COMMISSION OF THE EUROPEAN COMMUNITIES

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ANNEXE

2008/0243 (COD)

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

(Recast)

{SEC(2008) 2962}
{SEC(2008) 2963}

Detailed Explanation of the Proposal

For reasons of clarity, the form of the Regulation has been substantially amended, i.e. titles have been added to the Articles, new Chapters and Sections have been created, some Articles/paragraphs have been grouped differently. These modifications will be explained below in detail.

CHAPTER I: Subject matter and definitions

Article 1: *Subject-matter*

"Application for asylum" is replaced by "application for international protection" and a reference to "stateless person" is added. These changes are in line with the terminology used in Council Directive 2004/83/EC 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).[1] They are reflected in all relevant provisions of the proposal.

Article 2: *Definitions*

(a) The definition of "third-country national" is amended in line with Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).[2]

(b) The definition of "application for asylum" (previous letter (c)) is amended in line with the Qualification Directive in order to ensure that the Dublin Regulation also applies to applicants for subsidiary protection. This amendment is reflected in several provisions of the proposal. Previous letter (b) defining the "Geneva Convention" is deleted, in line with rules on legislative drafting, since this reference does not appear any longer in the text of the Regulation.

(c) The definition of "applicant"/"asylum seeker" is amended to be consistent with the Qualification Directive. This amendment is reflected in several provisions of the proposal.

(d) The definition of "examination of an asylum application" is amended to replace the reference to "national law" with a reference to the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter: the Asylum Procedures Directive),[3] which entered into force after the adoption of the Dublin Regulation. It is also clarified that the examination of an application implies the assessment of whether the applicant qualifies as a refugee or a beneficiary for subsidiary protection in accordance with the Qualification Directive.

(e) The definition of "withdrawal of the asylum application" is amended to be consistent with the EU acquis, namely with the Asylum Procedures Directive.

(f) The word "refugee" is replaced with "person granted international protection" to ensure that the Dublin Regulation also applies to beneficiaries of subsidiary protection in accordance with the Qualification Directive.

(g) A "minor" is defined as a third-country national or a stateless person below the age of eighteen years. This new definition is necessary as the Regulation also applies to applicants who are minors. The definition is based on the 1989 UN Convention on the Rights of the Child.

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1 OJ L 304, 30.9.2004, p.12.
2 OJ L 105, 13.4.2006, p.1.
3 OJ L 326, 13.12.2005, p.13.

(h) The definition of "unaccompanied minors" is made consistent with the definition used in the rest of the asylum and immigration *acquis*, by deleting the condition for the unaccompanied minors to be "unmarried".

(i) The definition of family members in extended in three regards, in view of increasing the level of protection afforded to children falling under the Dublin procedure: Firstly, it removes the condition for the minors referred to in point (ii) to be dependent. By doing that, it enlarges the scope of the application of the clause to minors who are not necessarily dependent on their parents from an economic point of view, but who depend more in an emotional way. Secondly, it foresees the possibility for the married minor children to be "family members" where it is in their best interests to reside with the applicant. Such a condition aims to respond in particular to situations where the married child is involved in a forced marriage or when he/she is separated from the spouse. Thirdly, it includes the minor unmarried siblings of the applicant, when the later is a minor and unmarried. The term "unmarried" is subjected to the same caveat that minor married applicants or their minor siblings can be considered as family members when it is in the best interests of one or more of them to reside together.

(k) The definition of a "visa" is kept unchanged but account will have to be taken of the results of the ongoing negotiations on this issue in the context of the Commission's proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas.[4]

(l) A new definition of the "risk of absconding" is inserted. This is needed in order to clearly identify the circumstances under which persons under the Dublin procedure may be detained (in accordance with the new Article 27 on detention). The definition is in line with the one used in the recently agreed Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter: the Return Directive).[5]

CHAPTER II: General principles and safeguards

The word "safeguards" is added in the title of this chapter, to better reflect its new content, which includes new Articles on safeguards.

Article 3: *Access to the procedure for examining an application for international protection*

1. Several linguistic changes are introduced to better reflect the idea behind this paragraph (i.e. the fact that Member States shall ensure that any application for international protection is examined by one Member State). The reference to "transit zones" is added for consistency with the scope of the Asylum Procedures Directive and it is also in line with the European Court of Human Rights case of *Ammur.*[6]

2. The previous paragraph 2 is moved to Chapter IV. The proposed new paragraph comes from the previous Article 13. It is proposed to be inserted here for reasons of legal clarity, in order to prevent any further difficulties of interpretation such as those which arose during the expert discussions within the informal Dublin Contact Committee meetings. The Commission considers that Article 13 of the existing Regulation does not imply an element of a procedure between two Member States, as it is the case for "take charge" or "take back", but it implies only one Member State who is "held" responsible because no other Member State can be

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4 COM(2006)403.

5 Following political acceptance by Council on 5 June 2008 and formal approval of the Directive by the European Parliament on 18 June 2008, formal adoption and entry into force of the Directive can be expected at the end of 2008 or the beginning of 2009.

6 *Ammur v France* application no. 19776/92, 25.6.1996

designated by virtue of the criteria laid down in Chapter III. Thus, previous Article 13 implies neither a situation of "taking charge" – but rather of designation of responsibility – nor a situation of "taking back" as there has only ever been one application.

3. This paragraph is amended in order to be put in conformity with the Asylum Procedures Directive which contains detailed rules with regard to the application of the "safe-third country" concept.

Article 4: *Right to information*

This Article expands and modifies the content of paragraph 4 of former Article 3.

