative process comments and declarations constituted only one aspect of the activities of Christian organizations. Other aspects included practical steps taken to promote the declared principles. Christian organizations (and secular NGOs) had several meetings with the members of the European Parliament. CCME and the Conference of European Churches (CEC) in cooperation with Caritas Europa and COMECE "wrote to the Presidents of the European Parliament, European Commission and EU Council to voice the Churches' concerns" [7. P. 5]. The meetings were held with the EU Presidency in Slovenia and the European Parliament President in Strasbourg [7. P. 5]. However, it is difficult to assess how active the Christian organizations were in their lobbying activities. The agenda and the content of the mentioned meetings have not been disclosed to the general public. Moreover, one could not observe an active role of national churches, which, in principle, could try to influence the position of the member states (which is very important for changing the Council's perspectives). Obviously, Christian organizations were engaged in various activities, but their scope and intensity remains subject to contradictory interpretations.

We can only note that the European Parliament suggested some amendments, which were similar to the ones of Christian NGOs. These amendments were reflected in the Draft Report on 16 June 2006 and the final Report on 20 September 2007. The parliamentarians, in particular, stressed that the voluntary return should be preferred [14. P. 7], that at least four weeks should be granted for the voluntary departure [14. P. 12], that no reimbursement of the return procedure would be required as a pre-condition for

lifting the re-entry ban [14. P. 17], that the third-country nationals will be informed about the legal remedies available to them in writing and "in a language the third-country national understands or is reasonably presumed to understand" [14. P. 19], and that the sentence "such visits may be subject to authorization" is deleted from the article dealing with the visits to temporary custody facilities [14. P. 23].

However, the Parliament refused to accept that the Directive should be applied to the transit zones and that the re-entry ban should be abolished or substantially reduced [14. P. 16]. The legislative body virtually enlarged the temporary custody for up to 18 months [14. P. 22]. In the "minority opinion" expressed by MEP Giusto Catania the necessity of "temporary custody" and 18 months of detention were severely criticized as well as the conditions in some detention centers in which irregular immigrants are kept [15]. This obviously coincided with the Churches' criticism of conditions in detention centers.

It is now stated that the final version of the Directive contains a number of measures, which are not compatible with the respect of the individual and his dignity including "prolonged pre-removal detention and mandatory entry bans" [3. P. 2]. Anneliese Baldaccini lists a number of drawbacks in the text of the Directive. First, she indicates that the Directive does not explicitly prohibit the issue of return decision on such grounds as "the best interest of the child, family life, the state of health of the third country national concerned" [3. P. 7]. Second, she criticises "the mandatory ban on re-entering the territory of the EU after a return decision has been issued and removal has been enforced" claiming that the value of the bans is doubtful and can even be regarded as counter-productive, because "they might reinforce the circle of irregular migration for the many who will find themselves banned and for whom illegal entry remains the sole option available" [3. P. 9]. Third, Baldaccini particularly criticises the rules on detention, because the two grounds for that (a risk of absconding and if the person avoids or hampers the removal process) are non-exhaustive, "which does not provide sufficient safeguard that persons should not be detained just because they are irregular migrants" [3. P. 13]. Fourth, she regrets that the rules on the length of detention "became considerably harsher in the final agreement: a six-month detention period is permitted, with a possible 12-month extension if the person concerned is uncooperative with the removal process or in the case of delays in obtaining documents" [3. P. 14]. Baldaccini rightly assumes that this is "an extremely long period for depriving irregular migrants of their liberty for the sole reason of facilitating their removal and preventing them from absconding in the meantime. Detention is an extreme sanction for people who have committed no criminal offence" [3. P. 14]. This is particularly true taking into account that the conditions in the detention centers are, at times, below acceptable standards. Consequently, it is not surprising that Baldaccini claims that "negotiations on the text of this Directive have failed to produce a result that entirely meets the minimum standards of proportionality, fairness and humanity which should apply to EU immigration and asylum law" [3. P. 17].

Obviously, one cannot deny that in the final version of the Directive many of the Churches' suggestions were not taken into account. However, the great diversity of opinions of the stakeholders made the achievement of a common position very difficult.

