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from: Presidency
to: JHA Counsellors

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Subject: Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) [First reading]

In view of the meeting of Justice and Home Affairs Counsellors on 14 December 2012, delegations will find in Annex compromise suggestions of the Presidency with regard to provisions related to postponement of conclusion of the procedure, derogations for victims of torture and unaccompanied minors and on other issues. Changes to the Council Position are indicated in **bold**. Changes to previous suggestions are indicated in **bold/underlined**.

Postponement of conclusion of the procedure (new recital, article 31(3))

Recital (29a)

(29a) In determining whether a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise and up-to-date information from relevant sources such as EASO, the UNHCR, the Council of Europe and other relevant international organisations. Member States should ensure that this postponement of conclusion of the procedure is applied in full compliance with their obligations under the Qualification Directive and Article 41 EU Charter on Fundamental Rights without prejudice to the efficiency and fairness of the procedures this directive.

Article 31.3

3. Member States may extend that time limit of six months for a period not exceeding a further **nine** months, where:

(a) complex issues of fact and /or law are involved;

(b) a large number of third country nationals or stateless persons **simultaneously** request international protection which makes it very difficult in practice to conclude the procedure within the six-month time-limit;

(c) where the delay can clearly be attributed to the failure of the applicant to comply with his/her obligations under Article 13.

Exceptionally, Member States may exceed the time limits laid down in this paragraph with a maximum of three months where it is necessary in order to ensure an adequate and complete examination of the application for international protection.

Member States may, **without prejudice to Articles 13 and 18 [Qualification Directive]** postpone concluding the procedure where the determining authority cannot reasonably be expected to decide within the time limits laid down in this paragraph due to an uncertain situation in the country of origin which is expected to be temporary. **In such a case, Member States shall:**

- (a) **conduct reviews of the situation in that country of origin at least every 6 months**
- (b) **inform the applicants concerned of the reasons of the postponement;**
- (c) **inform the Commission of the postponement of procedures for that country of origin.**

In any event, Member States shall conclude the procedure within a maximum time limit of **twenty one** months from the lodging of the application.

Explanation: The text has been modified to delete the word “simultaneously” in order to avoid confusion with the relevant provisions of the temporary protection directive, and point c in the end has been modified following comments from delegations that the word “decision” could imply a new administrative procedure.

Derogations for victims of torture and unaccompanied minors (recitals 26a), (28a), Articles 24 and 25(6))

New recitals

26a In order to prevent misuse of specific guarantees foreseen for minors, Member States should have the flexibility to decide how to determine the age of applicants who claim to be minors. In particular, Member States should be able to conduct age assessments, including medical examinations. In case Member States consider that the applicant has misled the authorities by presenting false information with respect to his/her identity, including age, they should be able to process or continue to process the application in an accelerated and/or border procedure.

Explanation: This recital has been modified to specify that the “age” is included in the “identity” of the applicant (“identity” refers to a specific acceleration or border ground; but “age” without the identity could appear to create a new ground, which is not possible in a recital) and to make explicit that the accelerated or border procedures can start before the age assessment process is concluded.

28a In order to preserve the integrity of asylum systems of the Member States and while guaranteeing unrestricted access to the asylum procedure for persons seeking international protection, it is necessary to ensure that Member States have at their disposal the necessary procedural tools to prevent and respond to abusive claims.

Article 24

Applicants in need of special procedural guarantees

1. Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.

2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of the Directive (...) (Reception Conditions) and need not take the form of an administrative procedure.
3. Member States shall ensure that where applicants have been identified to be in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.
4. In cases where the determining authority considers, **on the basis of a consistent set of evidence**, as a result of the assessment in paragraph 1, that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, **and where special needs result therefrom or where there is a link between the torture or violence suffered and the grounds for requesting international protection**, Article 31(6) and Article 32(2) shall not apply, unless Member States provide for free legal assistance and representation at first instance for this category of applicants.
5. Member States shall ensure that these special procedural needs, including the derogation referred to in paragraph 4, are also addressed, in accordance with this Directive, if they become apparent at a later stage of the procedure, without necessarily restarting the procedure.

