EUROPEAN COMMISSION

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ANNEX

Detailed Explanation of the Amended proposal

Accompanying the document

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down standards for the reception of asylum seekers

(Recast)

The detailed explanation of the Commission amended proposal is presented in comparison to the 2008 Commission proposal amending Directive 2003/9/EC.

Article 2

(a) Specific reference is made to "Article 2(h)" of the Qualification Directive in the definition of "application for international protection".

(b) "applicant for international protection" is added, since this term is used in the text of this Directive.

(c) – For reasons of clarity, the definition of family members is divided to two strands, namely i) where the applicant is an adult and ii) where he/she is a minor.

- Taking into account the EP position and concerns expressed by a number of Member States, a further condition is added in the definition of family members as far as married minors are concerned, namely that they will be included *only if they are not accompanied by their spouse on the territory of the Member State concerned* and it is in their best interests [and not just only if it is in their best interests].

(g) the definition of "procedures and appeals" is deleted, since it becomes obsolete [appeals and procedures are defined by EU law and not by national law, unless otherwise stated in the Directive]

(e) In the definition of an unaccompanied minor, the reference to "custom" is replaced with "the national practice of the Member State concerned" for reasons of clarity. .

(j), (k) Two new definitions are inserted, namely "representative" and "applicants with special reception needs" respectively.

Article 3

The scope of the Directive refers to "territorial waters", to ensure coherence with Article 3 of the Asylum Procedure Directive modified proposal.

Article 5

Reference to "as far as possible" is deleted, as requested by the European Parliament.

The word "competent authority" is deleted in line with the Asylum Procedures Directive modified proposal.

It is provided that information shall be provided "in a language the applicant understands or is reasonable supposed to understand", in line with the position of the Parliament [instead of "in a language the applicant is supposed to understand"]

Article 6

To simplify the provision, the reference to "the holder of the document shall be granted access to rights and benefits conferred on asylum seekers under this Directive" included in the 2008 proposal is deleted.

New paragraph 6 is included to ensure that applicants shall not be unjustifiably imposed with documentation or administrative obstacles before having access to their rights as conferred by the Directive.

Article 7

No changes have been introduced.

Article 8

The general principles of this Article have been maintained. A few language adjustments have been introduced in line with discussions in the Council and the position of the European Parliament. In particular:

- reference to a "particular place" is deleted as it is considered unnecessary [it is already included in the definition of detention in Article 2(h)];

- the word "alternative" has been added to better clarify the link with paragraph 4 of this Article;

- the wording of ground (b) has been clarified. In namely refers to practices where Member States may apply a "screening/preliminary" interview to identify the basis for an asylum claim (i.e. essential facts as to why asylum is being sought) that could not be obtained in the absence of detention;

- in line with discussions in the Council, it is clarified that detention in criminal proceedings falls outside the scope of this Directive;

- for reasons of clarity, the phrase "in accordance with national legislation" is replaced with "these grounds shall be laid down in national law";

- "designated place" is replaced with "assigned place" to avoid confusion with the definition of detention in Article 2(h).

Article 9

The modified proposal clarifies some procedural rules and guarantees on detention and allows more latitude in their implementation. In particular:

- paragraph 1 has been simplified, taking into consideration the relevant provision in the Return Directive and the European Parliament position. In particular, the paragraph now refers to the principle of "due diligence".

- taking into account Member States' divergent legal systems, paragraph 2 foresees that detention can also be ordered by administrative authorities (and not only by judicial). The 72 hours deadline has been retained to ensure automatic access to a judicial authority. Based on consultations, it appears that this is in line with current practices of some Member States.

- paragraphs 3 and 4 have been merged into paragraph 3 for reasons of clarity. Moreover, the obligation to notify to the applicant the duration of his/her detention is deleted, taking into account Member States divergent legal systems in this respect.

