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From: Presidency

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Subject: Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

This document contains compromise proposals suggested by the Presidency in relation to Article 41 and Recital (40), Article 4 (2) (1) and Recital (64c), Article 37, Article 40 and Article 54 taking into account the outcome of the JHA Counsellors meeting on 16 October 2018. To facilitate the discussion, the document also includes Articles 53 and 55 for which no new compromise proposals have been suggested.

Suggested modifications are indicated as follows:

- new text compared to the Commission proposal is in **bold**;
- new text compared to the previous version is in **bold underline**;
- deleted text compared to the Commission proposal is in [...]
- deleted Presidency text compared to the previous version is in ~~**bold strikethrough**~~.

Comments made by delegations in relation to the articles orally and in writing, as well as explanations given by the Commission and the Presidency appear in the footnotes of the Annex.

2016/0224 (COD)

Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
establishing a common procedure for international protection in the Union and repealing
Directive 2013/32/EU¹

Article 4

Definitions

1. For the purposes of this Regulation, the following definitions [...] apply:

([...]II) 'final decision' means a decision on whether or not a third-country national or stateless person is granted refugee status or subsidiary protection status by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation), including a decision rejecting the application as inadmissible or a decision rejecting an application [...] **as implicitly withdrawn, or a decision stating that an application is explicitly withdrawn [...] which is no longer subject to a remedy within the framework of Chapter V of this Regulation; or it also includes a decision stating that an application is explicitly withdrawn** as referred to in Art. 38/1b [...], irrespective of whether the applicant has the right to remain in accordance with this Regulation²;

¹ HU, IT, NL: parliamentary reservation. BE, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, NL, PL, PT, SE, SI: scrutiny reservation. FR, PL, SK: Directive instead of a Regulation.
² DE, EL, IE, SK: scrutiny reservation. FR: reservation on "decision rejecting an application as implicitly withdrawn" linked to Article 39. CZ: prefers reference to courts of first instance; no reference to explicit withdrawal. EL: too complicated; distinguish between final and definitive; the decisions on withdrawing the status are not mentioned; the reference should be to courts of first instance; proposed wording: "Final decision means a decision that is adopted after the appeal mentioned in articles 53 et seq. or a decision that cannot be appealed pursuant to these articles because the time-limits have lapsed". HR: unclear wording. HR, IE, NL, PL: reference to courts of first instance or to the fact that it can no longer be subject to a remedy that would provide examination on merits. FI, NL, SE: another option would be to delete the definition and deal with this notion in the relevant articles. IT: delete from "on whether" on and instead: "against which the applicant has exhausted all appeal possibilities provided for by the national law, with the exception of extraordinary or constitutional remedies where applicable under national law."

Recital (64c):

(64c) A decision should be considered as final irrespective of the existence of remedies which are available only once that decision has become definitive, including, where applicable, extraordinary or constitutional remedies, ~~under national law, such as constitutional remedies,~~ appeals in cassation or annulment under national law or actions before the European Court of Human Rights, ~~should not be considered as a final decision.~~

Article 37

Decision on the merits of an application

-1. An application shall not be examined on the merits where:

[(a) another Member State is responsible in accordance with Regulation (EU) No XXX/XXX (Dublin Regulation)];³ or

(b) an application is rejected as inadmissible in accordance with Article 36(1a) and (1aa).⁴

1. When examining an application on the merits, the determining authority shall **determine** [...] whether the applicant qualifies as a refugee and, if not, it shall determine whether the applicant is eligible for subsidiary protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation).

2. The determining authority shall reject an application as unfounded where it has established that the applicant does not qualify for international protection pursuant to Regulation (EU) No XXX/XXX (Qualification Regulation).

³ **CZ:** scrutiny reservation. **SK:** more appropriate to reject application as inadmissible and therefore it should be moved to Article 36

⁴ **SK:** reservation on para (-1). **CZ:** add a new point (c) drafted as follows: "(c) an application is explicitly or implicitly withdrawn". **SE:** delete para (-1).

