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COMMISSION OF THE EUROPEAN COMMUNITIES

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ANNEX

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on minimum standards on procedures in Member States for granting and withdrawing
international protection**

(Recast)

ANNEX

{SEC(2009) 1376}
{SEC(2009) 1377}

1. Detailed Explanation of the Proposal

Article 1

The reference to "procedures for granting and withdrawing refugee status" is replaced by a reference to "procedures for granting and withdrawing international protection by virtue of Directive [.../.../EC] [the Qualification Directive]" so as to underline that this Directive applies to examination procedures in relation with both the refugee status and the subsidiary protection status as set out in Directive [.../.../EC] [Proposal for a directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter: the Qualification Directive)].

Article 2

(b) The notion of 'application for asylum' is replaced by a notion of "application for international protection". This amendment aims to ensure consistency with the terminology used in the Qualification Directive, and to underline that Member States are required to examine applications both as applications on the basis of the Geneva Convention relating to the Status of Refugees of 28 July 1951 and as applications for subsidiary protection (hereafter: the single procedure). These changes are reflected in all relevant provisions throughout the Directive.

(c) The notion of "applicant for asylum" is replaced by a notion of "applicant for international protection" in line with the proposed amendment under point (b). This amendment is also reflected in all relevant provisions of the proposal.

(d) With a view to lay down additional guarantees for applicants with special needs, such as women, children, survivors of torture, and elderly or disabled applicants, the definition of applicants with special needs is inserted in this Article.

(e) A reference to subsidiary protection is inserted in line with the proposed amendment under point (b).

(g) The definition of "refugee" is amended to ensure consistency with Directive [.../.../EC] [the Qualification Directive].

(h) As the term "person eligible for subsidiary protection" is used in this proposal, it is appropriate to insert a definition.

(i) For reasons of legal clarity, the definition of international protection status is inserted.

(k) As the term "subsidiary protection status" is used in the Directive, it is appropriate to insert a definition.

(l) For reasons of legal clarity and with a view to align the Directive with the 1989 UN Convention on the Rights of the Child, the definition of a minor is inserted in this Article.

(m) The definition of an unaccompanied minor is amended to ensure consistency with Directive [.../.../EC] [the Qualification Directive].

(n) With a view to align the Directive with the 1989 UN Convention on the Rights of the Child, as interpreted by the UN Child Rights Committee, the definition of a representative is clarified.

(p) The reference to refugee status is replaced by a reference to international protection, and an additional reference to subsidiary protection status is inserted so as to underline that this Directive applies to procedures for withdrawing both the refugee status and the subsidiary protection status.

Article 3

In order to accommodate the specific situation of asylum seekers arriving at sea borders, the territorial scope of the Directive is clarified by specifying that the notion of "territory" covers territorial waters of the Member States.

Since the proposal requires Member States to examine application for international protection in the single procedure, the third paragraph is deleted.

A reference to Directive [.../.../EC] [the Qualification Directive] is inserted thus recognising the discretion of Member States to apply this Directive to applications for international protection falling outside the scope of the Qualification Directive.

Article 4

With a view to lay down necessary conditions for ensuring quality and efficient decision making at first instance, it is proposed to introduce additional requirements for a determining authority, namely:

- (a) the determining authority should be staffed with sufficient numbers of personnel;
- (b) these personnel should be primarily responsible for examining applications for international protection and be properly prepared to carry out their tasks.

The Article further sets out the requirements for training programmes to be made available to the personnel of the determining authority. Firstly, it is specified that both initial and follow up training must be provided. Secondly, the amendments lay down the minimum requirements for the content of the training programmes which are largely based on the European Asylum Curriculum and are in line with the Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office.

With a view to limit the current exceptions to the principle of a single determining authority, it is proposed to replace former paragraph 2 by a new paragraph allowing Member States to derogate from the principle of a single determining authority only in respect with cases falling under Regulation (EC) No .../..... [Proposal for 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] (hereafter: the Dublin Regulation).

Paragraph 5 essentially corresponds to subparagraph 2 of former Article 4 (1). In addition, a reference to border controls is inserted so as to reflect the specifics of joint border controls conducted by several Member States.

Article 6

Several sets of guarantees are introduced with a view to enhancing access to examination procedures for persons who wish to apply for international protection. These amendments are *inter alia* informed by the considerations of the European Court of Justice which indicate that a procedural system for exercising a right to residence permits provided for in Community Law should be "*easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time.*"¹ The accessibility of asylum procedures is also a key pre-condition for ensuring respect for the principle of non-*refoulement* for persons who wish to apply for international protection and are present at the border crossing points or areas close to the external border of the Union². To this effect, the amendments firstly spell out the positive obligation of Member States to ensure the accessibility of examination procedures for persons who wish to apply for international protection. To that end, the proposal implies that (i) the competent authorities must be designated, that (ii) those authorities must be obliged by law to register an application for international protection, and that (iii) while Member States may require persons to lodge their application at a designated place, the institutional and procedural system for receiving applications for international protection must be organised in a way that makes it possible for an asylum seeker to lodge his/her application with the competent authority without delay.