1. This paragraph specifies that information shall be provided by the competent authorities of the Member States in a timely manner upon the lodging of an application for international protection and specifies the content required of such information. Information should include the main elements of the Dublin Regulation, in order to make applicants fully aware of the responsibility determination procedure and of their rights.

2. This paragraph clarifies that the information has to be provided in writing in a language that the applicant is reasonably supposed to understand and, where necessary for the proper understanding of the applicant, Member States shall provide it also orally. Finally, in order to take into account the special needs of minors, it is required that the information be provided in an age-appropriate manner.

3. It is proposed that a common leaflet about the Dublin procedure and the applicants' rights within it be adopted for use by all Member States, so as to ensure that all applicants in the Member States will receive similarly accessible and appropriate information.

Article 5: *Personal interview*

This new Article lays down the obligation to conduct a personal Dublin interview, which is seen as an important means of ensuring the efficient and proper operation of the Dublin procedure as well as for protecting the rights of the persons concerned.

1. This paragraph lays down the obligation for the Member State carrying out the process of identifying the Member State responsible to organise a personal interview with the asylum-seekers subject to the Dublin procedure.

2. This paragraph specifies the purpose of the personal interview. The Member State carrying out the responsibility determination procedure will have the opportunity to gather all information necessary for the correct and efficient identification of the Member State responsible. Applicants will be adequately informed about the Dublin procedure when there is a need for doing so also verbally, in accordance with Article 4(2).

3. In order for the interview to be effective, it is to be organised as soon as possible after the lodging of an application and in all cases before any decision to transfer an applicant to the responsible Member State is taken.

Paragraphs 4, 5 and 6 lay down specific procedural guarantees Member States have to respect when organising a personal Dublin interview.

Article 6: *Guarantees for minors*

1. This paragraph explicitly lays down that the principle of the best interests of the child shall be adhered to throughout the Dublin procedure.

2. This paragraph introduces the necessary procedural guarantees for unaccompanied minors, namely the right to be represented and/or assisted during the Dublin procedure. The wording

is based on Article 17 (guarantees for unaccompanied minors) of the Asylum Procedures Directive.

3. This paragraph lays down the principle of close cooperation between Member States in assessing the best interests of the child in the context of a Dublin procedure and enumerates some of the main factors Member States have to consider when undertaking this assessment, based in particular on "General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin" of the UN Committee on the Rights of the Child and on Article 24.1 of the EU Charter on Fundamental Rights. For reasons of clarity, although the family reunification possibilities appear in Article 8 (former Article 6) as a criterion for identifying the Member State responsible for examining the application of an unaccompanied minor, and should in principle correspond to the best interests of the child, they are mentioned in this context too.

4. Given that in most cases the best interests of an unaccompanied minor would point to reunifying him/her with his/her family or other relatives, this provision introduces an obligation for Member States to establish procedures for tracing of family members or other relatives present in Member States and to start to trace them as soon as possible after lodging an application for international protection.

5. This paragraph lays down the obligation for Member States to ensure that the authorities applying this Regulation receive appropriate training in the special needs of this category of applicants.

CHAPTER III: Criteria for determining the Member State responsible

The previous title of this Chapter "Hierarchy of Criteria" has, for reasons of clarity, been changed into "Criteria for determining the Member State responsible".

Article 7: *Hierarchy of criteria*

This Article corresponds to and amends former Article 5. In order to ensure respect for the principle of family unity and of the best interests of the child, it is proposed in paragraph 3 to introduce an exception from the general principle of sending back an applicant to the Member State where he/she lodged a previous application for international protection, in the case where one of the family unity criteria or the criteria regarding unaccompanied minors can be applied at the time of the most recent application. This aims to ensure that Member States duly take into account possible new elements regarding the family situation of the applicant concerned, including elements unknown at the moment of the first application for international protection, in compliance with the international law (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the United Nations Convention on the Rights of the Child). However, in order to avoid situations where the merits of an application for international protection is examined more than once, it is proposed not to apply this principle when the Member State where a previous application was lodged has already taken a first such decision on the merits.

Article 8: *Unaccompanied minors*

This Article brings together and modifies former Article 6 and paragraph 3 and 5 of former Article 15.

1. The rule in paragraph 1 of former Article 6 is kept unchanged, except for one terminology adjustment.

2. This paragraph is based on paragraph 3 of former Article 15. Apart from editorial and terminology changes, it is proposed to clarify that the Member State responsible is the one on

whose territory the relative is located, provided that this is in the best interests of the unaccompanied minor. The words "legally present" have been added, for consistency with the previous paragraph. Moreover, the words "if possible" have been deleted in order to make this provision a fully binding criterion for determining responsibility.

3. This paragraph adds a new criterion for the situation where family members or relatives are legally present in more than one Member State, in which case the Member State responsible should be the one corresponding to the best interests of the child.

4. This paragraph is based on paragraph 2 of former Article 6, which is modified in two respects: firstly, it is clarified that the Member State responsible is the one where the minor lodged his/her most recent application; secondly, it is clarified that this identification of responsibility has to be in the child's best interests.

