



**COUNCIL OF
THE EUROPEAN UNION**

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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of 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 (Recast) [First reading]

= Draft statement of the Council's reasons

COMMON GUIDELINES

Consultation deadline for Croatia: 19.12.2012

I. INTRODUCTION

On 8 December 2008, the Council received from the Commission a proposal for a recast of the 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 (hereinafter "Dublin Regulation")¹.

The European Parliament's voted its first-reading position on the proposal on 7 May 2009². On 16 July 2009, the European Economic and Social Committee adopted an Opinion on the initial Commission proposal³. The Committee of the Regions adopted an Opinion on the initial proposal at its plenary session on 6/7 October 2009⁴.

In accordance with the provisions of the Joint Declaration on Practical Agreements for the Co-decision Procedure⁵, representatives of the Council, the Parliament and the Commission conducted informal trilogues with a view to finding agreement.

At its meeting on 18 July 2012, the Permanent Representatives Committee endorsed the compromise regarding the part of the proposal which was not related to comitology (implementing and delegated acts)⁶. The Committee on Civil Liberties, Justice and Home Affairs (LIBE) endorsed informally the above text on 19 September 2012.

With regard to comitology-related issues, a compromise between the Chair of the Permanent Representatives Committee and the Rapporteur was reached as a result of the informal trilogue held on 14 November 2012.

¹ Doc. 16929/08
² P6_TA(2009)0377
³ SOC/333-CESE 1210/2009
⁴ CdR 90/2009
⁵ OJ C 145, 30.6.2007, p. 5.
⁶ Doc. 12746/2/12 REV2

The political agreement on the recast of the Dublin Regulation was endorsed by the Council on 6 December 2012 and by the LIBE Committee on 27 November 2012.¹

In accordance with Articles 3 and 4a(1) of the 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, these Member States have notified their wish to take part in the adoption and application of the recast of this Regulation. In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union, and to the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption of the recast of this Regulation and is not bound by it or subject to its application.

II. OBJECTIVE OF THE PROPOSAL

The purpose of the Dublin Regulation is to lay down 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.

The main objectives of the recast proposal is to enhance the efficiency of the functioning of the current Dublin Regulation², as well as to ensure higher standards of protection for the applicants who fall under the responsibility determination procedure, pursuant the Regulation's legal framework.

¹ Doc. 16332/12

² Council Regulation (EC) No 343/2003/EC of 18 February 2003 (OJ L 50, 25.2.2003, p.1).

This recast proposal is part of a series of legislative proposals, submitted by the Commission with a view to fulfilling the commitment of the European Council to establish a Common European Asylum System by the end of 2012.

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

A. General observations

On the basis of the recast proposal, the European Parliament and the Council have conducted negotiations with a view to concluding 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. This compromise provides notably for strengthened legal safeguards and rights for the applicants for international protection, while focusing in particular on the needs of vulnerable groups such as unaccompanied minors and dependent persons. At the same time, the compromise caters for reducing abuses of the system set up by the Dublin Regulation and for ensuring that disputes among Member States in its context are tackled more efficiently. The compromise also provides for addressing in a timely manner problems in the application of this Regulation owed to particular pressure on a Member State's asylum system, or because of its malfunctioning, through the setting up of a mechanism for early warning, preparedness and crisis management.

It should also be noted that the compromise provides for an empowerment to use delegated or implementing acts in the context of certain provisions, in order to deal properly with certain issues regarding the implementation of this Regulation.

B. Key issues

The compromise text reflected in the Council position at first reading adapts the Dublin Regulation currently in force as to the following key issues:

1. A mechanism for early warning, preparedness and crisis management (Art. 33)

This mechanism is a new element added during the negotiations, replacing the so-called suspension mechanism contained in the original recast proposal of the Dublin Regulation, which was not acceptable by Council.

The compromise text reflected in the Council position at first reading provides for the setting up of this mechanism in order to address effectively and timely situations where the application of the Dublin Regulation may be jeopardised (with direct effects on the applicants who are in the Member State concerned), due to a particular pressure on a Member State's asylum system, or problems arising in the functioning of the asylum system of a Member State. It aims at ensuring effective cooperation and developing mutual trust and solidarity among Member States, within the framework of the Dublin Regulation, by way of preventing or managing a crisis in the asylum system of one or more Member States. In this gradual process, all parties concerned (the Member State which encounters the crisis, the Commission, EASO, the Council and the Parliament) are duly informed and, where appropriate, involved.