3. The determining authority shall ~~may~~ declare an unfounded application to be manifestly unfounded, **if at the time of the decision, any of the circumstances [...] referred to in Article 40(1) (a), (b), (c), (ca), (d), [...] (e) and (f) and (i), as well as in Article 40 (5) (a), (b), (c) and (d) applies,**⁵ ~~including where a decision is not taken within the time limits referred to in Article 34 (1a) and (1b) or in the case referred in Article 40(4).~~ **The determining authority may declare an unfounded application to be manifestly unfounded if at the time of the decision any of the circumstances referred to in Article 40 (1) (e) and (h) and 40-(2i), as well as in Article 40 (5) (a), and (ba), (c) and (d) applies. This paragraph applies regardless whether including where a decision is not taken within the time-limits referred to in Article 34 (1a) and (1b) or in the case referred to in Article 40(4).**⁶

Article 40

Accelerated examination procedure⁷

1. **Without prejudice to Article 20(3), [...]**the determining authority shall, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:⁸

⁵ **BE, DE, FR, SE, SI:** scrutiny reservation on para (3).

⁶ **BG, IT:** scrutiny reservation.

⁷ **CZ, DE, FI, IE, IT, PT, SE, SI:** scrutiny reservation. **EL:** reservation. **EL, ES, IE, IT, MT, SE:** "may" provision is preferable.

⁸ **EL:** the determining authority should have the possibility to decide whether an accelerated procedure should be applied, based on the merits of the individual case. Either it should not be obligatory to apply the accelerated procedure, or the applicable (short) time limits should be extendable. Flexibility is needed to be able to cope with a high influx of manifestly unfounded cases.

- (a) the applicant, in [...] **lodging** his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation);⁹
- (b) the applicant has made clearly **insufficient**, inconsistent [...] **or** contradictory, clearly false or obviously improbable representations which contradict [...] **relevant and available** country of origin information, thus making his or her claim clearly unconvincing [...] **as** to whether he or she qualifies as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation);¹⁰
- (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information [...];¹¹
- (ca) the applicant withheld documents relevant with respect to his or her identity or nationality or he or she has destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality or if the circumstances clearly give reason to believe that this is the case;**¹²

⁹ **DE:** insert "*clearly*" before "*not relevant*".

¹⁰ **FR:** scrutiny reservation, should be cumulative.

¹¹ **DE:** delete "*that could have had a negative impact on the decision*". **DE:** insert "*clearly*" before "*misled*".

¹² **HR, SE:** what is the difference compared to 39(1)(ca)? **PRES:** withholding documents not included in Art. 39, therefore no withdrawal but only in Art. 40 and accelerated procedure

- (d) the applicant [...] **makes** an application merely to delay or frustrate the enforcement of [...]decision [...] **for** his or her removal from the territory of a Member State;¹³
- (e) a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;
- (f) [...]there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States, **or the applicant had been forcibly expelled for serious reasons of national security or public order under national law;**¹⁴
- (g) [...]
- (h) the application is a subsequent application **which is not inadmissible [...]**;¹⁵
- (i) **the applicant entered the territory of Member States unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the competent authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry.**

¹³ **CZ:** delete "merely". **IT:** add "*subject to a return decision, including those in administrative detention in view of removal from the territory of a Member State,*" after "the applicant".

¹⁴ **DE:** keep previous drafting in the first sentence, namely "*the applicant may, for serious reasons be considered...*". **IT:** this should be an inadmissibility ground **PRES:** An applicant posing a threat to national security or public order might still be in need of international protection. Grounds for excluding persons from international protection (e.g. based on national security) are regulated in QR. Nevertheless, this would be already an examination on the merits and not an inadmissibility ground. Therefore, the applicant's request might be rejected based on the exclusion grounds in Article 12 and 18 QR (after an examination on the merits). Besides, the principle of *non-refoulement* must be taken into account (also for persons posing a threat to national security or public order).

¹⁵ **DE:** reservation on the deletion.

2. ~~[...] Without prejudice to Article 20(3), the determining authority may, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:~~
- ~~(a) the applicant withheld documents relevant with respect to his or her identity or nationality or he or she has destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality or if the circumstances clearly give reason to believe that this is the case;~~
- ~~(b) the applicant entered the territory of Member States unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the competent authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry.~~
3. [...]
4. Where the determining authority considers that the examination of the application involves issues of fact or law that are complex to be examined under an accelerated examination procedure, it may continue the examination on the merits in accordance with Articles 34(2) and 37.¹⁶ [...]

¹⁶ IT: delete reference to Article 37.