5. This paragraph is based on paragraph 5 of former Article 15, which it modifies. It concerns the adoption of the conditions and procedures for implementing paragraphs 2 and 3 in accordance with the regulatory procedure with scrutiny. Rules on the implementation of paragraph 5 of former Article 15 have been already adopted under comitology (the regulatory procedure) and are part of the Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003[7] (hereafter: the Dublin Implementing Regulation). In the future, there might be a need to modify these implementing rules. Moreover, implementing rules may also be needed for the implementation of the new paragraph 3. It is therefore proposed to keep the reference to comitology. However, the procedure to be used in the future for adopting implementing rules on this subject will no longer be the regulatory procedure but the regulatory procedure with scrutiny. This modification has been decided in the Regulation (EC) No 1103/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny,[8] and it is therefore taken on board in the current proposal. Finally, the reference to the conciliation mechanisms is deleted, since a new conciliation mechanism for all matters of disputes on the application of this Regulation (including therefore on the application of this provision) is proposed in Article 35.

Article 9: *Family members who are persons granted international protection*

This Article corresponds to former Article 7. By changing the word "refugee" to "person granted international protection", this Article enlarges the scope of the family reunification criterion to include beneficiaries of subsidiary protection, as also explained under Article 2(f). In line with Article 17(1) of the Dublin Implementing Regulation, it is proposed to expressly specify that the persons concerned must give their approval in writing. Several other terminology adaptations are made.

Article 10: *Family members who are applicants for international protection*

This Article corresponds to former Article 8. In line with Article 17(1) of the Dublin Implementing Regulation, it is proposed to expressly specify that the persons concerned must give their approval in writing. Several terminology adaptations and one linguistic correction are made.

Article 11: *Dependent relatives*

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[7] OJ L 222, 5.9.2003, p.3.

[8] OJ L 304, 14.11.2008, p.80.

This Article corresponds to paragraphs 2 and 5 of former Article 15, which it modifies.

1. This paragraph is modified in order to lay down an explicit criterion for determining responsibility in case of the existence of a dependency link between an applicant and his/her relative. Some of the modifications are based on the wording of Article 11(1) of the Dublin Implementing Regulation. It is proposed to add the condition that the written consent of the persons concerned must be obtained, as is the case for the criteria related to family reunification set out in Articles 9 and 10. Finally, the words "if possible" have been deleted in order to make this provision a fully binding criterion for determining responsibility.

2. As in the case of paragraph 5 of Article 8, this paragraph concerns the adoption of the conditions and procedures for implementing paragraph 1 in accordance with the regulatory procedure with scrutiny. Rules on the implementation of paragraph 5 of former Article 15 have been already adopted under comitology (the regulatory procedure) and are part of the Dublin Implementing Regulation. In the future, there might be a need to modify these implementing rules. It is therefore proposed to keep the reference to comitology. However, as in the case of paragraph 5 of Article 8, the procedure to be used in the future for adopting implementing rules on this subject will no longer be the regulatory procedure but the regulatory procedure with scrutiny.

Article 12: *Family procedures*

This Article corresponds to former Article 14 to which terminology adaptations are made.

Article 13: *Issuance of residence documents or visas*

This Article corresponds to former Article 9 to which terminology adaptations are made.

Article 14: *Entry and/or stay*

This Article corresponds to former Article 10 to which terminology adaptations and one linguistic correction are made.

Article 15: *Visa waived entry*

This Article corresponds to former Article 11 to which terminology adaptations are made.

Article 16: *Application in an international transit area of an airport*

This Article corresponds to former Article 12. The title "Application in an international transit area of an airport" is added, and terminology is adapted.

CHAPTER IV: Discretionary clauses

The previous title of this Chapter ("Humanitarian Clause") is replaced with the title "Discretionary clauses". For reasons of clarity, this Chapter brings together, in one Article, paragraph 2 of former Article 3 (what was called the "sovereignty clause") and paragraph 1 of former Article 15 (what was called the "humanitarian clause") together with some of its implementing rules, as both are provisions derogating from the binding criteria laid down in Chapter III.

Article 17: *Discretionary clauses*

This Article makes it clear that while the "sovereignty clause" (first paragraph) implies an unilateral decision of a Member State (with the consent of the applicant) and should be used mostly for humanitarian and compassionate cases where an applicant cannot be sent to the responsible Member State, the "humanitarian clause" always implies a procedure involving two Member States and it concerns the need to bring together members of the extended family.

1. This paragraph corresponds to paragraph 2 of former Article 3. It first proposes to reintroduce the condition of the applicant's consent for the application of the clause, a condition which figured in the Dublin Convention. Although it can generally be assumed that, by the very fact of applying for international protection in a certain Member State, an applicant agrees to that State examining his/her application, the strict application of the designation criteria might in some instances be preferred by an applicant, notably when this would allow him/her to rejoin family members in another Member States. The reintroduction of the consent is seen as an important legal safeguard for applicants for international protection and aims to ensure that the binding criteria of the Regulation related to family unity will always be applied, if the persons concerned so desire.

Secondly, without limiting the circumstances under which this clause can be applied, it is explicitly stated that Member States should use it in particular for humanitarian and compassionate reasons, as this appears to correspond to the rationale of this provision.

Finally, the Member State making use of this discretionary power shall inform the other Member States about this fact in accordance with Regulation […./…/EC] [concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Regulation]. This information is necessary in order to avoid procedures relating to a single application being carried out simultaneously in several Member States. Using the EURODAC database to communicate this information will ensure that all Member States (not only the concerned ones) are adequately informed. It is therefore no longer necessary to spell out the precise Member State or States which have to be informed.

2. This paragraph corresponds to paragraph 1 of former Article 15, including some of its implementing rules. It is firstly proposed to clarify which Member States can make a request on humanitarian grounds, based on the wording used in the first paragraph of Article 13 of the Dublin Implementing Regulation.