Explanation: The proposal has been clarified from a legal/technical point of view and an addition has been made in order to take into account delegations' remarks on the need to establish a link between the torture and the grounds for protection as well as the existence of special procedural needs for this category of applicants.

New recital 26 (linked to Article 25 – best interests of the child)

(26) The best interests of the child should be a primary consideration of Member States when implementing this Directive, in line with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's wellbeing and social development, including his/her background.

Article 25

(paragraphs 1 - 5 of Council Position remain the same)

- 6. Member States may determine the applicant's age in accordance with paragraph 5 in the framework of the procedures referred to in Articles 31(6) or 43.**

- 7. Where Member States identify an applicant as an unaccompanied minor, they may:**
 - apply or continue to apply the procedures referred to in Articles 31(6) or 43 if the applicant is from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive;**

 - consider the application as inadmissible in accordance with Article 32(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38;**

 - consider the application as manifestly unfounded in accordance with Article 32(2);**

 - apply or continue to apply the procedures referred to in Article 31(6) or 43 when there are serious grounds to believe that the applicant is a victim of trafficking.**

In all other cases, Member States shall not apply Articles 31(6) and/or 43 where it is contrary to the best interests of the child.

8. The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Explanation: The proposal has been redrafted and reformed into three paragraphs without being altered in essence. A new indent is added, in order to cover cases of trafficking in human beings. Reference to the merits test is deleted. A phrase – taken from recital 10 in the Dublin regulation - is added in the recital 26 of this Directive to make more explicit the reference to the best interests of the child.

Other issues

Dublin references put back in art 28(3), 34(2) and 46(8). EP will provide a redrafting suggestion for recital (42) based on a similar recital to APD in the Dublin text.

Article 17(3)

17(3). Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report **or the transcript**, at the end of the personal interview or within a specified time limit before the determining authority takes a decision. ~~Member States may provide that, when there is no recorded interview, the applicant has the opportunity to make comments and/or provide clarifications in the report.~~ To that end, Member States shall ensure that the applicant is fully informed of the content ~~[...]~~ ~~substantial elements~~ of the report ~~as referred to in paragraph 1~~ or of the **substantial elements of the transcript**, with the assistance of an interpreter if necessary. Member States shall then request ~~the~~ **acknowledgement** ~~[...]~~ of the applicant to **confirm that on** the content of the report **or the transcript correctly reflects the interview.**

Member States need not request the applicant's **confirmation that ~~acknowledgement~~** ~~[...]~~ ~~on~~ the content of the report **or the transcript** correctly reflects the interview, **nor allow for the opportunity to make comments and/or provide clarifications to the report or the transcript**, if the interview is recorded in accordance with paragraph 2 and if the recording is admissible as evidence in procedures referred to in Chapter V.

Explanation: The proposal has been modified to cover an omission in the previous text (namely the adding of the word “or the transcript” in the case MS need not request the confirmation of the applicant when the interview is recorded.

Article 17(5)

17(5) Applicants **and their legal adviser or other counsellor, as defined in Article 23**, shall not be denied access to the report **or the transcript** and, where applicable, the recording ~~or transcript thereof~~, before the determining authority takes a decision.

Where Member States provide for both a transcript and a recording of the interview, Member States need not provide access to the recording in procedures at first instance referred to in Chapter III. In such cases, they shall provide access to the recording in procedures referred to in Chapter V.

Without prejudice to paragraph 3, where ~~Where~~ the application is determined in the framework provided for in Article 31(6), Member States may provide that access to the report or the transcript and where applicable, the recording, is granted at the same time as the decision is made.

Explanation: The proposal has been modified to clarify, following Commission’s suggestion that in any case, the recording should be made available to applicants for appeals’ procedures.

Article 50 second subparagraph

50 As part of the first report, the Commission shall also report in particular on the application of Article 17 and the various tools used in relation to the reporting of the personal interview.

Explanation: the text is strengthened to appear more in line with the EP original proposal although it still does not entail any obligation for MS.