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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 proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

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1. Background

Date of transmission of the proposal to the European Parliament and to the Council (document COM(2008) 820 final/2 - 2008/0243 (COD)) 6 December 2008

Date of the opinion of the European Economic and Social Committee and of the Committee of the Regions: June, October 2009, respectively

Date of the position of the European Parliament, first reading: 6 May 2009

Foreseen date of adoption of the position of the Council: (document COM(2008) 820 final/2 - 2008/0243 (COD)) 7 June 2013

2. Objective of the proposal from the Commission

The proposal amends the 2003 Dublin Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, and aims to enhance the system's efficiency and, to ensure that the needs of applicants for international protection are comprehensively addressed under the responsibility determination procedure. In addition, it aimed at addressing situations of particular pressure on Member States' reception capacities and asylum systems, as well as situations where there is an inadequate level of protection for applicants for international protection.

3. Comments on the position of the Council

Following the Commission's amended proposal in December 2008, a common position was reached at political level by the co-legislators on the substantive parts of the draft regulation in July 2012. COREPER informally endorsed the common position on 18 July 2012 and the LIBE committee on 19 September 2012 via an orientation vote. As regards the issue of delegated and implemented acts in the Dublin Regulation, political agreement was reached on 14 November, endorsed by the LIBE committee via an orientation vote on 27 November 2012.

COREPER endorsed the common position on the entire Dublin Regulation on 27 November.

On 30 November, the LIBE Chairman sent a letter to the Council PRES indicating that if the Council is to transmit formally the text as agreed, during a forthcoming session of the EP's plenary, 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 2008 proposal are as set out below.

I. Enhancing the system's efficiency

The Commission proposal preserved the same general principle that responsibility for examining an application for international protection lies with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity. In particular the proposal introduced deadlines for submitting take-back requests and reduced the deadline for replying to requests for information. A deadline for replying to requests on humanitarian grounds was introduced and it was clarified that such requests can be made at any time. The cessation of responsibility clauses have been clarified as regards in particular the circumstances under which the cessation clauses should apply. Rules on erroneous transfers and costs for transfers have been added.

The common position limits the possibility to make a request on humanitarian grounds to the period previous to the first decision in substance. The Commission understands this change as preventing abuse in the form of a repeated application in case the first decision on substance is negative. The deadlines for submitting requests, replying to requests and carrying out transfers have been reduced in case of people detained under the specific ground of the Dublin procedure (see below under point *c*.)

II. Enhancing the protection of applicants under the Dublin procedure

Suspension of transfers/early warning system

The Commission proposal aimed at establishing an exceptional procedure for suspending Dublin transfers towards a particular Member State, during a temporary period, in two distinct situations: in case of particular pressure and to ensure that all applicants for international protection receive an adequate level of protection in all Member States.

The common position does not endorse the introduction of such a mechanism in the Dublin Regulation for fears it could result in a pull factor for irregular migration, an encouragement for Member States not to respect their obligations under EU law.

The common position replaced the provisions on suspension of transfers with the setup of an early warning, preparedness and crisis management system. This system focuses on detecting and addressing the root causes of problems that might develop into asylum crises. It also reinforces language on solidarity and protection of fundamental rights. Moreover, in conjunction with the new Art 3(2)bis, it ensures the same level of protection for the applicants as intended under the Commission proposal for a suspension of transfers and thus the objectives of the Commission proposal are met.

Effective remedy against transfer decision

No provisions exist in the current Dublin Regulation on effective remedy. The Commission proposal brought three main innovations to the current system: 1. It established the right to an effective judicial remedy against a transfer decision, 2. It introduced the rule that authorities should examine ex-officio the necessity of suspending the enforcement of a transfer decision and that the person concerned has to remain on the territory until a decision on the necessity to suspend the transfer is taken, and 3. It provided that legal assistance and/or representation should be free if the person concerned cannot afford the entailed costs.

As regards the **suspensive effect, the common position foresees the following option-based system:**

- (1) An automatic suspensive effect (where an appeal is lodged, the person is always granted the right to remain on the territory until the appeal is judged);
- (2) An automatic suspensive effect for a limited period of time (the same as first, only that a court or tribunal is asked to pronounce on whether the applicant needs to remain on the territory pending the appeal, within a pre-determined period of time; that period should be sufficient to allow for a rigorous scrutiny of the request);
- (3) Suspensive effect on request (whereby the suspension of the transfer is not automatically applied to all applicants appealing a transfer decision, but only to those asking for it; the transfer is consequently suspended for the period of time during which the court or tribunal is expected to pronounce on the matter).

In addition, a new provision was introduced, foreseeing that an applicant cannot be transferred to a Member State where there is a risk of violation of fundamental rights. On the overall, Commission's objectives were preserved by ensuring that in each case a court or tribunal will examine whether or not the person may be transferred, while the person remains on the territory.