Secondly, the condition that relatives have to be dependent is deleted, so as to widen the scope for the possibility of family reunification, to include for instance reunification of an adult applicant with his/her parents or with his/her major siblings. As reunification of dependent relatives is made binding (see Articles 8 and 11), this clause remains necessary in order to cover all other situations that can arise in practice, in the interests of both applicants and Member States.

Thirdly, in line with Article 17(1) of the Dublin Implementing Regulation, it is proposed to specify that the persons concerned must give their approval in writing.

Finally, regarding the time-limits for applying such a clause, it is made explicit that there are no time limits for submitting such requests, given the unpredictable nature of the circumstances under discussion. However, a time-limit for replying to such requests is established, in order to provide certainty to the requesting Member State and to the applicant about the outcome of the procedure. The two months proposed deadline is identical to the one existing for replies to take charge requests based on the binding responsibility determination criteria. An obligation to motivate a refusal is also established. As in the previous paragraph, the Member State accepting a request shall inform the other Member States about this fact by using the EURODAC database.

CHAPTER V: Obligations of the Member State responsible

Previous Chapter V "Taking charge and taking back" is split into two Chapters (V and VI) for reasons of clarity. Chapter V, as indicated in the proposed title, deals with the obligations of the Member State responsible, whereas Chapter VI concerns the procedures for taking charge and taking back.

Chapter V corresponds to former Article 16, which it modifies.

Article 18: *Obligations of the Member State responsible*

This corresponds to the first paragraph of former Article 16. As letter b) created confusion about the way in which it has to be interpreted, i.e. if the obligation to complete the examination of the application applies both in case of take charge and in case of take back, it is proposed to delete it as a separate letter but to include its content in a more comprehensive new paragraph 2. The new paragraph 2 sets out the general obligation of the Member State responsible which has to either take charge or take back an applicant, to ensure that, according to the circumstances, it examines or it completes an examination of the merits of the application. This is an important element which aims to guarantee that, upon transfer to the responsible Member State, applicants fully benefit from access to the asylum procedure. In case Member States decided to discontinue the examination of an application, it is specified that such decisions shall be revoked and Member States shall ensure completion of the examination of the application. Moreover, in paragraphs c) and e) it is clarified, in the light of paragraph 2 of former Article 16, what "without permission" means, and it is spell out the fact that the person could have made a second application for international protection in those circumstances as well. Finally, several terminology and numbering adjustments are made.

Article 19: *Cessation of responsibilities*

This Article corresponds to the second, third and fourth paragraphs of former Article 16.

1. This paragraph corresponds to the second paragraph of former Article 16 and is kept unchanged.

2. This paragraph corresponds to the third paragraph of former Article 16. It clarifies that it is the requested Member State that has to deliver evidence that the person concerned by the request has left the territory of the Member States. This paragraph also clarifies that an application lodged after an absence has to be regarded as a new application giving rise to a new determination of the Member State responsible.

3. This paragraph corresponds to the fourth paragraph of former Article 16. As in the previous paragraph, it is made clear that it is the requested Member State that has to deliver evidence that the person concerned by the request has been expelled. Several expressions such as "state in which he may lawfully travel" and "adopted and actually implemented" are deleted as they created difficulties of interpretation for Member States and replaced with terminology used in the Return Directive. By doing so, it is made clear that the person concerned has to have actually left the territory of the Member States, the mere delivery of a request to leave the country not being sufficient. Finally, it is also made clear that an application lodged after an absence has to be regarded as a new application giving rise to a new determination of responsibility.

CHAPTER VI: Procedures for taking charge and taking back

This Chapter regroups and restructures all relevant procedures linked with the identification of the responsible Member State and with the transfer once the responsibility has been established. Procedural safeguards and the issue of detention in view of a transfer have been included as well. For reasons of clarity it is proposed to structure this Chapter in six different sections as explained below.

Section I: Start of the procedure

Article 20

This Article corresponds to former Article 4, which was part of the original Chapter on General Principles. Besides some terminology adaptations, substantive modifications are made in paragraphs 3 and 5.

3. In order to guarantee that the best interests of the child always prevail, an explicit reference is made to this principle. This is in conformity with the other provisions of the Dublin Regulation on unaccompanied minors, which explicitly mention the principle of the best interests of the child.

5. The same clarifications as in Article 19 on cessation of responsibility are also made in this context. The Member State which bears the burden of proof is the requested Member State and an application lodged after an absence has to be seen as a new application giving rise to a new responsibility determination procedure.

Section II: Procedures for take charge requests

For reasons of clarity, it has been considered necessary to present the two procedural steps of a take charge and of a take back request (submitting and replying to a request) in two different sections (II and III), given in particular that the time-limits applicable to them are different. As the remaining aspects of both procedures are almost identical, they have been presented together in the remaining sections which are common.

Article 21: *Submitting a take charge request*

This Article corresponds to former Article 17, to which terminology and numbering adjustments are made.

Article 22: *Replying to a take charge request*

This Article corresponds to former Article 18, to which terminology and numbering adjustments are made.

Section III: Procedures for take back requests

As indicated above, a new Section III dealing with the initial steps of the procedure for take back requests is proposed.

Article 23: *Submitting a take back request*

This Article aims to add time-limits for submitting a take back request, where appropriate. The structure follows the one used in Article 21 (submitting a take charge request).

1. This paragraph corresponds to the introductory wording of paragraph 1 of former Article 20, which is clarified and put in line with the modifications made in paragraph 1 of Article 18 (former Article 16).

