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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 Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast) [First reading]
= Draft statement of the Council's reasons

COMMON GUIDELINES

Consultation deadline for Croatia: 19.12.2012

I. INTRODUCTION

On 7 June 2011, the Council received from the Commission an amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast) (11214/11). The Commission amended its initial proposal for a recast of the Reception Conditions Directive of 9 December 2008 (16913/1/08 REV1), taking into account the European Parliament's first-reading position voted on 7 May 2009 (9333/09) and the views expressed in the Council.

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

On 16 July 2009, the European Economic and Social Committee adopted an Opinion on the initial Commission proposal (SOC/332 - CESE 1209/2009). The Committee decided on 26 and 27 October 2011 not to draw up a new opinion on the amended proposal. The Committee of the Regions adopted an Opinion on the initial proposal at its plenary session on 6 and 7 October 2009 (CdR 90/2009 fin) and decided on 18 October 2011 not to issue an Opinion on the amended proposal but to inform the Council of its views in the form of a letter to the Secretary-General of the Council (18840/11).

At its meeting on 25 and 26 October 2012, the Council confirmed a Political agreement on the amended proposal (14112/1/12 REV1).

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 Reception Conditions 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. OBJECTIVE OF THE PROPOSAL

The Reception Conditions Directive sets standards for the reception of applicants for international protection. The recast of the Reception Conditions Directive is part of a series of legislative proposals in the field of asylum submitted by the Commission in keeping with the commitment of the European Council to establish a Common European Asylum System by 2012.

The objectives of the recast of the Reception Conditions Directive are to guarantee adequate and comparable reception conditions in the Member States bound by the Directive, to respect 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 to ensure consistency with the other asylum instruments.

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 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 ensures higher and more harmonised standards of reception for applicants for international protection, in particular for vulnerable persons with special reception needs. At the same time, the compromise reflects the need for rules allowing for effective implementation given the different national legal systems and rules capable of fighting abuse of the asylum process. The compromise also aims at avoiding any unnecessary administrative and financial burden for the Member States.

B. Key issues

The compromise text reflected in the Council position at first reading adapts the Directive currently in force¹ as to the following key issues:

¹ Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).

1. Definition of family members and joint housing

The compromise text reflected in the position at first reading provides for coherence between the different asylum instruments by aligning the definition of family members with the definition in the recast of the Qualifications Directive¹. Compared to the definition of the Reception Conditions Directive currently in force, which covers the spouse or unmarried partner and the unmarried children, the definition is extended to include the father, mother or another adult responsible for an applicant provided that the latter is a minor and unmarried.

Furthermore, the Council position at first reading contains new provisions in relation to joint housing. Firstly, Member States must ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them by law or by the national practice of the Member State concerned. Secondly, Member States must ensure that minor children of applicants or applicants who are minors are accommodated, provided that this is in their best interests, with their parents or with the adult responsible for them, or with their unmarried siblings.

2. Detention

The compromise text reflected in the position at first reading introduces an extensive legislative framework governing the detention of applicants for international protection. This framework includes rules on grounds for detention, guarantees for detained applicants, conditions of detention and the detention of vulnerable persons and persons with special reception needs.

¹ Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, p. 9).

2.1 Grounds for detention

The list of detention grounds has been drawn up in light of international law and jurisprudence of the European Court of Justice and the European Court of Human Rights, taking into account the need for Member States to effectively counter abusive applications. The list consists of the detention grounds included in the recommendation of the Council of Europe, supplemented by a reference to detention under the Dublin Regulation. In addition, the Council position contains a ground for detention for persons who are detained subject to a return procedure under the Return Directive¹ in order to prepare the return and/or carry out the removal process. In such cases, Member States must substantiate, on the basis of objective criteria, including the fact that the detained applicant has already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application merely in order to delay or frustrate the enforcement of the return decision.

2.2. Guarantees for detained asylum seekers

In view of the different national legal systems, the compromise text reflected in the position at first reading contains a provision that Member States must provide for a speedy judicial review of the lawfulness of detention ordered by administrative authorities which can be conducted *ex officio* or at the request of the applicant for international protection. In the event of an *ex officio* review, the review must be decided on as speedily as possible from the beginning of the detention. In the event of a review at the request of the applicant, the lawfulness of the detention must be subject to a review that is decided on as speedily as possible after the launch of the relevant proceedings. Member States must define in national law a period within which the reviews must be conducted.

¹ Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

With a view to safeguarding the right to an effective remedy, detained applicants for international protection must immediately be informed in writing of the reasons for detention, the procedures laid down in national law for challenging the detention order and the possibility to request free legal assistance and representation. This must be done in a language the applicant understands or is reasonably supposed to understand.