2. Remedies (Arts 27 & 3(2))

The compromise text reflected in the Council position at first reading provides for a comprehensive legal framework, whereby the fundamental rights of the applicants, or other persons entitled to a remedy, are observed, also in the light of the relevant case-law. At the same time, the concerns of the Council to ensure legal certainty and effective measures against abuse are also duly taken into account.

The compromise emphasises the right of the person concerned to an effective remedy against the transfer decision before a court or a tribunal. The Member State shall provide for a reasonable period of time within which the aforementioned remedy may be exercised in order to be effective. As regards the issue of the suspension of the implementation of the transfer decision until a decision on a remedy against it is taken, Member States shall at least ensure in their national legislation that an effective remedy can be exercised by suspending the transfer until a decision on the first suspension request is taken.

The recast also delineates the framework within which the person concerned will have access to legal assistance, free of charge where appropriate, in order to exercise effectively his/her right to an effective remedy.

As a corollary to Art. 27 on remedies, a provision has been added in Art. 3(2), in order to codify the recent ECJ case law and to make provision for the determination of the Member State responsible to examine the application, where the transfer of the person concerned is impossible due to the conditions described in the aforementioned case law (real risk of violation of fundamental rights). Moreover, by virtue of this provision, if the transfer cannot be made to any Member State designated under this Regulation, the Member State, which carries out the determination procedure shall become the Member State responsible.

3. Detention (Art. 28)

The compromise text reflected in the Council position at first reading provides for a comprehensive framework whereby the conditions under which a person concerned may be detained on the basis of “Dublin grounds” are clearly set out. These conditions are: a significant risk of absconding (whose definition has been added in the Regulation) of the person concerned, the need to impose detention in order to secure transfer procedures, an individual assessment of each case before taking a decision on whether to impose detention, detention can be imposed only when is proportional and other less coercive measures cannot be applied effectively.

The compromise also deals with the time limits of the detention period for the purposes of this Regulation, stating that detention shall be for as short a period as possible and for as long as it is reasonably necessary to fulfil the arrangements for carrying out the transfer.

The compromise also provides for a shortened time period to handle an application under this Regulation, where the person concerned is detained (but which gives sufficient time to Member States to carry out their part of the procedure) and for the consequences for the Member States involved in case of one of them failing their respective deadlines. As regards the detention per se, the most important consequence is the obligation of the Member State which detains him/her (and which did not meet its deadlines) to release the detainee, while it is clarified that there is no shifting of the responsibility under the Dublin procedure because of such non-compliance with the said deadlines.

Furthermore, the compromise makes reference to Articles 9-11 of the recast Reception Conditions Directive, regarding the detention conditions and the guarantees applicable to the persons detained, in order to secure the transfer procedures to the Member State responsible.

4. Unaccompanied minors & the definition of relatives (Arts. 2h & 8)

The compromise text reflected in the Council position at first reading in Art. 8 of the Dublin Regulation provides for the legal framework under which an unaccompanied minor (provision is also made for the married minors whose spouse are not legally present on the territory of a Member State) shall be united with family members, siblings, or relatives, along with the relevant conditions of each provision, with a view to rendering responsible for the examination of the application the Member State where the reunification will take place. The ultimate check on all cases provided for under this Article is that any reunification shall be in the best interest of the minor.

The best-interest-of -the-minor requirement also applies in the absence of any of the above family relations, in which case the Member State responsible is the one where the unaccompanied minor lodged his/her application. In the context of this occasion, the European Parliament, the Council and the Commission have submitted a statement (which is to be published in the OJ), inviting the latter to consider (without prejudice to its right of initiative) a possible revision of Art. 8(4) if the pending judgement of the ECJ on case C-648/11 MA and Others vs Secretary of State for the Home Department suggests so, or the latest by the time limits set in Art. 46 of the Dublin Regulation. The compromise also meets the concerns of the Council for fighting abuse in the context of the asylum procedures.

In this context, the compromise text reflected in the Council position at first reading provides for the scope of the term "relative" as the applicant's adult aunt or uncle or grandparent, who is present in the territory of a Member State.

5. Dependent persons (Art. 16)

The compromise on this provision reflected in the Council position at first reading deals with cases where the applicant, due to certain grounds of vulnerability, is dependent on the assistance of his/her child, sibling or parent legally resident in one of the Member States, or with cases where these persons depend on the applicant's assistance on the same grounds. The compromise provides for the legal framework on the basis of which Member States shall normally keep or bring together the applicant with the above persons, provided that certain conditions are met.