5. The accelerated examination procedure may be applied to unaccompanied minors only where:¹⁷
- (a) the applicant comes from a third country **that may be** considered to be a safe country of origin in accordance [...] **within the meaning of this Regulation**;¹⁸
 - (b) **there are reasonable grounds to consider** the applicant [...] as a danger to the national security or public order of the Member State, or the applicant **has** been forcibly expelled for serious reasons of [...] **national** security or public order under national law;¹⁹
- (ba) the application is a subsequent application which is not inadmissible;**

¹⁷ **DE, ES:** scrutiny reservation; redraft para (5) as follows: “*The accelerated examination procedure shall not be applied to unaccompanied minors.*” **SE:** hesitant. **FR, SE:** prefer previous version.

¹⁸ **IT:** add “*and provided that it is in the best interest of the child*”.

¹⁹ **IT:** this should be an inadmissibility ground **PRES:** An applicant posing a threat to national security or public order might still be in need of international protection. Grounds for excluding persons from international protection (e.g. based on national security) are regulated in QR. Nevertheless, this would be already an examination on the merits and not an inadmissibility ground. Therefore, the applicant’s request might be rejected based on the exclusion grounds in Article 12 and 18 QR (after an examination on the merits). Besides, the principle of *non-refoulement* must be taken into account (also for persons posing a threat to national security or public order).

- (c) the applicant withheld documents relevant with respect to his or her identity or nationality or he or she has destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality or if the circumstances clearly give reason to believe that this is the case ~~the applicant withheld documents relevant with respect to his or her identity or nationality or it is likely that he or she has destroyed or disposed of an identity or travel document that would have helped to establish his or her identity or nationality or if the circumstances clearly give reason to believe that this is the case;~~²⁰
- (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents ~~that could have had a negative impact on the decision.~~

Points (c) and (d) shall only be applied where there are serious grounds for considering that the applicant is attempting to conceal relevant elements ~~which would likely lead to a decision refusing to grant international protection and provided that the applicant after he or she has been given an effective opportunity to provide substantiated justifications for his actions.~~

²⁰ **EL:** reservation on "*it is likely that...*". **IT:** delete this.

Article 41

Border procedure²¹

1. [...] ~~Without prejudice to Article 20(3), Member States shall, in accordance with national law, provide for a border procedure whereby the determining authority may shall examine~~ [...] applications at the **external** border or in **the** transit zones of the Member State **and take decisions** on:²²
 - (a) the inadmissibility of an application made at such locations pursuant to Article 36 [...];
[...] and
 - (b) the merits of an application **made at such locations** in the cases subject to the accelerated examination procedure **based on the grounds** referred to in Article 40 (1)
(a), (b) and (f).

²¹ **SE:** parliamentary reservation. **CZ, DE, HU, FR, PT:** scrutiny reservation. **BG, EL, HU, LU:** reservation. **HU:** the entire asylum procedure should take place at the border, only those granted protection should be allowed in the EU. **NL:** the current APD states that a decision on the application must be taken on the application within four weeks (Article 43(2)). This article in the APD does not refer to a ‘final decision’, hence this means that it only refers to the decision of the determining authority. This provision is also in Article 41(2). The new provision in Article 41(3) adds that a final decision in the border procedure must be taken within 8 weeks. This means that in the four remaining weeks there must be a decision on first instance appeal and decision on second appeal. This is unfeasible. We note that even the smallest exceedance of the time-limit will lead to entry to the territory. The applicant has an interest to delay the appeal procedure. In these cases, it would not be in the interest or border control to grant the applicant access to the territory of the EU and it would even be disproportional if the decision on appeal is one or two days late.

²² **NL:** a rejection of an asylum application in a border procedure has to be followed by a refusal to enter the country. A rejected asylum application is not such a refusal in itself, which is not efficient. Therefore redraft as follows: add "or (2)" in point (a) and add a second sub-para along the following lines: "*Such a decision shall, pursuant to article 8, paragraph 3, under d, of [the Reception Conditions Directive] be considered as a refusal to enter the territory.*" **IT:** prefers the previous version (10973/18).

When, on the basis of evidence available, the determining authority prima facie considers that the application is neither inadmissible nor subject to the accelerated examination procedure based on the grounds referred to in Article 40(1)(a), (b) or (f), the assessment of the application need not be carried out at the external border or in the transit zone.

