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STATEMENT OF THE COUNCIL'S REASONS

Subject : Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (Recast)
= Statement of the Council's reasons
- Adopted by the Council on 6 June 2013

I. INTRODUCTION

The recast of the Asylum Procedures Directive is part of a series of legislative proposals in the field of asylum to establish the second phase of the Common European Asylum System.

On 7 June 2011, the Council received from the Commission an amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) (11207/11). The Commission had amended its initial proposal of 23 October 2009 (12959/09) taking into account the European Parliament's first-reading position voted on 6 April 2011 (8526/11) and the views expressed in Council.

With a view to avoiding delays, the European Parliament established its negotiating position by considering the amended proposal in light of its position at first reading on the initial proposal.

At its plenary session on 26 and 27 October 2011, the European Economic and Social Committee, under reference to its opinion of 28 April 2010[1], decided not to draw up a new opinion on the amended proposal, but to refer to the position it had taken on the initial proposal. On 16 November 2011, the Committee of the Regions announced in a letter not to issue an opinion on the amended proposal (18836/11).

At its meeting on 13/14 May 2013, the Council confirmed a Political agreement on the amended proposal (7695/13 + COR 1).

[1] EESC opinion "Minimum standards on procedures in Member States for granting and withdrawing international protection (recast)", OJ C 18 of 19.01.2011, p. 85.

In accordance with Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland are not taking part in the adoption of the recast of the Asylum Procedures Directive. Denmark is not taking part in its adoption and is not bound by it or subject to its application in accordance with the Protocol on the position of Denmark.

II. OBJECTIVES OF THE PROPOSAL

Directive 2005/85 provides for minimum standards on procedures that Member States apply for granting and withdrawing international protection with the aim of ensuring that applications are treated alike, irrespective in which Member State they are processed.

The objective of the recast of the Asylum Procedures Directive is setting common standards for national asylum systems at the level of the European Union. These standards must provide applicants for international protection with a high level of safeguards. They must also better enable Member States to operate asylum procedures that are cost-effective and capable of tackling potential abusive claims while taking into account the differences amongst national legal systems. Particular attention is given to more 'frontloading' of services, advice and expertise with a view to achieving an efficient and high-quality examination process that results in robust first instance decisions. Finally, the recast fully respects fundamental rights having regard to developing case law of the Court of Justice of the European Union and the European Court of Human Rights and ensures consistency with the other legislative instruments in the field of asylum.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

A. General observations

On the basis of the amended proposal of the Commission, the European Parliament and the Council have conducted negotiations with the aim to conclude an agreement at the stage of the Council's position at first reading. The text of the Council position fully reflects the compromise reached between the two co-legislators.

B. Key issues

The compromise reflected in the Council position at first reading adapts Directive 2005/85/EC[1] as to the following key issues:

Training

With a view to improving the quality of the asylum procedure, the Council position establishes training requirements for personnel of the determining authorities responsible in the Member States for an appropriate examination of applications for international protection as well as for personnel of other competent authorities that may come into contact with applicants for international protection.

The personnel of the determining authority need to be properly trained. To that end, Member States must provide for training that includes the same elements as those listed in the Regulation establishing the European Asylum Support Office, except those relating to reception conditions. Moreover, persons interviewing applicants must have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications of possible past torture.

[1] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 1.12.2005, p. 13).

The same training requirements apply to personnel working for another authority that is assigned to conduct interviews where a large number of third country nationals or stateless persons simultaneously request international protection as the requirements for personnel of the determining authority.

In case the personnel of authorities other than the determining authority conduct admissibility interviews, Member States must ensure these personnel receive, in advance, the necessary basic training , in particular with regard to international human rights law, asylum *acquis* and interview techniques.

Finally, also personnel of authorities likely to receive requests for international protection, such as border guards and personnel of immigration authorities or detention facilities, must receive the necessary level of training as appropriate to their tasks and responsibilities.

Access to the procedure

The Council position sets standards aimed at ensuring easy and timely access to the asylum procedure while taking into account the specificities of national systems. It fully clarifies that a person who has expressed the wish to apply for international protection is an applicant within the meaning of the Directive. In order to ensure that they effectively comply with their obligations and benefit from the relevant rights, their applications should be registered as soon as possible and within specific time limits: in case the application is made with the determining authority the time limit is 3 working days after the application is made; in case of other competent authorities, such as border guards, the time limit is 6 working days. A longer time limit of 10 working days is allowed in a situation of a large and simultaneous influx of applicants.

