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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

**Position of the Council on the adoption of a Directive of the European Parliament and of
the Council laying down standards for the reception of asylum seekers**

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1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council 9 December 2008
(document COM(2008) 815 final/2 - 2008/0244 (COD))

Date of the opinion of the European Economic and Social Committee: 16 July 2009

Date of the position of the European Parliament, first reading: 7 May 2009

Date of transmission of the amended proposal: 6 June 2011

Foreseen date of adoption of the position of the Council: 7 June 2013
(document COM(2011) 320 final -2008/0244 COD)

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The proposal amends the 2003 Reception Conditions Directive laying down minimum standards for the reception of asylum seekers, and aims to ensure better and more harmonised standards of treatment. In particular, it addresses the issue of grounds for detention and includes an extensive list of rules and guarantees. It strengthens access to employment, material support, health care, and legal assistance, provision of representation for unaccompanied minors, the identification of special needs as well as facilitating the Commission's role in monitoring implementation.

3. COMMENTS ON THE POSITION OF THE COUNCIL

Following the Commission's amended proposal in June 2011, which aimed at taking stock of the progress made in the negotiations until then, a common position was reached at political level between co-legislators on 28 June 2012. COREPER unanimously endorsed the common position on 11 July 2012. The LIBE committee also informally endorsed it on 19 September 2012 via an orientation vote [51 votes for, 4 against and 3 abstentions]. On 20 September, the LIBE Chairman sent a letter to the Council PRES indicating that if the Council adopts the common position without changes, he will recommend to the Members of the LIBE committee and subsequently to the Plenary to adopt the common position without amendments.

The main differences between the common position and the Commission 2011 amended proposal are as set below.

Definition of family members - Article 2 (c)

The Commission proposal extended the definition of family members as far as minors were concerned. In particular it includes married minor children of the applicant, the minor siblings of the minor applicant, and the parents or other adult responsible for the minor. In all cases, it covers both married and unmarried minors.

The common position does not endorse this definition, but the more restrictive one as agreed in the Qualification Directive amended proposal.

However, the definition of family members in the Reception Conditions Directive only concerns accommodation arrangements, and in particular the right of family members to be lodged together. Since the common position also includes safeguards in other provisions which ensure the rights of minors, whether married or unmarried, in relation to their accommodation rights, the objectives of the Commission proposal are fully met.

Identification of the special reception needs of vulnerable persons, Article 22, Recital 14

The common position retains the objectives of the Commission proposal concerning the treatment of this category of applicants. Although the wording has been substantially amended in negotiations, the obligation to assess the individual needs of all applicants with a view to identifying who is a vulnerable person and thus may need special reception guarantees is retained.

The amendments introduced to the Commission proposal mainly aim to address concerns that the identification procedure may create disproportionate administrative costs and unnecessary administrative procedures. They thus clarify the scope of application of the identification process but they do not restrict it.

Material reception conditions - Article 17(5), Recital 20

The common position retains the obligation included in the Commission proposal for Member States to apply a national point of reference when calculating the required level of material assistance for asylum applicants. As an example of such a point of reference, the Commission proposal stipulated the minimum social welfare assistance provided to nationals. This example was not retained in the common position due to concerns that this may, automatically, lead to equal treatment between asylum seekers and nationals in this respect. Since this reference was only included as an example in the concerned provision, its deletion has no effect to the obligation set therein.

Health care – Article 19

The common position retains the objective of the COM proposal in this respect, since it ensures better standards on healthcare for all applicants, including vulnerable persons. The

common position merely substitutes the reference of "post-traumatic disorders" with "serious mental disorders"; this change does not restrict the scope of this provision.

Reduction or withdrawal of material reception conditions: Article 20, Recital 21

The common position is more restrictive than the Commission proposal on this issue, in one aspect; in particular, it re-introduces the ground included in the current Directive which allows the reduction/withdrawal of support under all grounds envisaged in Article 20 of the Directive when the asylum application was unjustifiably made too late.

However, the re-introduced ground is also re-worded in order to be less ambitious than the one currently in force. In particular, it only allows the reduction of support and not the full withdrawal and it obliges Member States to first "establish" that the delay was without "justifiable reasons". It also states that in all cases, applicants must be ensured "dignified standards of living". Finally, the common position retains the obligation to ensure access to appeals against decision to withdraw/reduce support, accompanied by access to request for free legal assistance, as set out in the Commission proposal.

Access to the labour market- Article 15, Recital 19

The common position is more restrictive than the Commission proposal concerning the maximum period of time after which access to employment shall be granted [9 months instead of 6, as proposed by the Commission, and only if a first instance decision is not issued within that period]. It also re-introduces the possibility to apply the labour market test, which was deleted by the Commission proposal.