- 1a. The competent authority may also decide on explicit withdrawal pursuant to Article 38 or implicit withdrawal pursuant to Article 39 or examine and take decisions on applications made at the external border or in the transit zones in the ease of inadmissibility of an application pursuant to Article 36 and in cases subject to accelerated procedure on the other grounds mentioned in Article 40 (1) at such locations.

~~When, on the basis of evidence available, the determining authority prima facie considers that the application is neither inadmissible nor subject to the accelerated examination procedure based on the grounds referred to in Article 40(1), the assessment of the application shall not be carried out at the external border or in the transit zone.~~

2. A decision referred to in paragraph 1 shall be taken **following an adequate and complete examination of the application** as soon as possible [...], and no [...] **later than [...] eight six** weeks from when the application is lodged.²³
- [2a. **The competent authorities may/~~shall~~ carry out the procedure for determining the Member State responsible for examining the application as laid down in Regulation (EU) No XXX/XXX (Dublin Regulation) at the external border or in the transit zone of the Member State for the applications made at the external border or in the transit zones.**]²⁴
3. Where a final decision ~~on the application by a court or tribunal of first instance on an appeal~~ is not taken within [...] **eight twelve** weeks from when the application is lodged [...], the applicant shall no longer be kept at the border, [...] **in the transit zones or in other locations according to paragraph 4** and shall be granted entry to the territory of the Member State for his or her application to be processed in accordance with the other provisions of this Regulation.²⁵

²³ **EE:** scrutiny reservation. **PL:** sometimes the responsibility for not concluding the procedure within 4 weeks belongs to the applicant (e.g. in cases of ID fraud, new document submitted very late etc); in such cases it should be possible to extend the period by another four weeks. **CZ:** delete "following an adequate and complete examination of the application". **HR:** longer deadlines.

²⁴ **SI:** reservation linked to Dublin.

²⁵ **IT:** scrutiny reservation. **CZ:** reservation, deadline too short for the courts; red line for this delegation.

4. **Applications made at the external border or transit zone** ~~The border procedure~~ **may also be applied examined at any designated locations at or in proximity to the external border or transit zone.** In the event of arrivals involving a disproportionate number of third-country nationals or stateless persons **making [...]** applications for international protection at the **external** border or in ~~a~~ **the** transit zone, making it difficult in practice to apply the provisions of paragraph 1 at such locations, the border procedure may also be applied at **other** locations **designated in national law** [...].²⁶
5. The border procedure may be applied to unaccompanied minors, in accordance with Articles 8 to 11 of Directive (EU) No XXX/XXX (Reception Conditions Directive) **only in the cases referred to in Article 36(1a)(a) and (b) as well as in Article 40(5).** [...]²⁷
- (a) [...]
- (b) [...]
- (c) [...]
- (d) [...]
- [...]

²⁶ **BG, NL:** add "*closed*" before "*locations*".

²⁷ **DE, LU:** scrutiny reservation. **EL:** reservation on para (5), prioritising the examination of application from UAM is a good approach but it is doubtful that their best interest can be safeguarded in the accelerated or border procedure; clarify that in such cases it should be applied only if it is in the best interest of the child.

Recital (40):

(40) Many applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant. Member States should be able to provide for an examination on admissibility or an examination on the merits which would make it possible for such applications to be decided upon at those locations in well-defined circumstances. The border procedure should not take [...] ~~more than [...]~~ ~~eight~~ ~~twelve~~ weeks and after that period applicants should be allowed entry to the territory of the Member State. [...] A border procedure may be applied to unaccompanied minors only within the limited circumstances set out in this Regulation. ~~Proximity to the external border or transit zone should be defined by Member States according to their~~ Member States that wish to examine applications made at the external border or in transit zones in locations in proximity to the external border or transit zones ~~should define~~ designate such locations in national law taking into account factors such as the geographical situation of the external border and ~~taking into account elements such as~~ distance to the necessary infrastructures. Member States may also ~~that wish to~~ examine applications made at the external border or in transit zones at other locations where ~~in the event of~~ arrivals involving a disproportionate number of third-country nationals or stateless persons make it difficult in practice to examine the ~~making~~ applications for international protection at the external border, in the transit zones or in proximity to such locations. ~~should also define the~~ Such other locations should be designated in national law ~~which would have the status of the external border or transit zones.~~²⁸ The conditions of the Reception Conditions Directive apply to border procedures.

