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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: Communication from the Commission to the European Parliament pursuant to
Article 294(6) of the Treaty on the Functioning of the European Union
concerning the position of the Council on the adoption of a proposal for a
Directive of the European Parliament and of the Council on common
procedures for granting and withdrawing international protection

Delegations will find attached the Commission document COM(2013) 411 final.

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TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

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1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council 22.10.2009; amended proposal: 6.6.2011.
(documents COM(2009) 554 final and COM(2011) 319 final – 2009/0165 COD):

Date of the opinion of the European Economic and Social Committee: 28.4.2010, 26.10.2011.

Date of the position of the European Parliament, first reading: 6.4.2011.

Date of adoption of the position of the Council: 7.6.2013.

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

The Stockholm Programme adopted by the European Council at its meeting of 10–11 December 2009 underlined the need to establish "a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection", based on "high protection standards" and "fair and effective procedures", by 2012. It affirmed in particular that people in need of international protection must be ensured access to legally safe and efficient asylum procedures. In accordance with the programme, individuals, regardless of the Member State in which their application for asylum is lodged, should be offered the same level of treatment as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.

In this context, and as announced in the 2008 Policy Plan on Asylum¹, the Commission's proposal to amend Directive 2005/85/EC² aimed to achieve asylum procedures that are efficient and fair. The proposal ensures full respect of fundamental rights as it is informed by developing case law of the Court of Justice of

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "Policy plan on asylum - An integrated approach to protection across the EU" - COM(2008) 360, 17.6.2008.

² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13–34.

the European Union and the European Court of Human Rights, especially concerning the right to an effective remedy. Compared to Directive 2005/85/EC, procedural guarantees have been revised in order to lead to more consistent application of procedural principles and to ensure fair and efficient procedures. The proposal also introduces more consistent and simplified procedural notions and devices, thus providing asylum authorities with necessary procedural tools to prevent abuse and quickly process clearly unfounded applications.

3. COMMENTS ON THE POSITION OF THE COUNCIL

The Council's position reflects a compromise reached in informal trilogues between the European Parliament and the Council, facilitated by the Commission.

The position preserved the key objectives of the Commission's proposal and is a significant improvement compared to Directive 2005/85/EC. While the Commission regrets a small number of changes, it can nevertheless endorse the compromise and recommend its adoption by the Parliament.

3.1. **'Frontloading': reinforced procedural guarantees to improve the quality of asylum procedures**

The Council's position conforms to the principle of 'frontloading' and provides a strong set of guarantees for all asylum seekers.

It ensures fast and easy access to the asylum procedure. Even before a person expresses a wish to request protection, Member States will need to proactively inform third-country nationals present at border crossing points and in detention facilities of the possibility to apply for international protection, wherever there are indications that they may wish to apply. Basic interpretation arrangements will also have to be provided to ensure access to the asylum procedure in those areas. Although the time limits to register an asylum application (even expressed very informally) have been extended compared to the Commission's proposal, it has been clarified that a person who has expressed a wish to request international protection immediately becomes an applicant and is entitled to all relevant rights, regardless of formal registration or lodging of the application.

Subject to drafting or other minor changes, the text preserves the substance of the Commission's proposal on most guarantees for applicants including the principle of single determining authority; the content of the personal interview; provision of legal and procedural information at first instance; report from personal interview; free legal assistance in appeals; deletion of all standstill clauses and derogations from basic principles and guarantees.

Standards are slightly higher than the Commission's proposal on training of personnel involved in the procedure. The Council's compromise specifies that authorities other than the determining authorities conducting personal interviews on the admissibility of an application should have basic training in asylum issues.

A key element of 'frontloading' as proposed by the Commission was the general deadline of six months, extensible to twelve, to complete the examination of an application. This key element has been preserved, although the maximum duration has been extended. However, compared to the proposal, the Council's position frames better the possibility to postpone the procedure if there is an uncertain situation in the country of origin which means it is not reasonable to take a decision within the normal deadlines.

3.2. Applicants with special procedural needs, including unaccompanied minors

While the Commission regrets that the level of guarantees for unaccompanied minors has been lowered in the Council's position, the Commission can nevertheless accept this compromise since it provides an adequate level of protection.