The text also provides for cases where health issues prevent the applicant from travelling for a significant period of time to the Member State where the aforementioned people are legally residents. If such situation occurs the Member State where the applicant is present shall be the one responsible to examine his/her application.

By way of compromise, the wording of this Article is based on Art. 15 of the current Dublin Regulation.

6. Other important issues

The following are other important issues in the Council position at first reading, on which the Parliament and the Council reached a compromise:

- **Definition of unaccompanied minor (Art. 2(j))**

The compromise text reflected in the Council position at first reading provides that the unaccompanied minor may be married or unmarried in line with the Qualification Directive.

- **Right to information (Arts 4 & 5)**

The compromise text reflected in the Council position at first reading on Art. 4 provides for the right of the applicant to receive, in writing (or orally where appropriate) and in a language that the applicant understands or is reasonably supposed to understand detailed information regarding the contents of the Dublin Regulation upon the lodging of his/ her application. A common leaflet (and a special one on unaccompanied minors) containing at least the information to which the applicant is entitled in accordance with this Article, shall be established.

- **Personal interview (Art. 5)**

The compromise text reflected in the Council position at first reading on Art. 5 provides for an obligation to hold a personal interview with the applicant, in a timely and appropriate manner, with a view to facilitating the process of determining the Member State responsible. Grounds for omitting this interview are set out in this Article. However, a Member State which omits the interview shall give the applicant the opportunity to present all further, relevant information, before a decision is taken on the transfer of the applicant.

- **Guarantees for minors (Art. 6)**

The compromise text reflected in the Council position at first reading regarding the guarantees for minors should be considered through the best-interest-of-the-child principle. It provides for Member States' obligation to ensure proper representation of the minor, as well as for their obligation to take, as soon as possible, appropriate action to identify family members, siblings or relatives of an unaccompanied minor on the territory of another Member State.

- **Discretionary clauses (Art. 17)**

The compromise text reflected in the Council position at first reading provides for a derogation from the criteria for establishing the Member State responsible. The scope of the provision has been extended more explicitly by the deletion of the reference to "humanitarian and compassionate grounds", as a basis for the derogation has been deleted, as well as the provision for a prior consent from the applicant in order to use this Article.

- **Obligations of the Member State responsible (Chapters V & VI in general)**

Within the context of these Chapters, which regulate the obligations of the Member State responsible, the compromise text reflected in the Council position at first reading provides for legally and procedurally enhanced requirements aiming at safeguarding all the relevant rights of the applicant (such as the notification of a transfer decision and guarantees during the transfer operation), as well as making the practical co-operation among the Member States concerned more efficient (such as take back and take charge obligations among Member States, exchange of information, including on health data, before the transfer is carried out).

- **Implementing and delegating acts**

The compromise text reflected in the Council position at first reading provides for implementing powers (using the examination procedure, in accordance with Art. 5 of Regulation (EU) 182/2011)¹ for the purpose of certain provisions² where this kind of empowerment to the Commission was deemed sufficient. The option of delegated acts is provided for in the context of Art. 8 (reunification of the unaccompanied minor with family members, siblings or relatives) in particular regarding the assessment of whether the relevant criteria were met and Art. 16 (reunification of dependent applicants with children, parents or siblings, or vice versa) also in particular regarding the assessment of whether the relevant criteria were met.

¹ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 (OJ L 55, 28.2.2011, p.13).

² Among other provisions on which implementing acts will be used: the drawing up of a common leaflets under Art. 4, the drawing up of a standard form for the exchange of information regarding the identification of a family member, sibling, or relative of an unaccompanied minor, living on the territory of another Member State, the design of a laissez-passer for carrying out a transfer under this Regulation, exchange of information regarding particular situations in the context of the transfer operations.

IV CONCLUSION

The Council's position at first reading reflects the compromise reached in the negotiations between the European Parliament and the Council, with the support of the Commission. This compromise is confirmed by the letter of the Chair of the European Parliament's LIBE Committee to the Chairman of the Permanent Representatives Committee.¹ In this letter the LIBE Chair indicates that he will recommend to the members of the LIBE Committee – and subsequently to the plenary, that the Parliament 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 Dublin Regulation, the European Union concludes another essential building block for the establishment of the Common European Asylum System.

¹ Doc. 17132/12