2. A time-limit is established for submitting a take back request, in case of a subsequent application for international protection made by the applicant in the requesting Member State. The time-limit is two months when the request is based on a positive EURODAC "hit" ("category 1 against category 1 hit", i.e. the fingerprints of an applicant match against the stored fingerprints of an applicant) and three months when it is based on other grounds. In the first case, a two months deadline is considered reasonable, given that the requesting Member State should in principle quickly find out in EURODAC where the applicant previously applied for international protection and, as a consequence, submit a take back request to that Member State within the two months period. Moreover, it is considered that the two months deadline is long enough to accommodate also those situations which could arise in practice where, because of the poor quality of fingerprints, the requesting Member State might need to undertake additional checks. However, when the request is not based on a EURODAC hit, the

same deadline as for a take charge request (i.e. three months) should apply and start to run from the moment of the application. In this case, the requesting Member State would normally need more time to identify the Member State potentially responsible with a view to submitting a take back request.

3. A time-limit is established also for the situation where there is no subsequent application for international protection, the person staying in the territory of the requesting Member State without permission. It is proposed that, in case of a request based on a EURODAC hit ("category 3 against category 1 hit", i.e. the fingerprints of an alien found illegally present within a Member State match against the stored fingerprints of an applicant), the time-limit should be two months, as in the previous paragraph. Since this discretionary search in EURODAC should in principle allow a Member State to quickly indentify the Member State where the person previously applied for asylum, it is reasonable to fix the same time-limit as in the previous paragraph. A deadline is proposed also for the case where the request is based on other evidence than the EURODAC hit, namely three months from the moment where a Member State becomes aware that another Member State may be responsible for the person concerned.

4. As in the case of a take charge request, it is necessary to establish a rule for the case where the given time-limits are not respected. In this case, responsibility shall lie with the Member State in which the application was subsequently lodged or on whose territory the person is staying without a residence document.

5. This paragraph corresponds to paragraph 1(a) of former Article 20 which it modifies to make it consistent with the wording used for a take charge request (paragraph 3 of former Article 17, current Article 21). The final part regarding the possibility to use the procedure referred to in Article 40(2) to adopt *inter alia* rules of proof and evidence, corresponds to paragraph 3 of former Article 20. These rules have already been adopted under comitology (the regulatory procedure) and are part of the Dublin Implementing Regulation. In the future, there might be a need to modify these implementing rules. It is therefore proposed for reasons of legal certainty to keep the reference to comitology.

Article 24: *Replying to a take back request*

This Article corresponds to letters b) and c) of former Article 20. The modifications reflect the wording used for take charge requests in paragraphs 1 and 7 of former Article 18 (current Article 22), which is clearer and therefore has to be used in this context too.

The content of letters d) and e) and of paragraphs 2) and 3) of former Article 20 has been included under the relevant Articles.

Section IV: Procedural safeguards

This section contains procedural safeguards which are applicable both in case of a take charge and of a take back procedure, and have therefore been put together.

Article 25: *Notification of a transfer decision*

This Article corresponds to paragraph 2 of former Article 19 and to letter e) of former Article 20. Besides terminology adaptations, several important procedural safeguards are included in the text, which are essential pre-conditions and a necessary complement to the right to an effective remedy set in Article 26.

1. It is required that the person concerned by a transfer decision is notified in writing, in a language that he/she is reasonably supposed to understand and within no more than fifteen

working days from the receipt of the reply from the requested Member State. The reference to fifteen working days is aimed at ensuring that procedures are not unduly prolonged.

2. The content that the transfer decisions should include is extended in order to incorporate a description of the main steps in the procedure leading to the decision, information about legal remedies and on persons or entities that could provide specific legal assistance and/or representation to the person concerned. These requirements seem to be already provided for in the practice of some Member States, and it is proposed that they be generalised. Moreover, in order to ensure that the right to seek a remedy is effective, it is stated that the time-limits for transfers should be set in such a way as to allow the person concerned a reasonable time-limit for seeking a remedy. Finally, the references to appeal and review are deleted from these paragraphs and inserted, with modifications, in a new Article 26.

Article 26: *Remedies*

This new Article on remedies expands and modifies the last part of the second paragraph of former Article 19 and the last part of letter e) of former Article 20. Given the considerable number of modifications proposed, it has been considered preferable to create a new Article.

1. The right to an effective judicial remedy against a transfer decision is established. In line with Community law principles[9], it is ensured that appeal or review before a judicial body will involve an examination of the case both in fact and in law.

2. The principle of a reasonable period of time within which the person concerned by a transfer decision may exercise his/her right to seek a remedy is provided for. This paragraph is to be read together with the second paragraph of Article 25 which obliges Member States to fix effective time-limits for the carrying out of transfers.

3. It is proposed that the competent authorities examine ex-officio the necessity of suspending the enforcement of a transfer decision (i.e. allowing the person concerned to remain on the territory pending the outcome of his/her appeal or review). However, to avoid negative consequences for the smooth running of the Dublin procedure, the procedures for examining the suspensive effect should be prompt, and therefore a maximum time-limit of seven working days is proposed.

4. For this procedure to be effective, the person concerned has to remain on the territory until a decision on the necessity to suspend the transfer is taken. A negative decision has to be reasoned.

Paragraphs 5 and 6 lay down Member States' obligation to ensure access to legal assistance and/or representation, and, where necessary, to linguistic assistance. The granting of free legal assistance and/or representation is subject to the same conditions as those laid down in the Asylum Procedures Directive.

Section V: Detention for the purpose of transfer

Article 27: *Detention*

In order to ensure that detention of persons during the Dublin procedure is not arbitrary, a new Article on this issue is inserted in the proposal.

1. This paragraph refers to the general principle on detention laid down in the Asylum Procedures Directive, namely that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection.