The Commission proposed to exempt unaccompanied minors from accelerated and border procedures, as well as from non-automatic suspensive effect of appeals because these procedural devices significantly reduce the time available to prove one's claim, while minors require special support to help them fully express their international protection needs. As for border procedures, they involve detention which the Commission believe should generally not be applied to unaccompanied minors. Finally, non-automatic suspensive effect could jeopardise an unaccompanied minor's access to an effective remedy, guaranteed by the Charter.

The Council's position makes it possible to apply accelerated procedures to unaccompanied minors, but only in a small number of circumstances. Among those, the nationality of a safe country of origin is an objective indication that the application is likely to be unfounded; an accelerated examination of a subsequent application can be justified by a full examination of the previous application; and the third ground is a legitimate national security or public order concern.

There are six grounds allowing Member States to use border procedures. In addition to the three grounds for accelerated procedures, two circumstances related to admissibility are added (subsequent applications and possible application of the safe third country concept). Two more substantial additions are situations where the applicant misleads the authorities by presenting false documents, or destroys or disposes of an identity or travel document in bad faith. As such, those grounds would not have been acceptable to the Commission since unaccompanied minors cannot generally be expected to fully understand the necessity to cooperate with the asylum authorities. However, in the Council's position, these grounds can be used only 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 with additional procedural safeguards. As such, the Council's position is acceptable since it ensures that only applications where there are strong, objective indications of unfoundedness or other legitimate reasons (national security or subsequent application) can be processed in the border procedure. Moreover, contrary to accelerated procedures, border procedures can be used only in exceptional circumstances, since they imply detention and unaccompanied minors can be detained only in exceptional circumstances, according to the new Reception Conditions Directive.

As concerns appeals rules, while there is a possibility of non-automatic suspensive effect, this is only possible with significant additional guarantees. In particular, the applicant will have at least one week and the necessary legal assistance and interpretation to prepare the request to remain on the territory. Importantly, in the framework of this request, the court or tribunal will have to re-examine, in fact and in law, the negative decision, which means that the examination will have to go beyond the mere threshold of compliance with non-*refoulement*. In the Commission's view, these safeguards, together with high-quality first instance examination, can ensure an effective remedy even without full automatic suspensive effect in cases of manifestly unfounded applications by unaccompanied minors.

Regarding other categories of persons with special needs, the Council's position contains an unequivocal obligation to create an effective identification mechanism

and to provide adequate support in the procedure. Moreover, persons whose special needs mean they cannot participate in special rapid procedures are excluded from accelerated and from border procedures and receive additional guarantees in appeals in case of non-suspensive effect, which are the same as those for unaccompanied minors. Asylum procedures also continue to be gender-sensitive with the possibility for applicants to request and obtain same-sex interpreters and interviewers, and gender-specific violence being taken into account in assessment of special needs. The provisions on special needs thus preserve the Commission's key objectives.

The question of special needs is closely linked with the use of medical reports or examinations in the asylum procedure. Also here, the Council's position preserves the main objectives of the proposal (obligation for Member States to conduct a medical examination if relevant and possibility for applicants to conduct an examination themselves). However, the Commission regrets that the use of the Istanbul Protocol on identification and documentation of symptoms of torture has been rendered facultative, even though the Union encourages third countries to promote the systematic application of the Protocol for documentation of torture cases³.

3.3. Accelerated and border procedures and effective remedy

The harmonisation of the use of accelerated and border procedures, allowed in all cases under Directive 2005/85/EC, was one of the key objectives of the proposal. This objective has been preserved as the Council's position contains an exhaustive list of grounds for the use of these procedures.

The compromise adds three more grounds to the Commission's list: subsequent applications which are not inadmissible; applicants who refuse to have their fingerprints taken for the use in the Eurodac system; and applicants who entered the territory or prolonged their stay unlawfully and, without good reason, have not presented themselves to the authorities and/or filed an application for asylum as soon as possible given their circumstances of their entry.

The additional ground with most substantial impact is the last one. However, it contains important safeguards which ensure adequate protection for the applicant. First, Member States will be able to apply this ground only in case of abusive applications. Applicants who can provide reasons for not presenting themselves to the authorities given the circumstances of their entry (demonstrate why their application is not abusive) will not be subject to an accelerated/border procedure. Second, contrary to all other acceleration/border grounds, when Member States apply it, they must always provide at the appeal stage an automatic right to remain on the territory (full automatic suspensive effect).