²⁸ **ES, FR:** 4 weeks for determining authority (8 weeks for appeal procedure, 12 weeks in case of disproportionate pressure)

CHAPTER V

APPEAL PROCEDURE²⁹

Article 53

The right to an effective remedy³⁰

1. Applicants have the right to an effective remedy before a court or tribunal [...] against the following:³¹
 - (a) a decision taken on their application for international protection [...]:
 - (i) rejecting an application as inadmissible [...];
 - (ii) rejecting an application as unfounded or manifestly unfounded in relation to refugee status or subsidiary protection status [...];
 - (iii) rejecting an application as [...] **implicitly** withdrawn [...];
 - (iv) [...].
 - (b) a decision to withdraw international protection [...].³²

²⁹ **FR:** reservation. **CZ, DE, EL, ES, PT, SK, SI:** scrutiny reservation.

³⁰ **HU, IT:** scrutiny reservation.

³¹ **DE:** scrutiny reservation n para (1).

³² **DE, EL:** another category of cases should be added, covering disputes between member states and beneficiaries of protection as to whether protection status pursuant to Art. 52 (5) of the Asylum Procedures Regulation has expired by law, i.e. not due to an administrative decision

2. Persons recognised as eligible for subsidiary protection have the right to an effective remedy against a decision considering [...] **the** application unfounded in relation to refugee status. **Without prejudice to paragraph 1(b), where subsidiary protection status granted by a Member State offers the same rights and benefits as refugee status under Union and national law, the appeal against that decision in that Member State may be considered as inadmissible where provided for in national law.**³³
3. An effective remedy within the meaning of paragraph 1 shall provide for a full and *ex nunc* examination of both facts and points of law, **at least before a court or tribunal of first instance**, including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) No XXX/XXX (Qualification Regulation).³⁴
- 3a. **Member States may provide in national law that [...]**the applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been aware of at an earlier stage or which relate to changes to his or her situation.

³³ **EL:** scrutiny reservation. **CZ:** add "*by the court or tribunal*" in the end. **DE:** does "*may*" refer to a legislative option for MS? **SE:** redraft the end as follows "*...that MS may consider an appeal that decision*".

³⁴ **CZ, HU, PL, SK:** it should not mean that the court will have the power to grant international protection itself. **CZ, EL,** clarify "*including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) No XXX / XXX (Qualification Regulation)*", in the context of the preliminary references to the rulings of the European Court of Justice in cases C-586/17 and C-652/16. **PRES:** the court or tribunal should be able to pronounce itself on the international protection needs but it is not required that the court or tribunal formally issues the decision granting international protection if under national law that competence is reserved to the determining authority.

4. [...] ³⁵

4a. Applicants shall be provided with interpretation for the purpose of a hearing before the competent court or tribunal where such a hearing takes place and where appropriate communication cannot otherwise be ensured. ³⁶

5. Where the court or tribunal considers it necessary, it shall ensure the translation of relevant documents which have not already been translated in accordance with Article 33(4). Alternatively, the translation of those documents may be provided by other entities and paid for from public funds.

If the applicant agrees that the translation is not needed or the documents are not submitted sufficiently in advance for the court or tribunal to ensure their translation, the court or tribunal may refuse to take those documents into account if they are not accompanied by a translation provided by the applicant. [...] ³⁷

³⁵ **EL:** against deletion.

³⁶ **SK:** scrutiny reservation.

³⁷ **BE, FR:** reservation. **DE:** scrutiny reservation on para (5). **SE:** delete this para or redraft as follows: "*Where the court or tribunal considers it necessary for the examination of the application, relevant documents shall be translated.*" **ES:** delete this para. **CZ:** add "*certified*" before translation. **PRES:** it would be a burden for the applicant to provide only for certified translations.

6. [...] Member States shall lay down in their national law time-limits for applicants to lodge an appeals against [...] a decision referred to in paragraph 1. Those time-limits shall be set:³⁸
- (a) [...];
- (b) [...] between a minimum of two days and a maximum of one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn, as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [...] or in cases where the applicant is held in detention or kept at the border;³⁹
- (c) [...] between a minimum of one week and a maximum of ~~one~~ two months in all other cases [...].⁴⁰

³⁸ **SK:** reservation on para (6). **EL:** scrutiny reservation on the time-limits. **DE:** this delegation is in favour of time limits for lodging appeals and applications which correspond to those in national law: for appeals, in principle two weeks; time limits of one week for lodging appeals and applications in case of rejection as inadmissible or manifestly unfounded. **HU, SE, SK, ES:** replace para (6) with the following text: "*Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy. The time limits shall not render such exercise impossible or excessively difficult.*" **FR, PL:** deadlines should be in calendar days and could be shortened. **PRES:** in this case the deadlines will run during weekends and holidays but the authorities will not be able to receive the appeal. The right to lodge an appeal is not guaranteed.