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[9] Wilson v Ordre des avocats du barreau de Luxembourg, C-506/04 judgement of 19 September 2006

2. This paragraph aims to ensure that besides the four grounds included in Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers] under which detention could be applied to all asylum-seekers, Member States may keep in detention a person who is subject to a Dublin transfer decision only in exceptional cases when there is a significant risk of him/her absconding. Moreover, detention can only be lawful if i) it is in line with the principle of necessity as stated in the Geneva Convention relating to the Status of Refugees of 28 July 1951, and developed by the case-law of the European Court of Human Rights and ii) if other less coercive measures were not possible under the specific case. This paragraph finally requires that detention should be justified in the light of the individual circumstances of the case.

3. This paragraph lays down the obligation for Member States to take into consideration alternatives to detention while assessing the application of less coercive measures in the individual case.

4. The temporal scope of detention is limited, it being considered that only once the person is waiting to be transferred to the responsible Member State there might be a risk of him/her trying to avoid the transfer.

Paragraphs 5 to 9 provide for procedural rules and guarantees concerning detained persons under the Dublin procedure, similar to the ones foreseen in Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers].

5. This paragraph ensures that detention shall be for the shortest period possible. The duration of detention shall not exceed the time needed for administrative authorities to fulfil the relevant procedural requirements for carrying out a transfer. In any case, delays in the required administrative procedure, if they cannot be attributed to the person concerned, should not justify the prolongation of detention. These principles have been confirmed by the case-law of the European Court of Human Rights.

6. This paragraph states that the detention decision shall be ordered by judicial authorities or in urgent cases by administrative authorities in which case it shall be confirmed by a judicial authority within 72 hours. In case of unlawful detention, the person concerned shall be released immediately.

7. The detention order shall be in writing, specifying the grounds and its duration. The detained person shall be immediately informed of the grounds of detention, its duration and of the possibilities to challenge the detention decision.

8. In order to avoid arbitrary detentions it is important to provide for a regular review of detention by a judicial authority.

9. This paragraph ensures that detained persons under the Dublin procedure shall be granted access to legal assistance and/or representation that shall be free of charge where they could not afford the entailed costs. Relevant procedures on access to legal assistance and/or representation shall be laid down in national law.

In order to take into account the vulnerability of minors and of unaccompanied minors, specific rules are provided for in this respect in paragraphs 10 and 11.

12. This paragraph makes a cross-reference to Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers] in order to ensure that asylum-seekers detained during the course of the Dublin procedure benefit from the same level of reception conditions as other applicants detained in the general framework of the asylum procedure.

Section VI: Transfers

This section includes general rules that should be applicable in the case of transfers, regardless of whether they are the result of a take charge or of a take back procedure.

Article 28: *Modalities and time-limits*

1. This paragraph corresponds to paragraph 3 of previous Article 19 as well as to letter d) and second and third sub-paragraphs of letter e) of former Article 20. Besides several terminology and numbering adjustments, it is made clear that where a decision has been taken by the competent courts to suspend the enforcement of a transfer in accordance with Article 26(3), the time-limit of maximum 6 months should start to run from the moment of the final decision on appeal or review.

2. This paragraph corresponds to paragraph 4 of former Article 19 and paragraph 2 of former Article 20. It is proposed to clarify that the consequence for failing to meet the 6 months time-limit to operate a transfer to the responsible the Member State is that responsibility is transferred to the requesting Member State.

3. This new paragraph lays down a general rule to cover situations where a person is erroneously transferred and situations where a decision to transfer has been overturned on appeal after the transfer has been carried out. In those cases, the Member State that carried out the transfer must accept the person concerned back.

4. This paragraph corresponds to paragraph 5 of former Article 19 and to paragraph 4 of former Article 20. It concerns the possibility to adopt supplementary rules on carrying out transfers in accordance with the regulatory procedure with scrutiny.Some supplementary rules on this issue have been already adopted under comitology (the regulatory procedure) and are part of the Dublin Implementing Regulation. In the future, there might be a need to modify these implementing rules. It is therefore proposed to keep the reference to comitology. However, as in the case of paragraph 5 of Article 8 and of paragraph 2 of Article 11, it has been already decided in Regulation (EC) No 1103/2008 that the procedure to be used in the future for adopting implementing rules on this subject will no longer be the regulatory procedure but the regulatory procedure with scrutiny.

Article 29: *Costs of transfers*

This new Article lays down the principle according to which the costs for carrying out transfers shall be met by the Member State making the transfer and in no circumstance by the person concerned by the transfer. Moreover, it is made clear that, in the case of an erroneous transfer or of a decision which is overruled on appeal after the person has already been transferred, it is always the Member State who carried out the initial transfer that has to pay the costs of taking that person back. These clarifications are aimed at making the procedure between Member States clearer and therefore reducing the number of divergences between them, while at the same time clarifying the rights of individuals under the Dublin procedure. Finally, it is foreseen that, if necessary, supplementary rules on the issue of costs of transfers will be adopted in accordance with the procedure laid down in article 40(2).

Article 30: *Exchange of relevant information before transfers being carried out*

This Article is proposed with the aim of ensuring that asylum-seekers subject to a Dublin transfer will receive the necessary assistance in the responsible Member State and will benefit from continuity in the protection and rights afforded under this Regulation and Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers].

1. It is proposed that the transferring Member State always informs the receiving one whether the person concerned is able to travel and that only such persons who are able to travel are

transferred, meaning *inter alia* that their health will not significantly deteriorate as a result of the travel.