Also important for effective access to the procedure is the obligation for Member States to provide third-country nationals or stateless persons detained in detention facilities or present at border crossings with information on the possibility to make a request for international protection where there are indications these persons may wish to do so. Moreover, Member States shall provide interpretation arrangements in detention facilities and border areas to the extent necessary to facilitate access to the procedure concerning international protection.

Examination procedure

The Council position provides that a procedure for examining an application for international protection needs to be concluded within 6 months after the application was lodged. In case of complex issues, a large number of applicants or a delay due to the lack of cooperation of the applicant, Member States may extend this time limit by a period not exceeding a further 9 months. Finally, an additional extension of maximum 3 months is allowed exceptionally, in duly justified cases, where it is necessary to ensure an adequate and complete examination.

When a determining authority cannot reasonably be expected to decide within these time limits due to an uncertain situation in the country of origin which is expected to be temporary, Member States may postpone concluding the procedure. In such a case, the Member States must conduct every 6 months a review of the situation in that country and inform within a reasonable time the applicants concerned about the reasons of the postponement and the Commission about the postponement of procedures for that country. In any case, Member States are required to conclude the procedure within a maximum time limit of 21 months from the lodging of the application.

The Council position also introduces a distinction between prioritized and accelerated procedures. The latter imply shorter procedural time limits compared to those in a regular procedure, while prioritised procedures merely mean that the application is examined before other applications. Member States must lay down reasonable time limits for accelerated procedures while being allowed to exceed them in order to ensure an adequate and complete examination.

In line with the aim to establish more harmonised asylum procedures, accelerated examination procedures and border procedures can be conducted only under specific grounds, which aim to include in those procedures only applications that are likely to be unfounded, or that raise serious national security or public order concerns.

Information in case of derogations

In case a Member State, as a consequence of a large number of persons applying simultaneously, derogates from the time limits for registration of the application and for conclusion of the examination of the application, or allows other authorities than the determining authority to conduct asylum interviews, it must inform the Commission. This information must be provided as soon as the reasons for applying these exceptional measures have ceased to exist and at least on an annual basis.

Report and recording of interview

The Council position provides for an extensive set of rules concerning the reporting on and recording of asylum interviews. As part of its report on the application of the recast of the Directive in the Member States, the Commission will report in particular on the application of these rules and the various tools used in relation to the reporting of the personal interview.

The Council position provides that Member States are required to prepare a thorough and factual report containing all substantial elements or a transcript. In addition, they may provide for an audio or audio visual recording. Member States must also ensure that the applicant is fully informed of the content of the report or of the substantial elements of the transcript.

Furthermore, the Council position specifies the conditions for the applicant to make comments and/or provide clarifications on the report or the transcript and to give his confirmation that the content of the report or the transcript correctly reflects the interview.

Finally, the Council position lays down the rules for access by the applicant and his legal advisor or counsellor to the report, the transcript or the recording.

Legal information and legal assistance and representation

The Council position provides that Member States must ensure that applicants, on request and under certain conditions, are provided with legal and procedural information free of charge in procedures at first instance. This shall include, at least, the provision of information on the procedure in the light of the applicant's particular circumstances. Furthermore, in the event of a negative decision in first instance, Member States must, on request, provide applicants with information in order to clarify the reasons of such decision and explain how it can be challenged. Furthermore, Member States may provide that this legal and procedural information is provided by non-governmental organisations, or professionals from government authorities or specialised services of the State.

In addition, Member States must ensure that, under certain conditions and in full consistency with the other asylum instruments, free legal assistance and representation is granted on request in appeals procedures. This must include, at least, the preparation of the required procedural documents and participation in the hearing before the court or tribunal of first instance on behalf of the applicant. Notwithstanding these mandatory rules for appeals procedures, Member States may decide to provide free legal assistance and/or representation in procedures at first instance.

Applicants in need of special procedural guarantees

The Council position aims at allowing applicants in need of special procedural guarantees to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure. To that end, Member States must assess, within a reasonable period of time after the application, whether the applicant is in need of special procedural guarantees. With a view to avoiding unnecessary administrative burden, it is specified that such assessment may be integrated into existing national procedures and/or into the assessment for special reception needs and that it needs not take the form of an administrative procedure.

Where applicants have been identified to be in need of special procedural guarantees, they must be provided with adequate support. Moreover, where such adequate support cannot be provided within the framework of accelerated or border procedures, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States are not allowed to apply such procedures, or must cease to apply them.

Where Member States identify special procedural needs of a nature that could prevent the application of accelerated and border procedures, this implies that the applicant must also be provided with additional guarantees in cases where his appeal is not automatically suspensive. These guarantees are the same as those for persons subject to border procedures.