Even more difficult was to achieve a position that could coincide with the requests of the Christian organizations. Therefore, even partial success suggests that the role and influence of the Churches should be taken into consideration. We also need to bear in mind that the arguments employed in the area of migration and asylum often lack religious language and are addressed more globally to human rights and the rights of the vulnerable, the suffering and the oppressed.

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Migration and asylum are the spheres where the Churches have extensive practical expertise since they worked with migrants and asylum seekers long before the European Union acquired an adequate degree of competence in the area. However, we need to understand that in most cases the work is done not by the Churches themselves, but by different Christian organizations that cannot be equated with the Churches. In fact, these special structures were created by the Churches for more focused tasks and responsibilities. These organizations, which work at the European level, are now firmly established in Brussels and their work encompasses some broad areas and different methods to achieve their aims. On the surface (and in terms of their legal status) the Church NGOs may look similar to secular NGOs working on the same issues. The main difference here is, first, closer links with the Churches and, second, the recognition of the religious origin of those values and principles, which inspire their work.

Overall, we can admit that Christian organizations with their experience and expertise proved to be respected partners of the European Union policy-making in migration and asylum. They are able to interact on a high level both with the European Commission and the European Parliament. Their presence is evident in the amendments proposed and sometimes accepted during the legislative process. Of course, one can hardly ignore the fact that many suggestions of Christian organizations, as seen in the adoption of the Returns Directive, were not taken into account. However, this should not be regarded as a reason to underestimate the Churches' influence. In fact, the scope of activities of the Churches in this area may be not as substantial as when it relates, for example, to the foundation documents of the European Union (i. e. Constitution). Second, even those politicians who are very respectful towards Churches do not necessarily follow their advice on the issues of migration [21]. One of the reasons for that is the prevalence of the viewpoint that the issues of bioethics, family and morality are of much higher importance for the Christian community than the promotion of legislation aimed to take care of illegal immigrants and similar categories of "aliens" on the European Union territory. Finally, the Churches' resources are restricted and sometimes directed to specific projects, while the interaction with the European Union is limited partly due to the lack of interest from both sides.

We cannot, of course, exaggerate the level of influence of Christian organizations, but with the limited resources at their disposal and in the circumstances that the views of the member states are very different, the Church NGOs are indeed the ones, which cannot be overlooked or ignored. With the growing level of expertise it is even likely that they will be able to exercise more influence in the future than they do now.

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ЦЕРКВИ, ДИРЕКТИВА О ВОЗВРАЩЕНИИ И ИММИГРАЦИОННЫЕ ВОПРОСЫ В ЕВРОПЕЙСКОМ СОЮЗЕ

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В статье анализируется роль христианских церквей в иммиграционной политике Европейского Союза. Особое внимание автор уделяет длительному процессу разработки и принятия «Директивы об общих стандартах и процедурах, подлежащих применению в государствах-членах для возврата незаконно пребывающих на их территории граждан третьих стран» (так называемая «Директива о возвращении»). В начале статьи кратко рассмотрены основные черты политики Европейского Союза в области внешней миграции и предоставления убежища, а также определены ведущие христианские организации, работающие в данной сфере на общеевропейском уровне принятия решений, в том числе юридического характера. Далее автор детально анализирует процесс принятия Директивы о возвращении, показывая здесь и основные исторические этапы, и ключевые дискуссионные моменты. Данная директива была первым законопроектом, предложенным в условиях действии механизма совместного принятия решений в области миграции и предоставления убежища на территории Европейского Союза. Христианские организации участвовали в процессе принятия директивы с самого начала посредством официальных критических заявлений и переговоров. Невзирая на гуманистический пафос, многие предложения церквей не были учтены в итоговом документе, что, видимо, следует объяснять серьезными расхождениями во мнениях участников законодательного процесса, что значительно затрудняло продвижение позиции церквей. В целом можно признать, что христианские организации, с учетом их огромного опыта и разносторонних экспертных знаний, подтвердили свой статус уважаемых партнеров Европейского Союза в области миграции и предоставления убежища.

Ключевые слова: христианские церкви; Европейский Союз; иммиграция; Директива о возвращении; религия; неправительственные организации