³⁹ **LV:** scrutiny reservation. **SK:** at least 2 weeks after appointment of representative. **SE:** deadlines in national law. **ES:** only minimum deadlines. **FR, LV:** maximum of 2 weeks.

⁴⁰ **DE:** scrutiny reservation. **HU:** deadline too long. **PRES:** this is a balanced compromise. **ES:** two months or no maximum deadline.

[...] Member States may provide for an *ex officio* review of decisions taken pursuant to a border procedure.⁴¹

The time-limits [...] **referred to** in this paragraph shall start to run from the date when the decision of the determining authority is notified to the applicant **or his or her representative or legal adviser in accordance with Article 35 (1)[...]**.⁴² **The procedure for notification shall be laid down in national law.**

Article 54

Suspensive effect of appeal⁴³

1. [...] Applicants **shall have the right** to remain on **the [...]** territory **of the Member State responsible** until the time limit within which to exercise their right to an effective remedy **before a court or tribunal of first instance** has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.⁴⁴

⁴¹ **ES, HU:** reservation on the *ex officio* reviewing procedure. **PRES:** it is a “*may*” clause. **SE:** scrutiny reservation on the reference to a border procedure.

⁴² **DE:** reservation. **SK:** include reference to Article 55.

⁴³ **DE, ES, IT, SI:** scrutiny reservation. **ES:** reservation. **EL:** the case-by-case examination of the right to remain should not be part of the asylum procedure but rather part of the return procedure. We risk overburdening the authorities dealing with second instance examination.

⁴⁴ **DE:** reservation; in case of a return decision and/or a decision on removal and/or entry ban has been adopted in accordance with Article 6(6) of Directive 2008/115/EC, this decision shall be suspended accordingly.

2. **The applicant shall not have the right to remain in accordance with paragraph 1 shall not apply [...] in case of the following [...] decisions by the determining competent authority:**⁴⁵
- (a) a decision which [...] **rejects** an application [...] **as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply or in the cases subject to a border procedure [...];**⁴⁶
 - (b) a decision which rejects an application as inadmissible pursuant to Article 36(1a)(a), (f) and (g) and [...] **(1aa)(a) and (b);**⁴⁷
 - (c) a decision which rejects an application as [...] **implicitly** withdrawn [...];⁴⁸
 - (ca) **a decision to withdraw international protection in accordance with Article 14(1)(b), (d) and (e) and Article 20(1)(b) of Regulation No XXX/XXX (Qualification Regulation).**

⁴⁵ **DE:** scrutiny reservation; redraft this para as follows: *"The applicant's right to remain on the territory of the Member State in accordance with paragraph 1 shall be excluded: a) in cases where the application is rejected as inadmissible or as manifestly unfounded, b) in cases where international protection is withdrawn pursuant to Article 52 for the following reasons: (i) Article 14 paragraph 1 letter b) in conjunction with Article 12 paragraph 2 of the [Qualification Regulation], (ii) Article 14 paragraph 1 letters d) to f) of the [Qualification Regulation], (iii) Article 20 paragraph 1 letter b) in conjunction with Article 18 paragraph 1 of the [Qualification Regulation] or (iv) Article 20 paragraph 1 letter d) of the [Qualification Regulation]. In cases under sentence 1, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State responsible, either upon the applicant's request or acting ex officio."* **SE:** hesitant regarding the extension of cases where the suspensive effect is not automatic in 54(2). In particular regarding the new (ca) but also in relation to all cases in the accelerated procedure since the scope of article 40 has been extended compared to article 31(8) of the current directive.

⁴⁶ **SE:** delete *"in the cases subject to an accelerated examination procedure or border procedure."* **PRES:** this is covered under point (ca) and accelerated procedure.

⁴⁷ **IT:** reservation. **DE:** include 36(1a)(b). **CZ:** include also 36(1aa)(c). **PRES:** that point is in square brackets due to discussions on Dublin.

⁴⁸ **DE:** scrutiny reservation on the categories in (a)-(c). **SE:** scrutiny reservation on point (c).