Finally, as regards access to free legal assistance and representation, the position at first reading aligns the text of the Reception Conditions Directive with the text of the Asylum Procedures Directive currently in force¹ but without a merits test for assessing whether free legal assistance and representation must be made available given the likelihood that the review will succeed. It is further specified that free legal assistance and representation must be provided by suitably qualified persons as admitted or permitted under national law without any conflict of interests vis-à-vis the applicant for international protection.

2.3 Conditions of detention

The provisions on detention conditions define the rights of applicants for international protection who are detained taking into account asylum practice. Against that background, applicants are, as a rule, detained in special reception facilities. Applicants are also, as far as possible, to be kept separate from other third-country nationals. If applicants are detained in prison accommodation, they must always be kept separate from criminals. Irrespective of their conditions of detention, applicants maintain the rights provided for in the Directive, including the right to privacy when communicating with representatives or family members.

¹ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13).

2.4 Detention of vulnerable persons and persons with special reception needs

The compromise reflected in the position at first reading contains specific provisions in relation to the detention of vulnerable persons and of persons with special reception needs.

The health - including the mental health - of detained applicants who are vulnerable persons must be of primary concern to national authorities. Moreover, where vulnerable persons are detained, Member States must ensure regular monitoring and adequate support, taking into account their particular situation including their health.

In accordance with the United Nations Convention on the Rights of the Child, it is specified that minors may only be detained as a measure of last resort and that unaccompanied minors may only be detained in exceptional circumstances and never in prison accommodation.

3. Access to the labour market

The compromise text reflected in the position at first reading reduces the time limit for access of applicants for international protection to the labour market from twelve to nine months.

Allowing access three months earlier is based on two counter-balancing considerations: on the one hand, the considerations that earlier access makes applicants economically independent sooner - thereby lowering the risk of exploitation on the black market and decreasing the need for public support - and that earlier access allows them to integrate more effectively in the host society; on the other hand, the consideration that earlier access possibly makes it attractive for economic migrants who do not qualify for international protection to attempt to exploit the asylum system.

4. Material reception conditions

The compromise reflected in the position at first reading provides that, in cases where Member States grant applicants for international protection material reception conditions in the form of financial allowances or vouchers, the amount must be determined on the basis of the level(s) established by the Member State concerned either by law or practice so as to ensure adequate standards of living for nationals. It is further specified that Member States may grant less favourable treatment to asylum seekers compared to nationals, in particular where material support is partially provided in kind or where the abovementioned level(s) applied for nationals aim(s) to ensure a standard of living higher than that prescribed for applicants for international protection.

Furthermore, the position at first reading provides for an adapted regime for reducing and withdrawing material reception conditions. Member States must provide applicants for international protection with a dignified standard of living. They are also allowed to reduce or, in exceptional and duly justified cases, withdraw material reception conditions where an applicant abandons his place of residence, fails to report adequately or when he has lodged a subsequent application. Furthermore, reduction of material reception conditions remains possible when a person has not lodged an application as soon as possible. Finally, as in the Directive currently in force, Member States have the possibility to reduce or withdraw conditions if an applicant has concealed financial resources.

5. Vulnerable persons with special reception needs

The compromise reflected in the position at first reading provides for the obligation for Member States to assess the special reception needs of vulnerable persons. Victims of female genital mutilation are added to the non-exhaustive list of categories of vulnerable persons. Furthermore, with a view to avoiding any unnecessary administrative burden, it is specified that such assessment need not take the form of an administrative procedure and that Member States may integrate the assessment into existing national procedures.

6. Free legal assistance and representation

Applicants for international protection have the right of access to an effective remedy when they appeal against decisions relating to the granting, withdrawal or reduction of benefits and decisions relating to residence and freedom of movement. In those cases, the conditions for granting free legal assistance and representation are the same as in the case of a review of a detention order, with the exception that Member States may provide that free legal assistance and representation is not made available if the appeal is considered by a competent authority to have no tangible prospect of success.

7. 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:

- Specification of the qualifications of the "representative" with a view to enabling unaccompanied minors to benefit more fully from the rights and comply with the obligations provided in the Reception Conditions Directive.

- Member States may not make the granting of reception conditions conditional on unnecessary and disproportionate documentation or other administrative requirements.
- Member States must provide applicants for international protection with the necessary health care which must include, at least, emergency care and essential treatment of illness and serious mental disorders. It is further specified that Member States must provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.
- Member States must start to trace the members of an unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting the minor's best interests.
- Member States must ensure that persons who have been subject to torture, rape or other serious acts of violence receive the necessary treatment, in particular access to appropriate medical and psychological treatment or care. Furthermore, those working with such persons must have had and continue to receive the appropriate training and be bound by the confidentiality rules.
- Member States must submit the information on implementation of the Directive so as to enable the Commission to monitor its implementation.

IV CONCLUSION

The Council's position at first reading reflects the compromise reached in 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 (13885/12). 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 Reception Conditions Directive, the European Union puts into place another essential building block for the establishment of the Common European Asylum System.