At the same time, it ensures higher standards of protection than the current Directive which only allows access after a period of 12 months. Moreover, the common position retains the obligation included in the commission proposal for Member States to ensure that while conditions on access to employment may be imposed, in practice they shall not be so restrictive as to effectively prevent access to employment.

Detention

To be noted that, with the exception of a few general principles, the Directive in force does not include rules on detention. Therefore, the common position, which to a great extent retains the Commission proposal's objectives, achieves a high added value compared to current standards.

a. Grounds for detention - Article 8(3)

The common position adds one more ground for detention to the 4 proposed by the Commission. The additional ground allows the detention of an asylum seeker if national authorities can substantiate, on the basis of objective criteria, including that the person had the opportunity to apply for asylum sooner but did not, that the intention was merely to frustrate the return procedure.

The common position retains the list of grounds exhaustive. It also includes all the general safeguards introduced in the Commission proposal [detention may only apply if proportional, necessary, if alternatives considered etc.].

b. Guarantees for detention – Article 9

The common position retains, to a large extent, the guarantees proposed by the Commission, namely on access to free legal assistance, information on grounds for detention and possibilities to appeal. However, it does not foresee for an automatic judicial review of the detention order if it is issued by the administrative authorities. At the same time, in such cases, the common position obliges Member States to at least inform the applicant in writing about his rights to lodge an appeal against the detention order, and if such an appeal is lodged, to ensure that it is processed speedily.

c. Detention of persons with special reception needs - Article 11

Article 11(1) of the Commission amended proposal which prohibits Member States to detain vulnerable persons unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention has been deleted in the common position. Instead, the common position states that "the health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities" and that Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

Article 11(1) needs to be seen together with Article 22, which obliges Member States to assess without delay the situation of all applicants arriving on the territory with a view to identifying their special needs, including in terms of health and psychological status. In this respect, Article 22 can also assist to ensure that the objectives of Article 11(1) are met.

Moreover, Article 11 no longer refers to the obligation to ensure that detention is not applied unless it is established that it is in line with the best interests of the child principle. However, Article 23 of the Directive states that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the law concerning minors, as also stipulated in the UN Convention on the Rights of the Child. In this respect the Directive retains the obligation to ensure that the principle of the best interests of the child is respected in all cases including detention.

Finally, the common position deletes the reference to "particularly" from "particularly exceptional". However, the principle of ensuring that detention of minors is applied only exceptionally is retained in the text.

d. Conditions for detention - Article 10

The common position does not retain the obligation to always ensure the separation of asylum applicants from other third country nationals while in detention, as proposed by the Commission, but only "as far as possible". However, it is ensured that in such cases applicants

are under a different regime from third country nationals and can still benefit from the specific reception conditions set out in the Directive.

Moreover, the common position allows Member States to exceptionally resort to prison accommodation if they are "obliged to" since they "cannot" use special detention facilities; the Commission proposal only allowed the use of prison facilities when places in special facilities are exhausted. The common position ensures however that in such cases, applicants shall be detained separately from ordinary prisoners.

The remaining guarantees included by the Commission proposal are retained, namely ensuring access to recreational activities, including in the open-air, communication and visitation rights for UNHCR, NGOs, family members and legal advisers, and access to information on the running of the detention facility.

Appeals (free legal assistance and representation) - Article 26

The common position reached is more restrictive than the Commission proposal on two points. First it includes a second ground for accessing free legal assistance informed from the charter of Fundamental Rights, namely when "it is necessary to ensure effective access to justice". Secondly, it introduces the "merit test" (informed by case-law of the ECtHR) which allows judges to refuse access to free legal assistance if they consider that the appeal will have no chance of success.

At the same time, the two elements added are fully in line with developing case-law and existing obligations of Member States concerning effective access to justice. In all cases, the court will first need to assess the level of difficulty of the legal procedures and the person's ability to follow them and the level of severity of the sanctions involved with a view to deciding whether free legal assistance is necessary. Although in the case of applicants it would be difficult to prove that such assistance is not needed (unaware of the language, national legal proceeding etc.), there could be cases where access to legal assistance may be considered by the court to be disproportionate (i.e. minor reduction of pocket money which does not affect his fundamental rights).

4. CONCLUSION

The common position fully satisfies the main objective of the Commission proposals. It brings added value to the current standards of treatment and an increased level of harmonisation on reception conditions for asylum seekers. It also introduces rules on detention and access to free legal assistance, issues which the current asylum instruments do not address. The substance of the Council's position is, therefore broadly in line with the Commission's proposal and can be supported.