It is also clarified that the discretion of Member States to require that applications for international protection be made in person must be without prejudice to the provisions dealing with the applications on behalf of minors.

The Article further introduces an additional guarantee for dependent adults who give their consent to the lodging on the application on their behalf. Such adults should be informed in private of relevant procedural consequences and of his/her right to make a separate application for international protection. The amendment primarily aims at making the examination procedures gender sensitive and reducing the root causes of subsequent applications.

With a view to align the Directive with Article 22 (1) of the 1989 UN Convention of the Rights of the Child, the Article explicitly stipulates the right of a minor to make an application for international protection. The proposal further specifies that this right may be exercised either by the minor himself/herself or through his/her parents or other caregivers. This provision should be read in conjunction with paragraph 7 which corresponds to former paragraph 4, and allows Member States to determine the cases in which the application may be lodged by or on behalf of a minor.

In order to provide additional safeguards for unaccompanied minors who are the subject to return procedures pursuant to Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, the Article requires Member States to

¹ Case C-327/02

² See Gebremedhin [Gaberamadhien] v. France, Application No 25389/05, 26.04.2007

recognise the right of bodies referred to in Article 10 (1) of the Return Directive to lodge an application for international protection on behalf of an unaccompanied minor.

Another set of guarantees aims at facilitating access to the competent authorities and examination procedures for *de facto* asylum seekers who are subject to border controls. In this respect, the amendments single out 4 categories of national authorities likely to be addressed by a person who wishes to make an application for international protection, namely the border guards, police, immigration authorities and personnel of detention facilities, and require Member States to issue instructions and provide necessary training for these authorities. In cases where such authorities are not designated as the competent authority within the meaning of paragraphs 1 and 2, the instructions must include the obligation to forward the application to the competent authorities.

Subparagraph 2 of paragraph 8 essentially corresponds to former paragraph 5. In the proposed framework, its functional role is to ensure that public authorities which are not explicitly referred to in this proposal are able to facilitate access to procedures by providing information to a person and/or forwarding his/her application to the competent authorities.

The proposal sets out the 72 hour time limit for completing necessary formalities related to the lodging of an application for international protection.

Article 7

This Article lays down necessary safeguards aimed at enabling a *de facto* asylum seeker who is present at the border and/or in an immigration detention facility to articulate his/her request for international protection. In essence, the safeguards concern information, advice and the possibility to communicate intention to apply for international protection to the border guards or other relevant authorities. In this respect, the amendments aim to ensure that (i) information about the possibility and procedure for lodging an application for international protection is made accessible to persons who are subject to border controls pursuant to the Schengen Borders Code, that (ii) organisations providing advice and counselling to asylum seekers enjoy access to the border crossing points, including transit zones, and detention facilities with a view to providing advice and counselling to persons who wish to apply for international protection and that (iii) interpretation arrangements aimed at ensuring at least a basic level of communication which makes it possible to identify that the person concerned wishes to apply for international protection are made available to the border guards and personnel of detention facilities. The proposed provisions require Member States to make relevant arrangements available at border crossing points and in detention facilities rather than introduce additional rights for third country nationals or stateless persons. In this respect, an expression of the wish to apply for international protection remains a key pre-condition for the applicability of this Directive *ratione personae*. The amendments, however, take account of the fact that a number of factors, such as trauma, difficult journey, or lack of knowledge of common languages, may negatively affect the ability of persons whose reasons for travel are protection related to articulate their request for international protection already during the initial contacts with the authorities of the destination Member State. The proposal is largely informed by arrangements available in several Member States which aim at providing counselling and advice to persons who wish to apply for international protection and are present at the border and/or in detention facilities.³

³ See *inter alia* the report *Access to protection at airports in Europe*, Hungarian Helsinki Committee, August 2008.

Article 8

The amendments introduce two clarifications with respect to the Member States' right to surrender or extradite an applicant for international protection to a third country. First, the Article explicitly prohibits extradition of an applicant for international protection to his/her country of origin. In this respect, it is considered that the determining authorities and, where applicable, a court or tribunal should examine, in the first place, as to whether an applicant qualifies for international protection pursuant to the Qualification Directive before taking a decision with regard to an extradition request. This approach is in line with the case law of the European Court of Human Rights which has repeatedly stressed that extradition may engage the responsibility of a state under Article 3 of the European Convention of Human Rights.⁴ The amendment is also consistent with Articles 12 (2) (b), 17 (1) (b) and 17 (3) of the Qualification Directive which lay down the exclusion clauses in relation to refugee and subsidiary protection status.