- the notion of regular review of detention by a judicial authority is better prescribed: the provision notes that it concerns in particular cases of a prolonged detention, in the meaning of a long duration, or where circumstances arise or there is new information that may affect the lawfulness of detention.

- "detention shall not be unduly prolonged" is deleted as it is considered unnecessary (in the light of Article 9(1)).

- the scope of access to free legal assistance is better prescribed, in line with the European Parliament's position and discussions in the Council also ensuring coherence with the Asylum Procedures Directive modified proposal. In particular it concerns cases of an appeal or review of a detention order and only when it is necessary to ensure effective access to justice; it only covers preparation of documents and representation before the judicial authorities and it may be restricted to lawyers designated by the Member State concerned.

Article 10

-Paragraph one is amended for reasons of clarity. Same applies for paragraph 3, taking into consideration the relevant provisions in the Return Directive and in order to ensure coherence with Article 18(2)(b) and (c) of the modified proposal which refers to housing modalities.

-Paragraph 2 introduces the obligation to ensure access to open-air spaces in line with recent case law of the ECtHR.

-Paragraph 5 is readjusted in line with the relevant provision in the Return Directive. Moreover it is stated that information shall be provided "in a language the applicant understands or is reasonable supposed to understand", as suggested by the Parliament [instead of "in a language the applicant is supposed to understand"].

-In line with discussions in the Council and to allow more flexibility in the implementation of this provision, paragraph 6 allows Member States to temporarily derogate from certain reception standards in detention. In particular, when capacities in specialised detention facilities are temporarily exhausted applicants may be detained in prisons provided they are separated from criminals. However, this derogation shall not apply for detained unaccompanied minors, who must always be placed in specialised detention facilities.

Member states may also derogate from the obligation to provide asylum applicants with information concerning the rules of the detention facility and their rights and obligations in that facility when the applicant is detained at a border post or a transit zone; however this derogation cannot be applied in border procedures, set out in Article 43 of the Asylum Procedures Directive modified proposal, where Member States should be better equipped to provide this guarantee in the relevant locations.

Moreover, such derogations should not be applied automatically, but only in exceptional circumstances. In this respect, they shall be duly justified and take into consideration the circumstances of each case such as the level of severity of the derogation applied, its duration and its impact on the concerned individual.

Article 11

-The paragraphs of this Article have been re-structured for reasons of clarity.

-The full prohibition on the detention of unaccompanied minors is deleted. In this respect, without prejudice to Article 8 of this Directive, minors shall not be detained unless it is in their best interests. However, taking into consideration the particularly vulnerable situation of unaccompanied minors, the provision also maintains that they shall be detained only in particularly exceptional cases.

Moreover it is expressly clarified that detention of minors shall be applied only as a measure of last resort, and once all alternative measures have been examined and found ineffective. Detention of minors shall also be for applied for as short a period as possible and Member States shall also make efforts to ensure that they are place them in open accommodations suitable for minors.

- Exceptionally, female and male applicants can be placed at the same area while carrying out recreational or social activities.

-Before a vulnerable person is detained, Member States need to establish that his/her health and well being will not substantially deteriorate. However, the obligation that this is certified by a "qualified professional" is deleted.

-In line with discussions in the Council and taking into consideration that where detention is applied in border posts or transit zones it may be practically difficult to ensure access to certain reception guarantees paragraph 5 allows Member States to temporarily apply derogations on the rights stipulated in the fourth subparagraph of paragraph 2, paragraph 3 and the first subparagraph of paragraph 4.

However, these derogations cannot be applied in border procedures, set out in Article 43 of the Asylum Procedures Directive, where Member States should be better equipped to provide these guarantees in the relevant locations. Moreover, such derogations should not be applied automatically, but only in exceptional circumstances. In this respect, they shall be duly justified and take into consideration the circumstances of each individual case such as the level of severity of the derogation applied, its duration and its impact on the concerned individual.

Article 14

- The clarification that access to education may be confined to the state education system is reintroduced, in line with discussions in the Council.