2. This paragraph lays down the limited purpose for which information can be exchanged between the competent authorities of Member States. In order to ensure that the exchange of information will serve the purpose identified, it is important that such communication takes place well in advance of a transfer and at the latest seven working days before. However, in the exceptional case where a Member State becomes aware of relevant data at a later stage, it shall still communicate it to the responsible Member State in view of ensuring an adequate protection of the person concerned.

3. Paragraph 3 details the type of information to be exchanged between Member States. Point a) refers to the communication of contact details of family members in the receiving Member State, in order to facilitate the process of bringing together the applicant with his/her family members. Point b) refers to the exchange of information about the level of education of minors, to ensure that they will benefit from the correct type of schooling in the responsible Member State. Point c) requires Member States to exchange relevant information about the age of an applicant. Such information could be relevant for instance in view of settling age-disputed cases (e.g. when a discrepancy arises between the age claimed by the person/registered by the authorities in the sending Member State and the age claimed in the responsible Member States). Finally, the list of information to be exchanged is left open in order to cover all unforeseen circumstances that could arise in practice.

4. This paragraph obliges the transferring Member State to transmit to the responsible Member State information about any special needs of the applicant to be transferred, including, in specific cases, sensitive information concerning the state of the physical and mental health, for the limited purpose of providing care and treatment to the person concerned. During the consultation process, the exchange of information on the medical conditions of the person to be transferred has been identified as an essential element in order to adequately address the needs of vulnerable applicants in the context of the Dublin procedure. Given their vulnerability, they should benefit from special treatment both during the transfer and once they have arrived in the responsible Member State.

5. Given the sensitiveness of processing personal data concerning health, paragraphs 5 and 6 lay down particular data protection safeguards, in compliance with Directive 95/46, such as: explicit consent of the applicant and/or of his/her representative is needed; the sending Member State shall delete data sent once the transfer has been completed; the processing of health data can only be carried out by health professionals subject to the obligation of professional secrecy or by other persons subject to an equivalent obligation of secrecy, which shall receive appropriate medical trainings as well as trainings on the processing of sensitive health personal data.

7. In order to ensure that personal data referred to in this Article is exchanged under safe conditions, it is firstly proposed that only the authorities notified to the Commission in accordance with Article 33, which shall also include the health professionals authorised to process the information pursuant to paragraph 4, can exchange these data and secondly that the exchange has to be done only via the secure DubliNet system, set-up under Article 15 of the Dublin Implementing Regulation. In addition, reference is made to the principle of purpose limitation.

8. It is proposed that a standard form be adopted in accordance with the procedure laid down in Article 40(2), in order to facilitate the exchange of relevant information between Member States.

9. A reference is made to paragraphs 8 to 12 of Article 32, in order to enlarge the application of the data protection rules laid down in that context to the exchange of information in accordance with this Article.

Section VII: Temporary suspension of transfers

Article 31

A new Article on the issue of the temporary suspension of transfers is proposed. It aims at establishing an exceptional procedure for suspending, in certain circumstances and during a temporary period, Dublin transfers towards a particular Member State. The Article covers two distinct situations which are explained in paragraphs 1 and 2.

1. This paragraph deals with the case where a Member State is faced with an exceptional situation of particular pressure on its asylum system and where Dublin transfers, if continued, would further aggravate the difficult situation in that Member State. The procedural step the affected Member State has to undertake to trigger the procedure for suspending the transfers as well as the information the request should contain, are clearly defined in this paragraph.

2. This paragraph covers the situation where a Member State is concerned that the circumstances prevailing in another Member State could lead to a level of protection for applicants for international protection which is not in conformity with Community legislation on asylum, and in particular with Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers] and the Asylum Procedures Directive. As in the previous paragraph, this paragraph specifies the procedural step a Member State has to undertake in order to trigger the procedure for suspending the transfers towards the Member State which may not guarantee a level of protection compliant with the Community legislation on asylum as well as the information a request should contain.

3. This paragraph lays down the possibility for the Commission to initiate consultations between Member States on the possibility of suspending transfers, following the receipt of a request pursuant to paragraphs 1 or 2.

4. This paragraph sets out the procedure under which measures suspending transfers towards a particular Member State can be adopted, namely the procedure laid down in Article 40(2).

5. This paragraph lays down the possibility for the Commission to submit a proposal regarding the suspension of transfers towards a particular Member State and specifies the elements such a proposal shall contain, including any conditions attached to such suspension, which will depend on the particularities of each specific case.

6. It is required that the Member States in which the applicants whose transfers have been suspended are present, become responsible for examining the applications for international protection of those persons. In addition, it is specified that any suspension decision shall take particular account of the need to ensure the protection of minors and of family unity. On the one hand, this paragraph aims to ensure an adequate level of protection for the applicants affected by suspension measures, and in particular prevent any further delays in their access to the asylum procedure. On the other hand, by shifting the responsibility to the Member States suspending transfers, the Member State under pressure would be better able to remedy the exceptional asylum situation, as the concerned applicants will no longer be transferred.

7. This paragraph lays down the fact that the decision to suspend transfers will justify the granting of the emergency financial support under Decision No 573/2007/EC of the European Parliament and of the Council [10], if that Member State made a request in that sense.

8. The maximum time-limit for the suspension of transfers is set at six months. This time-limit is considered to be long enough to allow for a change in the circumstances of the Member State concerned by the suspension and to ensure that the Dublin system will continue to run smoothly in a spirit of mutual trust between Member States. If, however, the grounds for the suspension still persist after that period, an extension by a further six months period is possible, using the same procedure as the one used for taking the initial decision.