The Article further makes it clear that in case of extradition or surrender to a third country other than the country of origin of an applicant Member States remain bound by the non-refoulement principle. To this effect, the Article implies that the competent authorities must always consider the risk of direct and indirect refoulement before acceding to any extradition request from a third country.

Article 9

The reference to former Article 23 (4) (i) is deleted so as to reflect changes in that Article.

The amendments also introduce additional requirements for the examination of applications.

Firstly, the Article establishes a mandatory sequence of the examination of applications. To this effect, it is specified that the question of whether the person qualifies for refugee status must always be examined in the first place.

The proposal also clarifies that country of origin information must be made accessible to the applicant or his/her legal advisor to the extent it has been used by the determining authority for the purpose of taking a decision on the application. This amendment is considered necessary in the light of evolving jurisprudence of the European Court of Justice with regard to the right of defence (to be heard) and the principle of equality of arms.

With a view to lay down necessary conditions for ensuring quality decision making at first instance, the Article requires Member States to make expertise and advice available to the personnel examining applications for international protection.

Article 10

Several additional requirements for a decision by the determining authorities are introduced in order to lay down necessary conditions for ensuring access to effective remedy in the context of a single examination procedure, and to ensure the confidentiality of a decision in cases involving gender and/or age based persecution. To this effect, the amendment firstly specifies that the determining authority must state reasons in fact and in law in a decision rejecting the application with respect to (i) refugee status or (ii) international protection status (i.e. both

⁴ See *inter alia* Ryabikin v. Russia, Application no. 8320/04, 19 June 2008, para 110

refugee status and subsidiary protection status). The amendment is necessary with a view to aligning the single procedure, as set out in this proposal, with the principle of effective judicial protection of rights guaranteed by Community Law.

Secondly, the proposal requires Member States to issue a separate decision to a dependent person where disclosure of personal circumstances to family members of that person can be against his/her interests.

Article 11

The amendments aim to facilitate access to independent advice and counselling by extending guarantees applicable to UNHCR partner organisations to all other Civil Society organisations providing legal advice and counselling to asylum seekers according to national legislation of Member States.

As the proposal provides for free legal assistance in first instance procedures, the reference to free legal assistance in sub-paragraph (e) is deleted.

Article 12

With a view to preserving the integrity of procedures, the proposal introduces an additional obligation for applicants to cooperate with the competent authorities in establishing the elements of their application for international protection. It is clarified that applicants for international protection must be searched by a person of a same sex.

Article 13

The amendments introduce a number of modifications with regard to arrangements for personal interviews.

Firstly, in line with the principle of a single determining authority set out in Article 4, it is underlined that an interview on the substance of an application for international protection must always be conducted by the personnel of the determining authority.

Secondly, with a view to align the Directive with evolving case law of the European Court of Justice regarding *the right to be heard*, the proposal reduces the current possibilities for Member States to omit a personal interview. In this respect, it is proposed to delete an optional provision allowing Member States to give the opportunity of a personal interview to dependent adults who have consented to lodging an application on his/her behalf, and to introduce a mandatory provision obliging Member States to interview dependent adults in such cases. In order to provide an applicant with a realistic opportunity to present all elements of his/her application in line with Article 4 (1) (2) of the Qualification Directive, the amendments further delete the grounds for omitting a personal interview falling under former Articles 12 (2) (b) and 12 (2) (c). The amendment implies that Member States are required to conduct a personal interview in all cases, including where the application is examined in an accelerated procedure, unless the applicant clearly qualifies for refugee status or is unfit or unable to be interviewed. The latter exception is qualified by a duty of the determining authority to consult a medical expert in order to establish whether the condition is temporary or permanent.

Article 14

A personal interview is an essential element of asylum procedures which, to a large extent, predetermines the outcome of an examination of the protection needs in accordance with the Qualification Directive. The amendments introduce several additional requirements for a personal interview aimed at creating necessary conditions for an applicant to present the elements of his/her application and, where applicable, taking into account gender, age and trauma considerations.

The proposal adjusts the requirements for a person who conducts a personal interview. To this effect, the amendments delete the term "sufficiently" in point (a) of paragraph 3 of former Article 13 thus making it clear that the personal interviews must always be conducted by competent personnel. The amendment is in line with Article 4 of this proposal which *inter alia* requires Member States to train the personnel of the determining authority regarding interview techniques.

It is also specified that the person conducting a personal interview must be competent to take account of gender considerations. This amendment is in line with the definition of applicants with special needs, and aims at making examination procedures gender sensitive. The phrase "insofar as it is possible to do so" are considered to be redundant as the paragraph addresses the issue of preparedness of a person to conduct a personal interview and not the actual situations which may occur when interviewing the applicants.

The amendments, in point (b), further require Member States to assign an interviewing person of the same sex if the applicant so requests. Same applies to the obligation of Member States to select an interpreter for a personal interview as specified in point (c). These requirements are introduced in view of enabling applicants to present elements of their application in cases involving gender based persecution as referred to in Article 9 (2) (f) of the Qualification Directive.