- To ensure coherence with the Asylum Procedures Directive modified proposal it is clarified that an asylum application can be lodged on behalf of the minor (instead of "by his/her parents" to cover also other modalities included in the APD modified proposal)

- The wording of the second sub-paragraph of paragraph 2 is better clarified.

Article 15

The modified proposal retains the prescribed deadlines on access to the labour market. Namely access shall be granted within a maximum period of 6 months after lodging an application for international protection. However, this deadline can be extended for a maximum period of 6 more months, in the cases prescribed in Article 31(3) paragraphs (b) and (c) of the Asylum Procedures Directive modified proposal which also allow an extension to the examination of an asylum claim. These cases are i) when there is a large number of

simultaneous requests for international protection and ii) where the delay can clearly be attributed to the failure of the applicant to comply with the certain obligations included in Article 13.

The Article also notes that while conditions on access to employment may be imposed it shall be ensured that in practice these conditions are not too strict as to prevent effective access to employment for asylum seekers.

Article 17

Reference to "persons with special needs" is replaced with "vulnerable persons" referred to in Article 21, following the changes to that Article.

Taking into consideration discussions in the Council and the position of the European Parliament, the benchmark concerning the level of adequate material support is simplified and allows more flexibility in its implementation.

The objective of this provision is to quantify the meaning of the notion "adequate standards of living". In particular, where material support is provided in the form of money, Member States shall determine the amount to be granted based on the financial assistance provided to nationals when such assistance is needed. Negotiations have revealed that this is fully in line with national practices or law of a number of Member States. Moreover, the provision allows Member States to apply less favourable standards for applicants vis-à-vis nationals when duly justified; for example when some level of support is provided in kind and it is therefore deducted from financial assistance or when the level of support provided to nationals goes beyond what is necessary to ensure "standards of living which guarantee their subsistence and protect their physical and mental health" and therefore asylum applicants are only granted a percentage of this national support.

Article 18

-Minor adjustments have been inserted to better clarify the links between this provision and rules on detention (namely, by stating that the provision is without prejudice to Articles 10 and 11 and by deleting point (c): "the asylum seekers is in detention or confined to border posts").

-For reasons of consistency paragraph 7 has been included as point (b) of paragraph 2 so that all guarantees on housing are listed in one single provision.

-Paragraph 2 has been simplified: the wording of points (b) and (c) on the right to communicate with or to receive in housing facilities family members, legal counsellors etc has been readjusted, in particular in order to ensure coherence with previous paragraph 7, now point (b).

- For reasons of consistency paragraph 3 is moved under Article 23 which deals with guarantees for minors

Article 19

- The obligation to grant "access to health care equal with nationals" for persons with special reception needs has been deleted, in line with the European Parliament position and discussions in the Council.

-The term "mental disorder" is replaced with "post traumatic disorder" for reasons of clarity.

Article 20

The provisions is substantially modified and allows Member States to withdraw and/or reduce material support in all cases prescribed under the Directive in force, with the exception of "where the applicant has failed to make an application as soon as possible" taking into consideration current case-law.[1]

For reasons of clarity, paragraph 2 of the 2008 proposal becomes Article 1(d) so that Article 1 combines all withdrawal/reduction grounds.

Paragraph 3 clarifies that reduction of material support (which according to Article 2(g) it concerns housing, food, clothing and financial assistance) does not include health care. Moreover, reference to "persons with special needs" is replaced with "vulnerable persons" referred to in Article 21, following the changes to that Article.

Article 21

The link between the notions of special reception needs and vulnerability is better clarified; in particular the provision notes that special reception needs may only concern vulnerable persons after their individual situation has been assessed in line with Article 22. This modification has also been reflected in the title of chapter IV. This provision shall also be read together with the definition of persons with special reception needs in Article 2(k).

Moreover, "persons with serious physical illnesses" is added in the list of vulnerable persons. This corresponds to the notion of "persons with special procedural needs" set out in the Asylum Procedures Directive modified proposal.