- 2a. Member States that apply Article 36 (1a)(b) ~~shall regulate~~ may exclude the right to remain referred to in paragraph 1 in their national law.⁴⁹
- 2b. In ~~those~~ the cases referred to in paragraphs 2 and 2a, a court or tribunal shall have the power to rule following an examination of facts and law whether or not the applicant may remain on the territory of the Member State responsible pending the outcome of the remedy upon the applicant's request. The competent court or tribunal may under national law have the power to decide on this matter *ex officio*. ~~The competent court or tribunal shall rule on whether the applicant may remain following an examination of both facts and law.~~⁵⁰ This procedure may be conducted as a part of the appeal procedure and by the same court or tribunal competent to hear the appeal.

⁴⁹ **IT:** why is this paragraph limited to article 36(1a)(b)? **PRES:** not granting automatic suspensive effect for a decision rejecting an application as inadmissible on the safe third country ground is a very sensitive matter. It should not be added to the acquis but left to the MS.

⁵⁰ **SK:** reservation. **RO:** scrutiny reservation. **DE:** must the request be made within a specific time limit? Does Art. 53 (6) apply here? It must be clarified whether a statutory order by the authority is needed for the immediate enforcement or whether the suspensive effect is omitted ipso iure. **PRES:** the deadline is specified in Paragraph 3 of this Article. Art. 53 (6) does not apply here. Suspensive effect is non – automatic.

3. For the purpose of paragraph 2**b**, the following conditions shall apply⁵¹ [...]:
- (a) the applicant shall have [...] at least 2 days from the date when the decision is notified to the applicant to [...] request [...] to be allowed to remain on the territory pending the outcome of the remedy;⁵² [...]
 - (aa) the applicant shall be provided with interpretation in the event of a hearing before the competent court or tribunal, where appropriate communication cannot otherwise be ensured;⁵³
 - (ab) the applicant shall be provided, upon request, with free legal assistance and representation in accordance with Article 15a ~~where he or she lacks sufficient resources unless the application has no sufficient prospect of success~~⁵⁴;

⁵¹ **CZ:** delete para (3).

⁵² **CZ:** scrutiny reservation. **DE:** this should be regulated in national law. **SE:** 54(2)(a) unclear and complicated. In 37(3) it is mandatory to consider an application as manifestly unfounded if the circumstances in 40(1) and 40(5)(a), (b) and (ba) apply. This delegation would prefer that this was a may-provision since all the grounds in article 40 do not necessarily imply that the application is manifestly unfounded. Furthermore, in article 54(2)(a) also a decision finding an application as unfounded shall not have automatic suspensive effect if the circumstances in 40(1) and 40(5) applies. Thus, for unaccompanied minors, an application may not be found as manifestly unfounded in the cases referred to in 40(5)(c) and (d) but, nevertheless, they may not have automatic suspensive effect. This delegation suggests that 54(2)(a) should only refer to if a decision has been taken that the application is manifestly unfounded. That should also be a valid reason for not having suspensive effect in accordance with the case law on the right to an effective remedy.

⁵³ **DE, SI:** scrutiny reservation. **SK, SI:** add "*where relevant*" in the beginning. **SE:** delete

⁵⁴ **IT:** add reference to national law.

(b) [...]

[...] **(ba)** the applicant **shall [...]** **not be removed from [...]** **the territory of the Member State responsible:**

(i) **until the time limit for requesting a court or tribunal to be allowed to remain has expired; and**

(ii) **where the applicant has requested to be allowed to remain within the set time limit, pending the [...]** **decision of the court or tribunal** on whether or not the applicant may remain on the territory. [...]⁵⁵

5. [...]⁵⁶

Article 55

Duration of the first level of appeal

1. **Member States shall lay down in their national law time limits for the court or tribunal to examine the decision of the determining authority.**⁵⁷ [...]

(a) [...]

(b) [...]

(c) [...]

2. [...]

⁵⁵ **CZ:** add "*on condition the request has been submitted together with the appeal*" after "*on the territory*". **DE:** reservation on the deletion; replace with the following: "*That decision should regularly be taken within one month from the lodging of the appeal.*"

⁵⁶ **FR, NL:** keep deleted para or clarify that this is to be regulated in national law.

⁵⁷ **SE:** "*may*" instead of "*shall*". **DE:** scrutiny reservation.