It is also specified that in a personal interview the communication must take place in a language which the applicant (i) understands and (ii) in which he/she is able to communicate clearly. The amendment therefore modifies the current standard which refers to a language which the applicant "may reasonably be supposed to understand." The amendment is considered to be crucial in order to ensure the correct and reliable assessment of the elements of applications for international protection according to Article 4 (1), (2) of the Qualification Directive.

The Article also specifies that the person who conducts an interview on the substance of an application for international protection must not wear a uniform. The amendment aims to address the specific situation of applicants in cases involving acts of past persecution or serious harm conducted by military or para-military personnel.

The reference to Article 12 (2) (b) is deleted so as to reflect amendments with respect to the possibility to omit a personal interview.

Article 15

This new Article complements the proposed framework for personal interviews by imposing minimum requirements for the content of personal interviews. In this respect, it makes clear that (i) the content of the interview must enable the determining authority to collect information needed to apply substantive grounds of international protection in accordance with the Qualification Directive, and (ii) that the applicant must be given the opportunity to

provide necessary clarifications with regard to the elements of his/her application or any inconsistencies which occur in his/her statements.

Article 16

This Article replaces former Article 14, and aims to ensure that the testimony of an applicant is documented correctly and adequately. To this effect, the Article describes the steps to be taken with a view to documenting the testimony of the applicant. It firstly requires Member States to make a transcript of every personal interview, and to give the opportunity to the applicant to comment on its content. In order to reflect the current practices based on former Article 14, the Article also refers to a written report of a personal interview.

The proposal also provides for the right of an applicant to access the transcript and, where applicable, the report of a personal interview before a decision at first instance has been taken.

Article 17

This new Article sets out the procedural standards relating to the use and status of medico-legal reports in procedures for granting international protection.

1. This paragraph sets out the general rule that an applicant for international protection must be entitled to request a medical examination in order to support his/her statements relating to past persecution or serious harm. It is also specified that the applicant must be given a reasonable time limit to submit a medical certificate to the determining authority.

2. The proposal imposes the positive obligation on Member States to ensure that a medical examination is carried out in cases where the determining authority suspects symptoms of post traumatic stress disorder.

3. This paragraph is introduced in order to ensure that expertise relevant to the application of this Article is made available for the personnel of the determining authority. In this respect, it gives Member States a margin of flexibility to proceed with relevant institutional arrangements which make it possible to examine and document the symptoms of torture.

4. This paragraph requires Member States to lay down further rules dealing with the issues related to the identification and documentation of symptoms of torture.

5. This paragraph addresses the role of medico-legal reports in the examination procedures. In this respect, it provides for two important clarifications. First, the paragraph makes it clear that medico-legal reports must be taken into account by the determining authorities when assessing the elements of the application according to Article 4 (2), (3) of the Qualification Directive. Another important implication of this paragraph is that the findings of the medical examination referred to in this Article must be taken into account when establishing the general credibility of the applicant.

Article 18

The amendments revise in several respects the current framework for exercising the right to legal assistance set out in former Article 15.

Paragraph 1 clarifies that applicants for international protection shall be given the opportunity to consult in an effective manner a legal advisor or counsellor at all stages of the procedure,

including at the appeal stage. This general rule may be implemented in different forms, including *inter alia* by granting free legal assistance as described in paragraphs 2.

In paragraph 2 the reference to "a negative decision by a determining authority" is deleted thus indicating that the right to free legal assistance is also applicable in procedures at first instance, subject to the limitations referred to in paragraph 3. Paragraph 2 further requires Member States to provide for rules dealing with the provision of free legal assistance in respectively first instance and appeal procedures. The paragraph aims to lay down the minimum requirements regarding the types of services to be covered by free legal assistance in Member States. To this effect, it is specified that free legal assistance in first instance procedures must include at least 2 elements, namely

- (i) provision of information on the asylum procedure in the light of the applicant's particular circumstances;
- (ii) explanation of the reasons in fact and in law in the case of a negative decision with regard to refugee status and/or subsidiary protection status.

Paragraph 3 aims to lay down grounds for limiting free legal assistance which apply in both first instance and appeal procedures. To this effect, points (a) and (d) of former paragraph 3 are deleted as they refer to appeal procedures in accordance with Chapter V only. At the same time, an additional subparagraph is inserted for the purpose of enabling Member States to apply a test before granting free legal assistance in appeal procedures before a court or tribunal. The proposed wording is in line with Article 47 of the Charter of Fundamental Rights.

As regards the appeal procedures, the amendments require Member States to provide free legal assistance at least in procedures before a court or tribunal hearing an appeal as the first instance appeal body. In order to accommodate administrative traditions of different Member States, the amendments refer to a possibility of contracting a non-governmental organisation for the purpose of providing free legal assistance to applicants in first instance and/or appeal procedures.