The term "mental health problems" is replaced with mental illness or post-traumatic disorders for reasons of clarity.

The list of vulnerable persons, as in the 2008 proposal, remains an open one.

New Article 22

The reference to the identification of special reception needs has been included in a new separate Article. Moreover, the relevant provision has been modified to make its implementation easier and it now refers to the establishment of "mechanisms" instead of a "procedure prescribed in national law". It is thus better clarified that identification of special reception needs does not necessarily require the establishment of an new/separate administrative procedure but that it could be integrated to existing national modalities [i.e. medical screening], where needed in connection with adjustments to ensure that identification is carried at the beginning of the asylum procedure and that it is sufficiently equipped to identify special reception needs in line with the definition in Article 2(k). To further facilitate its implementation, the provision sates that these identification mechanisms shall be initiated "within a reasonable time", instead of "immediately" after an application for international protection has been lodged.

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[1] *R(Q) v Secretary of State for the Home Department* [2004] QB 36, confirmed by the opinion *of the Lords of Appeal for the judgement in the case* Regina v Secretary of State for the Home Department [2005] UKHL 66

The provision thus maintains that Member States need to identify whether the applicant belongs to the category of vulnerable groups in line with Article 21, and if so, whether he or she has special reception needs. The nature of these needs shall then be specified in order to decide the appropriate course of intervention, i.e. if they required health treatment or just specific accommodation arrangements etc.

Moreover, the provision maintains that special reception needs revealed after the initial screening prescribed in Article 22 must not be ignored. This may particularly be the case for certain traumatic disorders that, due to their nature, may only be revealed over a certain period of time.

Finally, the provision specifies that the identification of special reception needs is without prejudice to the examination of an application of international protection, in order to clarify that such reception needs may not be relevant to the conditions for being granted international protection status under the Qualification Directive.

Article 23 [previous Article 22]

Paragraph 4 is added (previous Article 18(3)), so that all minor-related modalities are grouped in one Article. The word "custom" has been replaced with "the national practice of the Member States concerned" to ensure coherence with the definition of unaccompanied minors and family members in Articles 2(f) and (c) respectively.

Article 24 [previous Article 23]

Paragraph 1 is modified to ensure coherence with the Asylum Procedures Directive modified proposal.

Paragraph 2 is added clarifying the qualifications and the role of a representative for unaccompanied minors, in line with discussions in the Council and the Asylum Procedures Directive modified proposal.

Paragraph 2 also recalls that the principle of the best interests of the child must be ensured in cases Member States decide to place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers. Paragraph 3 is simplified: it refers to "mechanisms" instead of "procedures in national law" concerning tracing of unaccompanied minors. Moreover, in line with discussions in the Council the provision includes the phrase: "where necessary with the assistance of international or of other relevant organisations".

Article 25 [previous Article 24]

Minor language adjustment: "rape or other serious acts of violence" is added in paragraph 2 to ensure consistency with paragraph 1.

Article 26 [previous Article 25]

Paragraph 2 has been modified to reflect the wording on access to free legal assistance included in Article 9(5).

Article 27 [previous Article 26]

No changes

Article 28 [previous Article 27]

Article 28 no longer refers to the obligation to report on a yearly basis. Instead it establishes a deadline for the submission by Member States of the first set of information, in accordance with Annex I of this proposal.

Article 29 [previous Article 28]

No changes

Article 30 [previous Article 29]

The Commission shall report to the Parliament and the Council 2 years after the transposition deadline of the Directive.

Annex I

This reporting mechanism is retained under the modified Directive. However, in line with discussions in the Council and concerns about administrative constrains, the level of details has been substantially reduced to include the most core provisions of the Directive where monitoring would be difficult in the absence of relevant information. Timing has also been modified; after the deadline prescribed in Article 28(2), Member States are only obliged to resubmit the required information when there has been a substantial change in the national law or practices that outdate the provided information.