Minors

The Council position provides specific guarantees to minors and unaccompanied minors while avoiding potential misuse. It clarifies the conditions that apply to minors who wish to make an application on their own behalf. Furthermore, it specifies that interviews with minors must be conducted in a child appropriate manner.

As regards unaccompanied minors, the Council position establishes a set of guarantees in relation to the representative. Member States are also required to provide unaccompanied minors, free of charge, with legal and procedural information for procedures for the withdrawal of international protection. That way, unaccompanied minors and their representative receive a form of legal support in all procedures of the Directive (first instance, appeal and withdrawal).

Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, Member States may use certain procedures for processing the application for international protection only under specific circumstances:

- Member States may apply, or continue to apply, accelerated procedures only if the applicant comes from a safe country of origin, he has made a subsequent application that is not inadmissible or for reasons of national security or public order.

- Member States may apply or continue to apply border procedures under the same three circumstances that allow the use of accelerated procedures. Furthermore, they can apply border procedures under three additional circumstances:

    - where there are reasonable grounds to consider that the unaccompanied minor applicant comes from a safe third country;

    - if the unaccompanied minor applicant has misled the authorities by presenting false documents;

    - if the unaccompanied minor applicant, in bad faith, has destroyed or disposed of an identity or travel document that would have helped establish his identity or nationality.

    Member States may invoke the latter two circumstances only in specific cases where there are serious grounds to consider that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for his actions, including by consulting with his representative.

    Because border procedures always involve some form of detention, they cannot be used systematically in any of the six circumstances. In order to comply with the Reception Conditions Directive, unaccompanied minors may be detained only in exceptional circumstances, which must be appreciated with due regard to the best interest of the child.

- Member States may declare the application of an unaccompanied minor inadmissible in case the unaccompanied minor comes from a safe third country, which is not a Member State, only provided this is in the minor's best interest. Member States may declare the application of an unaccompanied minor inadmissible on the other applicable grounds under the normal rules.

- Member States may decide not to provide free legal assistance and representation to an unaccompanied minor applicant if the appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success, but only if the minor's representative has legal qualifications.

Finally, Member States must grant to unaccompanied minors at least the same additional guarantees as those for persons subject to border procedures in cases where their appeal against a negative decision is not automatically suspensive.

Gender sensitive asylum procedures

The Council position takes into account that asylum procedures must be gender sensitive. In that light, Member States must, wherever possible, ensure that the interviewer and the interpreter are of the same sex as the applicant, if the applicant concerned so requests. Member States need not however provide a same sex interviewer or interpreter in case the determining authority has reasons to believe that the request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner.

Moreover, without prejudice to any search carried out for security reasons, a search of the applicant's person in the application of this directive must be carried out by a person of the same sex in full respect of the principles of human dignity and of physical and mental integrity.

Subsequent applications

The Council position clarifies the procedural rules regarding subsequent applications. Contrary to a variety of procedural arrangements for those applications possible under Directive 2005/85/EC, the Council position provides that a subsequent application is considered inadmissible when in a preliminary examination no new elements or findings arise or are presented by the applicant which significantly add to the likelihood of him being in need of international protection.

Applicants that make subsequent applications with the sole intention to delay removal from the territory of the Member State put an undue strain on national asylum systems. Therefore, effective rules on subsequent applications are needed. These rules must enable Member States to distinguish between, on the one hand, persons who make a subsequent application because protection needs have arisen *sur place* after their previous application or for other legitimate reasons and, on the other hand, persons who make a subsequent application only to delay removal from the territory. In this context it is noted that Member States remain at all times bound by the principle of *non refoulement* which means that a person must not be send back to a country where he could be at risk.

Against this background, in two cases Member States are allowed to make an exception from the normally applicable right to remain in the territory. First, where a person has made a first subsequent application, which is considered inadmissible, merely in order to delay or frustrate the enforcement of a decision which would result in his imminent removal from that Member State. And second, where the person makes another request for international protection in the same Member State, following a final decision to consider a first subsequent application inadmissible or after a final decision to reject that application as unfounded.

Implicit withdrawal/abandonment of an application

The Council position lays down that, under certain conditions, Member States may assume that an applicant has implicitly withdrawn or abandoned his application for international protection. Member States may make such an assumption in two cases in particular. Firstly, when it is ascertained that the applicant has failed to respond to requests to provide information essential to his application or has not appeared for an personal interview, unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control. And secondly, when the applicant has absconded or left without authorisation the place where he lived or was held, without contacting the competent authority within a reasonable time, or when the applicant has not within a reasonable time complied with reporting duties or other obligations to communicate, unless he demonstrates that this was due to circumstances beyond his control.