Article 19

The amendments aim to align the Directive's provisions on the scope of legal assistance with the principle of equality of arms and the right to effective judicial protection. To this effect, the Article firstly specifies that a legal advisor or counsellor representing an applicant must enjoy access to the applicant's file upon which a decision is or will be made. The amendment implies that this opportunity must be allowed in both first instance and appeal procedures. The Article further introduces additional guarantees with a view of ensuring sufficient procedural safeguards for applicants and their representatives in cases where Member States make an exception to the above entitlement for reasons of national security, security of other persons or organisations or the investigative interests in accordance with former Article 16 (1). In this respect, the proposal requires Member States (i) to allow the opportunity of enjoying access to the information in the applicant's file to a special representative (i.e. a legal advisor or other counsellor) and (ii) to make access to the information or sources in question available to the appeal authorities. These amendments are informed by evolving jurisprudence of respectively the European Court of Justice and the European Court of Human Rights regarding access to effective remedy.

The amendment also requires Member States to allow a legal advisor or other counsellor who represent an applicant to attend his/her personal interview. However, Member States remain free to provide for rules covering the presence of legal advisors or other counsellors at interviews, including the rules defining the rights and obligations of a legal advisor or counsellor during the interview.

Finally, in order to ensure consistency with the proposed amendments with regard to the guarantees for unaccompanied minors, it is clarified that the right of the competent authority to conduct a personal interview where a legal advisor or other counsellor is absent must be without prejudice to the special guarantees applicable to unaccompanied minors.

Article 20

This new Article spells out guarantees for applicants with special needs with a view of enabling them to present properly the elements of their application for international protection as required by Article 4 (1), (2) of the Qualification Directive. Essentially, the Article provides for four standards.

Firstly, it sets out the general obligation of Member States to design their asylum procedures in a context sensitive way thus taking account of gender, age or trauma implications. This general obligation is further specified with regard to survivors of torture. In this respect, the Article lays down two basic guarantees aimed at reducing negative consequences of trauma on the results of the examination of the protection needs of persons who have been subjected to torture. Thus, the amendments require Member States to give such applicants a necessary period of time and relevant support to prepare for a personal interview, and exempt them from accelerated procedures. The Article makes it clear that these guarantees must only apply to victims of torture or other acts of violence following an individual examination of their situation. In this respect, a reference to Article 21 of the Commission Proposal for the Reception Conditions Directive is inserted thus making sure that the survivors of torture identified in accordance with the Reception Conditions Directive are able to benefit from the guarantees set out in this Article.

Article 21

With a view to align the Directive with the UN Convention of the Rights of the Child, the amendments provide for several additional safeguards for unaccompanied minors. To this effect, it is clarified that the tasks of a representative of an unaccompanied minor cover both the duty to represent and the duty to assist. In line with the UN Child Rights Committee conclusions, the amendments also requires Member States to grant free legal assistance to unaccompanied minors throughout the procedure, including, where relevant, in the appeal stage. In this respect, it provides for mandatory presence of a representative and/or a legal advisor or other counsellor representing an unaccompanied minor in accordance with national legislation at a personal interview. The current provision allowing Member States to derogate from the duty to appoint a representative where the unaccompanied minor can avail himself, free of charge, of a legal advisor is deleted. It is likewise proposed to delete the stand still clause allowing Member States to refrain from appointing a representative where the unaccompanied minor is 16 years old or older. This amendment is in line with the proposed definition of a minor.

Given that unaccompanied minors may be unable, due to their age, to properly articulate and substantiate their request for international protection, the amendments also provide for

exempting them from (i) admissibility procedures based on the safe third country notion and (ii) accelerated procedures.

For reasons of consistency with the Commission proposal for the Reception Conditions Directive which maintains that unaccompanied minors must not be detained, the amendments also provide for exempting unaccompanied minors from border procedures.

Article 22

With a view to align this Directive with the Commission proposal for the Reception Conditions Directive, it is clarified that a possibility of speedy judicial review must be ensured in line with the Reception Conditions Directive. Same applies to grounds and conditions of detention.

Article 24

Several changes are introduced in the Directive's provisions dealing with implicit withdrawal or abandonment of the application. The amendments essentially aim at reducing the root causes of subsequent applications. To this effect, it is specified that Member States, in case of implicit withdrawal or abandonment of the application, must take a decision to discontinue the examination.

In order to ensure consistency with the proposed changes in the Directive's provisions dealing with subsequent applications, the reference to Articles 32 and 34 is deleted. In line with the principle of non-refoulement, it is also proposed to delete the optional provision which limits the applicant's right to request that his/her case be reopened by allowing Member States to set out a time limit which the applicant's case can no longer be re-opened.

With a view to align the Directive with Regulation (EC) No .../.... [the Dublin Regulation], the amendments make it clear that the notion of implicit withdrawal or abandonment of the application is not applicable where the person concerned is transferred to the responsible Member State in accordance with the Dublin Regulation.