The proposal also aimed to strengthen the right to an effective remedy before a court or tribunal by setting out the principle of automatic suspensive effect of appeal, subject to limited exceptions. This principle remains in the Council's position. However, there are more exceptions: in addition to the two of the grounds for acceleration of the procedure as explained below, cases of implicit withdrawal and the application of the European safe third country concept are added to the list.

Regarding implicit withdrawal, relevant safeguards have been included before the appeal stage; in particular, the person has the possibility to request the re-opening of his case and there is always a possibility to examine the claim as a subsequent

³ Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, Council document 6129/12, 15 March 2012.

application. The risk of infringing the non-*refoulement* principle when the European safe third country concept is used is also minimal, given the strict requirements for a third country to be considered a European safe third country.

Moreover, in case an appeal has no automatic suspensive effect, there is a possibility to request suspensive effect and the person must be allowed to remain on the territory while that request is processed. There is therefore no risk of return without any judicial remedy.

Finally, in line with the case-law of the European Court of Human Rights, the Commission proposed that an appeal against a negative decision taken in a border procedure has an automatic suspensive effect. The Council's position provides instead in appeals in border procedures for the same guarantees as for unaccompanied minors. In manifestly unfounded cases, these guarantees can mitigate the negative consequences of non-automatic suspensive effect. In particular, they clarify that no removal can take place pending the outcome of the request for suspensive effect (which, as explained above, is a general principle also applicable to other non-suspensive appeals); they ensure that the applicant always benefits from effective legal and linguistic assistance; they establish a reasonable minimum time limit for the preparation of the request; and, importantly, they define the scope of the scrutiny by the court of tribunal considering the request for suspensive effect to ensure such scrutiny is close and rigorous. This should give applicants sufficient opportunities to establish the arguable nature of their claims and therefore ensure compliance with fundamental rights obligations as informed by the case-law of the European courts.

3.4. Fight against abuse

In order to ensure a balance between the objectives of protecting genuine asylum seekers and fighting abusive repeated applications, the Commission proposed to allow Member States to remove an applicant after a second subsequent application (i.e. third application), provided that the non-*refoulement* principle is respected. The Council's position upheld the objectives of the proposal but added an additional case where the applicant's right to remain on the territory can be removed: after an inadmissible first subsequent application made merely in order to frustrate an imminent return. The Council argued this is required to tackle abusive last-minute subsequent applications.

The Commission can accept these provisions since the basic safeguards included in the proposal, namely to ensure that applicants making genuine subsequent applications are not removed from the territory without a careful consideration of their claims, are maintained. The application of special derogatory rules for subsequent applications remains possible only after a final decision on the first application and, in addition, only after at least one subsequent application which is either unfounded or contains no new elements compared to the previous one, which clearly points to its abusive character. Moreover, the Council's position clearly specifies that the exceptions from the right to remain must be applied in line with the principle of non-*refoulement*.

The Council's position also amends the Commission proposal as regards the rules on implicit withdrawal or abandonment of the application. The proposal's objective was to harmonise the rules regarding those situations and in particular prevent the risk of an application never been examined in substance before being rejected. This objective remains in the Council's position since it specifies that an application

cannot be rejected without an adequate examination of its substance. The Commission regrets the inclusion of the provision that an applicant's case may be reopened only once if the applicant reports back following a discontinuation of the application. However, the negative impact of this provision is largely mitigated by additional safeguards meaning that if an applicant can demonstrate that the application was considered implicitly withdrawn due to circumstances beyond his/her control, the application should not be considered as implicitly withdrawn at all.

4. CONCLUSION

The Council's position upholds the main objectives of the Commission's proposal. It makes a step change in the level of harmonisation of procedural guarantees in asylum procedures by introducing clear, detailed and compulsory rules, and by deleting derogations and stand-still clauses. It will lead to easily accessible, faster and fairer procedures, based on the cost-efficient concept of 'frontloading'. It harmonises the use of accelerated and border procedures and ensures the right to an effective remedy by introducing detailed EU-level rules. While increasing the quality and speed of asylum procedures, it also provides new tools to tackle abusive repetitive applications. It introduces strong provisions on special procedural needs, including gender-specific ones. Finally, it will provide for adequate protection of unaccompanied minors, while at the same time taking into account concerns regarding potential abuse.

The substance of the Council's position is therefore broadly in line with the Commission's proposal and can be supported.