As regards free legal assistance, the common position foresees a *merits test* made by an administrative authority, accompanied by additional safeguards for the applicants, essentially guaranteeing their right to appeal against the refusal for free legal assistance in front of a court or tribunal.

The Commission considers that these safeguards are sufficient to ensure an adequate level of effective remedy for the applicant, even where free legal assistance is considered on request, as the applicant may always appeal a court or tribunal on the decision not to grant legal assistance free of charge. Moreover, the merits test is an important factor in helping Member States to avoid abuse by unfounded applications for assistance free of cost.

Detention

No specific provisions currently exist on the detention of persons found under a Dublin procedure. The Commission proposal aimed at ensuring that detention of persons during the Dublin procedure is not arbitrary, by introducing the following main conditions and guarantees: a person cannot be held in detention for the sole reason to be an applicant for international protection; a person subject to a transfer decision can also be detained when there is a significant risk of absconding (defined in the text); detention cannot last longer than what is reasonably necessary to fulfil the administrative procedures for carrying out the transfer; the guarantees and detention conditions as foreseen in the Reception Conditions Directive were repeated in the Dublin Regulation.

During negotiations the approach was taken that, for reasons of legal coherence, it is better to have all the necessary provisions regarding the guarantees applicable to persons in detention and detention conditions together in only one asylum instrument – the Reception Conditions Directive. Only the Dublin specific ground and conditions need to be defined in the Dublin Regulation itself.

The common position reflects this point and foresees:

- reference to the Reception Conditions Directive, whose guarantees and detention conditions apply to persons detained during the Dublin procedure, along with the clarification that a person under Dublin procedure can only be detained for the Dublin-related ground;
- introduction of the principle that a person cannot be detained only for the reason that is subject to the Dublin procedure (thus extending the scope of protection to former applicants for international protection, previously under the scope of Return Directive, who can now benefit from greater protection);
- introduction of clear time limits for each leg of the Dublin procedure, ensuring that a person cannot be detained in total for longer than 3 months (otherwise the entire Dublin procedure can last up to 11 months), or else the person is released. The detention time takes into account the different timelines under suspensive effect, which can now be shorter than the duration of the appeal, thus ensuring that a person is not abusively kept in detention for longer than the suspensive effect.

The common position meets the objectives of the Commission proposal and even goes beyond it, by foreseeing a maximum detention period of three months.

Vulnerable persons - minors and dependants

The Commission proposal brought various amendments to the current Dublin Regulation in order to increase the level of protection for minors, in particular for unaccompanied minors. In particular as regards the definition of family members, the Commission proposal extended it in three regards: 1. It removed the condition for the minor to be dependent in order to be recognised as family member of an applicant; 2. It foresaw the possibility for the married minor children to be "family members" where it is in their best interests to reside with the applicant, and 3. It included the minor unmarried siblings of the applicant, when the latter is a minor and unmarried.

Concerning dependants, the former provisions of the humanitarian clauses were introduced in the hierarchy of criteria, at the beginning of these criteria, together with the family-related ones.

The common position includes a new Recital making it clear that the rights and guarantees applicable to applicants under the Asylum Procedures Directive also cover the persons under a Dublin procedure, subject to limitations of scope applicable to United Kingdom and Ireland. It limits the scope of family to the nuclear family, as agreed in the Qualification Directive, but introduces references to members of the extended family in the relevant articles. It accepts to include married minors in the definition of unaccompanied minors. It introduces a definition of the term "relative", referring to the uncle, aunt or grandparent of a minor. It foresees the obligation for Member States to be proactive and start looking for the family of an

unaccompanied minor. It allows the reunification of a married unaccompanied minor with family and siblings, when he/she is not accompanied by the spouse.

As regards the criterion relative to dependants, it is moved outside the hierarchy of criteria, under the norm "shall normally".

As regards the situation of an unaccompanied minor with no family or relatives on EU territory, the common position foresees that the Member State responsible is that where the minor has lodged an application for international protection. A Declaration is attached to the draft Regulation, providing that the Commission will put forward a new proposal on this issue as soon as the Court of Justice of the European Union will have delivered its judgment in the preliminary case C-648/11, reflecting the outcome of this judgment:

The European Parliament and the Council invite the Commission to consider, without prejudice to its right of initiative, a revision of Article 8(4) of the Recast of the Dublin Regulation once the Court of Justice rules on case C-648/11 MA and Others vs. Secretary of State for the Home Department and at the latest by the time limits set in Article 41 of the Dublin Regulation. The European Parliament and the Council will then both exercise their legislative competences, taking into account the best interests of the child. The Commission, in a spirit of compromise and in order to ensure the immediate adoption of the proposal, accepts to consider this invitation, which it understands as being limited to these specific circumstances and not creating a precedent.