Article 26

In order to ensure consistency with the Qualification Directive and in the light of proposed provisions relating to the single examination procedure, it is specified that Member States must not disclose information regarding individual applications for international protection to the alleged actor(s) of serious harm. Same applies to the requirement to refrain from obtaining information from the alleged actor(s) of serious harm.

Article 27

The amendments provide for several sets of changes in the current framework for examination procedures.

Firstly, for the purpose of improving efficiency of the first instance procedure, it is proposed to set out a time limit for taking a decision on an application for international protection. This amendment is *inter alia* informed by the ECJ findings that decisions on residence permits taken on the basis of Community Law require a procedural system which makes it possible to

take a decision within a reasonable period of time⁵. Based on the average duration of procedures at first instance in Member States, it is proposed to set out the 6 month limit for taking a decision on an application for international protection. For the purpose of ensuring an adequate and complete examination, the proposal specifies that the initial 6 month period may be extended for a further 6 months in cases involving complex issues of fact and law. This can also include cases of applicants with special needs in line with Article 20 (1). Member States also remain bound by the current obligation to inform the applicant of the delay.

The Article leaves it for Member States to determine in national legislation any consequences of non-compliance with the proposed time limits.

The Directive's provisions on prioritised and accelerated procedures are revised so as to ensure that an applicant is given a realistic opportunity to present and substantiate his/her claim, while the determining authority has sufficient time to assess the elements of the application in line with Article 4 (1), (2) and (3) of the Qualification Directive. In this respect, the amendments firstly make a distinction between the notion of *prioritised examination* and the notion of *accelerated procedures*. To this effect, it is specified that prioritised procedures may be applied to process certain categories of cases, such as well founded cases or cases of applicants with special needs. Member States are therefore given discretion to organise their examination procedures in a way that makes it possible to proceed quicker with certain types of applications. Given diverse practices in Member States, it is, however, considered unnecessary to set out an exhaustive list of such cases. Furthermore, this discretion should be subject to two limitations, namely (i) such a prioritised examination must not be based on considerations that the case in question may be unfounded and (ii) the basic principles and guarantees as well as the requirement of an adequate and complete examination must be fully respected.

Accelerated procedures are designed differently. Firstly, grounds of an accelerated examination are directly linked with the elements of the application as described in Article 4 (2) of the Qualification Directive. In this respect, an accelerated examination should be a logical consequence of serious deficiencies in the application for international protection. The deficiencies may relate to both the statements of the applicant and the documents he/she submits or is expected to submit in order to substantiate the claim. In such cases, it is justified and indeed reasonable to enable the determining authority to process applications in an accelerated procedure thus preserving the integrity of the asylum system and optimising efforts and resources for dealing with cases which raise more complex issues of facts and law. This approach is in line with UNHCR Executive Committee Conclusion No. 30.

The above considerations informed the revised list of cases which can be considered as manifestly unfounded and, consequently, fall under provisions allowing Member States to accelerate an examination procedure. These include cases where:

- (i) the applicant has raised issues that are not relevant to the examination of whether he/she qualifies for international protection;
- (ii) the applicant is from a safe country of origin;
- (ii) the applicant has intentionally misled the authorities with regard to his/her identity or nationality which could have had a negative impact on the decision;

⁵ Case C-327/02, paras 26, 27

(iii) there are valid reasons to consider that the applicant, in bad faith, has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality;

(iv) the applicant is making an application for the purpose of misusing the procedure in order to delay or frustrate the enforcement of a return decision;

(v) the application was made by an unmarried minor, after the application of the parents has been rejected and no new elements were raised.

Paragraph 7 essentially corresponds to former Article 28 (2).

With a view to ensure that the determining authority has sufficient time to conduct a meaningful assessment of the elements of the application in line with Article 4 (2), (3) of the Qualification Directive, the amendments require Member States to provide for reasonable time limits for taking a decision in accelerated procedures.

It is further underlined that the manner in which the applicant has entered into the territory, the location in which an application has been submitted or the mere fact that an applicant lacks documents or uses forged documents may not *per se* lead to an accelerated examination of the application.

Article 28

Article 28 corresponds to Article to former Article 28 (1).

Old Article 24

Article 24 of the current Directive is deleted so as to reflect amendments in Sections IV, V and VI.

Article 29

The amendments aim to align the inadmissibility grounds set out in former Article 25 with the right to asylum enshrined in Article 18 of the Charter of Fundamental Rights and the general principles of Community Law. In this respect, it should be recalled that refugee status is a right conferred to individuals by the Community *acquis*. For this reason, the current provisions allowing Member States to consider an application inadmissible where the applicant is allowed to remain in the Member State on some other grounds and consequently is granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC or is allowed to remain pending the outcome of a procedure for the determination of such a status are deleted.