Against that background, the Council position provides for a set of rules with regard to the re-opening of an implicitly withdrawn or abandoned application. In case the person reports again to the authorities within a period of at least 9 months, Member States are not allowed to treat the re-opened application or the new application as a subsequent application. However, in case the person reports again after 9 months, the Member State are allowed to apply the regime of subsequent applications. This means that the application could be considered inadmissible if no relevant new elements have arisen or been presented since the discontinuation decision. Furthermore, Member States may provide that an application that has been discontinued can be re-opened only once.

Effective remedy

The Council position establishes a set of rules on the right to remain on the territory pending an appeal which aims to fully guarantee the right to an effective remedy while acknowledging the need for effective and efficient asylum systems capable of preventing misuse. Against that background, as a rule, Member States must allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.

However, in a limited number of cases, a Member State may foresee that such automatic suspensive effect does not apply. In such cases, Member States must provide that a court or tribunal has the power to rule whether or not the applicant may remain on the territory, either upon request of the applicant or acting on its own motion. These cases cover decisions:

- to consider an application manifestly unfounded or unfounded after examination in accelerated procedure, except where these decisions are based on the fact that the applicant entered the territory of the Member State unlawfully or prolonged his stay unlawfully and, without good reason, has not presented himself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his entry;

- to consider an application inadmissible because another Member State has granted international protection, a country which is not a Member State is considered as a first country of asylum for the applicant or the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant is in need of international protection have arisen or have been presented by the applicant;

- to reject reopening of the applicant's case that has been discontinued;

- not to examine or not to examine fully the application because the European safe third country concept applies.

In border procedures, non-automatic suspensive effect can be applied only provided that, firstly, the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him/her the right to remain on the territory pending the outcome of the remedy and, secondly, that in the framework of the examination of the request to remain in the territory, the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

When non-automatic suspensive effect is applied, the applicant is allowed to remain on the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Furthermore, in all cases, the principle of *non refoulement* applies.

Safe third countries

The Council position allows Member States to apply the safe country of origin, safe third country and European safe third country concepts, while recognising the need for possible further harmonisation in the future. To that end, Member States should take into account, *inter alia* the guidelines and the operating manuals developed by the European Asylum Support Office and the United Nations High Commissioner for Refugees and conduct regular reviews of the situation in those third countries. Furthermore, the importance is underlined of exchanging information from relevant sources and having regular reviews on the application by Member States of the safe third country concepts with the Member States and with the involvement of the Parliament.

The Council position clarifies the conditions for the application of those concepts as it provides that Member States must allow applicants to challenge the application of the European safe third country concept on the grounds that the country is not safe in their particular circumstances.

Other important issues

Other important issues in the Council position at first reading on which the Council and the European Parliament reached a compromise concern:

Extradition

A Member State may make an exception to the right of an applicant for international protection to remain on the territory until a first instance decision on his application is made, where the Member State will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals. A Member State may extradite an applicant to a third country only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of international obligations of the Member State.

Determining authority and other competent authorities

Member States may provide that an authority other than the determining authority is responsible for the purposes of processing cases pursuant to the Dublin Regulation or of granting or refusing permission to enter in the framework of a border procedure, subject to the conditions set out in that framework and on the basis of the reasoned opinion of the determining authority.

Medical examination

The Council position includes rules concerning medical examinations so as to ensure that signs that might result from past persecution or serious harm are included in the assessment of the request for international protection. These rules include *inter alia* provisions indicating the conditions when the medical examination is to be paid out of public funds or when they are at the cost of the applicant.

National security considerations

In appeals, in case of national security considerations and with a view to ensuring equality of arms, Member States must provide access to information or sources whose confidentiality is required for national security reasons available to the courts and tribunals in appeal and establish in national law procedures guaranteeing respect of the applicant's rights of defence.

IV CONCLUSION

The Council's position at first reading fully reflects the compromise reached in the negotiations between the Council and the European Parliament, facilitated by the Commission. This compromise is confirmed by the letter of the Chair of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) to the Chairman of the Permanent Representatives Committee (8223/13). In this letter, the LIBE Chair indicates that he will recommend to the members of the LIBE Committee, and subsequently to the plenary, that they accept the Council's position at first reading without amendments at Parliament's second reading, subject to verification by the lawyer-linguists of both institutions. By amending the Asylum Procedures Directive, the European Union provides an essential building block for establishing the Common European Asylum System.