The Commission considers that the common position ensures the level of protection foreseen by the Commission proposal and even brings welcome standards in certain respects (e.g. ensures un-conditional reunification of siblings of any age or legal status without any additional conditionality). The fact that the notion of relatives of an unaccompanied minor is now defined makes it easier to monitor its implementation in practice.

As regards dependants, the common position could be accepted since, although now this criterion is left outside the hierarchy, it appears under a compulsory provision, subject to derogation only in exceptional situations. The current wording entails that, except for more favourable provisions, dependants must be kept/put together with family.

Right to information and personal interview

The Commission proposal expanded and modified current provisions on information, to specify the information to be provided to the applicant in writing, in a language that he/she understands or is reasonably supposed to understand, and to foresee the opportunity for a personal interview in order to inform the applicant on this procedure and to gather information necessary to determine the Member State responsible.

The common position makes the personal interview compulsory subject to limited exceptions, and inserts the obligation to inform the applicant not only on the criteria, but also on its hierarchy, including the fact that the application may end up in being examined by a Member State that is not the one responsible under the hierarchy of criteria (sovereignty clause), as well as on the fact that the person may ask for the suspension of the transfer.

The Commission considers that the common position ensures a good level of information of the applicant, both in writing as well as through the compulsory interview, and thus largely meets the Commission's objectives.

III. Delegated and implementing acts

The Commission proposal was tabled before the Lisbon Treaty and thus did not foresee empowerments for the Commission to adopt delegated or implementing acts. Nevertheless, the proposal foresaw references to the procedure established under Article 5 of Decision 1999/468/EC (regulatory procedure) as regards the adoption of a common leaflet, provisions on minors and dependants, the standard form for sending requests for taking charge or taking back, the lists of proof and evidence, the laissez-passer, for the set-up of the electronic communication network, as well as under Article 5(a) of the same Decision (regulatory procedure with scrutiny) as regards supplementary rules for reunification of minors and dependents with the family and relatives, on carrying out transfers and on meeting the costs of transfers.

As compared to the Commission proposal, the common position retains the possibility to adopt implementing acts for all the issues for which the Commission has proposed implementing procedures, to which it added the power to adopt a common health certificate and a standard form for exchanging information on family members and relatives of minors.

Furthermore, the common position foresees an empowerment for the Commission to adopt delegated acts containing supplementary rules on the reunification of minors and dependents with family and relatives; a recital stresses that the Commission should carry out consultations with experts, including all relevant national authorities. The possibility to adopt supplementary rules on the costs of transfers was not retained as the Council considers that the rules of the basic act are sufficient in this respect. As regards transfers, the common position foresees only the possibility to adopt uniform rules of implementation, but not supplementary rules. The period granted to the Parliament and to the Council to possibly object to a delegated act adopted by the Commission has been set at four months, extendable at the European Parliament's or Council's initiative by another two.

As regards the power to adopt implementing acts, the common position foresees a limitation to its powers, providing that the Commission cannot adopt an act where the assisting Committee delivers no opinion on the draft proposal. The Commission made a Declaration in this respect, to be annexed to the final text:

The Commission underlines that it is contrary to the letter and to the spirit of Regulation 182/2011 (OJ L 55 of 28.2.2011, p. 13) to invoke Article 5 § 4, subparagraph 2, point b) in a systematic manner. Recourse to this provision must respond to a specific need to depart from the rule of principle which is that the Commission may adopt a draft implementing act when no opinion is delivered. Given that it is an exception to the general rule established by Article 5 § 4 recourse to subparagraph 2, point b) cannot be simply seen as a "discretionary power" of the Legislator, but must be interpreted in a restrictive manner and thus must be justified.

Finally, a Commission Declaration clarifies that, when proposing implementing acts in this respect, the Commission will uphold the standards on transfers as set out in the Regulation 1560/2003:

In the application of the present Regulation, the Commission reiterates that, when proposing uniform conditions for implementing the provisions on transfers as foreseen under the present Regulation, it will ensure that current standards on transfers, as laid down in Articles 7-10 of Commission Regulation 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003, will be upheld.

4. Conclusion

The common position satisfies the main objective of the Commission proposal. In particular it adds value to the current standards of treatment of applicants found under a Dublin procedure. It guarantees their right to information and access to effective remedy against transfer decisions and it introduces clear rules on detention and access to free legal assistance, issues which the current instrument does not address. It provides a more predictable environment for the relations between Member States and more favourable conditions for reuniting vulnerable persons, in particular unaccompanied minors, with their family or relatives. The substance of the Council's position is, therefore broadly in line with the Commission's proposal and can be supported.