Article 30

This Article aims to guarantee the right to be heard, in line with the general principles of Community Law, for applicants for international protection at the admissibility stage of the procedure. In this respect, the Article requires Member States to give the opportunity to the applicant to present his/her views with regard to the applicability of the inadmissibility grounds in his/her individual circumstances in the form of a personal interview.

Article 32

The amendments address both the material requirements for considering a third country as a safe third country and the rules dealing with an individual examination of particular circumstances of the applicant. An additional criterion is inserted in the list of material requirements set out in paragraph 1 of former Article 27 so as to reflect both forms of international protection provided for in the Qualification Directive. This implies that the competent authorities must refrain from applying the safe third country notion to a country in which an applicant may be subjected to serious harm as defined in Article 15 of the Qualification Directive. The amendment essentially incorporates the requirements of Article 18 of the Charter in the Community rules on safe third countries.

In line with the proposed arrangements on the admissibility interview and with a view to ensuring the right to be heard for concerned applicants, the amendments also clarify that national rules dealing with an individual examination of the safety of the third country for a particular applicant must allow the applicant to challenge both the safety of the country and the reasonableness for requesting international protection in that country.

Old Article 28

Paragraph 1 is moved to Article 28, whilst paragraph 2 is deleted so as to reflect the proposed amendments with regard to manifestly unfounded applications.

Old Article 29

This Article is deleted with a view of consolidating the Directive's provisions dealing with safe countries of origin. The proposal implies that the designation of third countries as safe countries of origin should be dealt with at national level in accordance with the substantive criteria set out in the Directive.

Article 33

The substantive criteria for the national designation of safe countries of origin are further clarified in this Article. In essence, the amendments aim to ensure that the application of the notion is subject to the same conditions in all Member States covered by the Directive.

Firstly, references to the minimum common list of safe countries of origin are deleted.

Secondly, the optional provision allowing Member States to apply the notion to part of a country is also deleted. The material requirements for the national designation must therefore be fulfilled with respect to the entire territory of a country.

It is further proposed to delete the stand still clauses which allow Member States to derogate from the material requirements in respect with a country or part of a country and/or to apply the notion to a specified group in that country or in part of that country.

With a view to ensuring reliable and up to date determinations, the proposal also requires Member States to review regularly the situation in countries designated as safe countries of origin. The reference to the European Asylum Support Office is inserted so as to reflect the proposed role of that office in the Common European Asylum System in accordance with the Commission proposal for establishing a European Asylum Support Office.

Article 34

The amendments firstly clarify that the applicant may challenge the presumption of safety of a country of origin in relation with both the refugee definition and the grounds of subsidiary protection. This clarification aims to ensure consistency with the Qualification Directive and is in line with the single procedure concept.

In view of the proposed deletion of the common list of safe countries of origin, the obligation of Member States to consider an application as unfounded where the country of origin of an applicant appears on the minimum common list of safe countries is also deleted.

Article 35

The Directive's framework for subsequent applications is re-designed with a view to reducing the root causes of this phenomenon, and enabling the competent authorities to deal effectively with repeated applications whilst ensuring necessary safeguards against *refoulement*. In this respect, it is worth recalling that causes of subsequent application essentially fall under the following categories:

- (a) international protection needs arising *sur place* in accordance with Article 5 of the Qualification Directive;
- (b) procedural deficiencies in the legislative framework preventing a person to properly articulate his/her protection needs where the application is examined for the first time;
- (c) where evidence is obtained or testimony is given at a latter stage, in particular in the case of survivors of torture;
- (d) legal reasons, for example, where a decision in relation with the first application was taken on the basis of an incorrect interpretation of Community Law;
- (e) subsequent applications by dependents in cases where the first application was submitted on their behalf;
- (g) where applicants abuse the asylum procedure with a view to *inter alia* delaying or frustrating the enforcement of a return decision.

The proposal firstly aims to address the root causes of subsequent applications as described in points (b) and (c) above. The philosophy behind the amendments is that all necessary efforts should be taken to ensure a rigorous examination of the protection needs where a person lodges an application for the first time.

To this effect, the proposal requires Member States to examine further representations or the elements of the subsequent application in the framework of the examination of the previous application, including, where relevant, in appeal procedures. In this respect, it is further clarified that a preliminary examination procedure is applicable where a person makes a subsequent application after a final decision has been taken on the previous application or his /her application has been explicitly withdrawn.

For reasons of legal clarity, it is underlined that a preliminary examination procedure with regard to subsequent applications may result either in a new substantive examination of the subsequent application or in declaring the identical application inadmissible in accordance with Article 29 (2) (d) of this proposal.

The amendments introduce two important clarifications with regard to the applicability of a preliminary examination procedure, namely Member States may apply this procedure (i) where the previous application was explicitly withdrawn or (ii) after a final decision had been taken on the previous application.

In order to ensure consistency with the Qualification Directive it is also clarified that the new elements must be assessed in the light of both the refugee definition and the grounds of subsidiary protection.

With a view to preventing abuse of asylum procedures referred to in point (g) above, the last set of amendments introduces procedural devices aimed at dealing with multiple applications for international protection lodged in the same Member State. To this effect, the proposal allows Member States to make an exception to the right to remain in the territory. Member States are also given a margin of flexibility to apply a preliminary examination procedure or examine a subsequent application in an accelerated procedure.

Old Article 33

The situations described in former Article 33 are essentially addressed in Article 24 (1) (a) and (b) of this proposal. For this reason and due to lack of added value, former Article 33 is deleted.

Article 36

Two changes are proposed with regard to the procedural rules applicable in a preliminary examination procedure. Firstly, the optional provision allowing Member States to require submission of the new information within a time limit is deleted to avoid possible tension with the principle of non-refoulement. Secondly, it is clarified that the optional provision allowing Member States to omit a personal interview on the sole basis of written submissions must not apply to cases of dependent adults who have previously consented to the lodging of application on his/her behalf.

Article 37

Several amendments are introduced with a view to harmonising national arrangements on border procedures. The current framework provides for two types of border procedures, namely (i) the procedures in accordance with the basic principles and guarantees and (ii) the procedures derogating from the basic principles and guarantees. The amendments aim at ensuring the availability of basic principles and guarantees for all applicants for international protection irrespective of where the application is lodged. To this effect, the amendments specify that the border procedures may be employed in order to decide at the border or transit zones on the admissibility of an application for international protection and/or on the substance of an application in cases where a Member State applies an accelerated procedure. This implies that admissible cases which do not fall under the notion of manifestly unfounded applications should be processed in in-land procedures.

In light of the above, the stand still clauses allowing Member States to maintain border procedures which derogate from the basic principles and guarantees are deleted.

It is also specified that Member States may apply border procedures to applicants accommodated at locations in proximity to the border or transit zone in the case of arrivals

involving a large number of third country nationals or stateless persons only. In this respect, the reference to "particular types of arrivals" is deleted.

Article 38

This old Article 36 is amended. In particular, the European safe third country concept is revisited to the extent that the common list is no longer foreseen.

Article 39

The phrase "in case of cessation in accordance with Article 11 (a) to (d) of Directive 2004/83/EC" is deleted" so as to enable the person concerned to bring forward his/her views with regard to the applicability of the cessation clauses in his/her particular circumstances in line with the case law of the European Court of Justice regarding the right to be heard.

Article 41

The amendments aim to incorporate the latest developments in the case law of the European Court of Justice as regards the principle of effective judicial protection, and to align the Directive's provisions on appeals procedures with the notion of a single asylum procedure. To this effect, the amendments firstly entitle an applicant to lodge an appeal against a negative decision with regard to (i) the refugee definition or (ii) both the refugee definition and the grounds of subsidiary protection.

In order to ensure consistency with proposed amendments deleting the European safe third country and special border procedures notions, references to old Article 36 and old Article 35 (2) are deleted.

Based on established case law of the European Court of Human Rights, the proposal underlines the principle of a full and *ex nunc* examination of appeals. In particular, the amendments explicitly provide for review of both facts and points of law at least in appeal procedures before a court or tribunal of first instance. This provision is in line with respective case law of the European Court of Justice and the European Court of Human Rights.

With a view to ensure the accessibility of a remedy, Member States are required to ensure that the time limits for giving notice of appeal are reasonable and do not render access to a remedy impossible or excessively difficult.

The amendments set out the general principle of automatic suspensive effect of appeals. The proposal further stipulates that where Member States opt for exceptions in the case of a decision taken in an accelerated procedure or of a decision to consider an identical application inadmissible, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State. No expulsion may take place pending the outcome of that procedure.

Article 44

This article requires Member States to appoint a national contact with a view to facilitating cooperation and an exchange of information relevant to the implementation of this Directive.

Article 45

To ensure consistency with the Qualification Directive, the evaluation and reporting mechanism is adjusted. In this respect, it is specified that the Commission reports to the European Parliament and to the Council every 5 years.

Article 46

It is proposed to introduce an obligation for a correlation table. The Commission systematically proposes such a table.

Article 47

This Article lays down the transitional clauses. It is proposed that Member States will apply the amended Directive to applications submitted and procedures for the withdrawal of international protection status initiated after the dates by which Member States will be obliged to bring into force the transposition measures. It is also specified that applications for international protection submitted before those dates must be dealt with in accordance with Directive 2005/85/EC. Same applies to procedures for the withdrawal of refugee status.

Article 48

This is a standard article specifying the result of adopting this Directive.

Old Annex III

Former Annex III is deleted to ensure consistency with the proposed notion of an applicant for international protection and the rules dealing with the issue of suspensive effect of appeals.