9. This paragraph contains a standard provision which underlines the exceptional character of the measures laid down in this Article.

CHAPTER VII: Administrative cooperation

This Chapter corresponds to the previous Chapter VI.

Article 32: *Information sharing*

This Article corresponds to former Article 21. Except for terminology modifications, the following changes are made:

3. In view of the sensitive nature of the information provided for in this paragraph, it is proposed to clarify that it is for the requested Member State to obtain the written approval of the applicant concerned by the request for information. In addition, it is proposed to specify, in line with Article 17(2) of the Dublin Implementing Regulation, that the applicant concerned must know for what information he/she is giving his/her approval.

4. Based on the outcome of the discussions with Member States' experts in the Dublin Contact Committees, and in order to ensure uniform application of this paragraph by all Member States, it is made clear that requests for information can only be sent in the context of an application for international protection (i.e. Member States cannot send requests for information concerning illegally staying persons without any reference to an application for international protection) and that they must be duly motivated.

5. As experience has demonstrated that replies to requests for information are often needed in order to allow for the identification of the Member State responsible and in particular for submitting take charge requests, it is proposed that the deadline for replying to a request for information be shortened from six to four weeks. It is moreover underlined that the requested Member States must duly justify any delays in the provision of replies. Finally, although no provision can be made to penalise failure to meet the deadline, in view of preventing a misuse of this provision, it is important to lay down the fact that a Member State which delays its reply cannot invoke the expiry of the time-limits established for sending a take charge or a take back request as grounds for refusing to comply with such requests if it is clear that it is responsible.

6. It is made clear that the authorities that can exchange information in accordance with this Article are those communicated to the Commission pursuant to Article 33(1).

9. The references to "blocking" of data are deleted from this paragraph. This is in line with Regulation […./…/EC] [concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Regulation]. Moreover, it is proposed to lay down the right for an asylum seeker to bring an action or a complaint before the

[10] OJ L 144, 6.6.2007, p.1

competent body which refused him/her the right of access to or of correction or deletion of data relating to him/her. This is in conformity with the data protection rules established in other legislative instruments, such as in Regulation (EC) No 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas[11] (hereafter: the VIS Regulation).

12. It is made clear that, under the given circumstances, ensuring compliance with this Article through effective checks is an obligation for Member States.

Article 33: *Competent authorities and resources*

This Article corresponds to former Article 22.

1. Except for terminology adjustments, it is proposed that Member States communicate to the Commission, without delay, the specific authorities responsible for applying this Regulation (e.g. those competent for carrying out transfers, for sharing information etc) and any amendments thereto. This is important for reasons of transparency, as well as in order to allow the Commission to fully exercise its monitoring role.

2. For reasons of transparency, the Commission will publish in the Official Journal of the European Union a consolidated list of the competent authorities. Where there are amendments to the list, the Commission will publish an updated consolidated list once a year. These modifications are based on the wording agreed in other legislative instruments, such as in the VIS Regulation.

3. This paragraph lays down the obligation for Member States to provide adequate training to the authorities charged with applying this Regulation.

4. For reasons of legal clarity, this paragraph is brought into line with the principle laid down in Article 15 of the Dublin Implementing Regulation, according to which not only requests, but also replies and all written correspondence shall be sent through the secure 'DubliNet' electronic communications network.

Article 34: *Administrative arrangements*

This Article corresponds to former Article 23. It is proposed in the second paragraph to give a more important role to the Commission in scrutinising the conformity of administrative agreements with this Regulation, by foreseeing a formal 'approval' procedure.

CHAPTER VIII: Conciliation

A new Chapter entitled "Conciliation" is added.

Article 35: *Conciliation*

This Article corresponds to Article 14 of the Dublin Implementing Regulation. It extends the current conciliation mechanism, which can be used only for disputes on humanitarian grounds, to all potential disputes on any matter related to the application of the current Regulation. The procedure to be followed is identical to the one laid down in Article 14 of the Dublin Implementing Regulation.

CHAPTER IX: Transitional provisions and final provisions

This Chapter corresponds to former Chapter VII.

Article 36: *Penalties*

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[11] OJ L 218, 13.8.2008, p.60.

This is a standard provision of Community law which establishes effective, proportionate and dissuasive penalties for sanctioning any misuse of data processed in accordance with this Regulation.

Article 37: *Transitional measures*

This Article corresponds to paragraph 2 of former Article 24 and includes only numbering adaptations. Paragraphs 1 and 3 of former Article 24 are deleted since they are not relevant any longer and a new provision on repeal of the Regulation 343/2003 is proposed (Article 43).

Article 38: *Calculation of time-limits*

This Article corresponds to former Article 25. Paragraph 2 is deleted as it is contradictory with paragraph 2 of former Article 22 and with Article 15 of the Dublin Implementing Regulation, according to which requests, replies and all written correspondence shall be sent through the 'DubliNet' electronic communication network. Leaving such an open provision would moreover be in contradiction with the data protection rules.

Article 39: *Territorial scope*

This Article corresponds to former Article 26 which remains unchanged.

Article 40: *Committee*

This Article corresponds to former Article 27. It deletes in paragraph 3 the reference to the need to adopt rules of procedure and it introduces references to the new regulatory procedure with scrutiny, in line with Regulation (EC) No 1103/2008.

Article 41: *Monitoring and evaluation*

This Article corresponds to former Article 28 and only includes numbering adaptations.

Article 42: *Statistics*

In line with Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers[12], Member States are obliged to communicate to the Commission, statistics concerning the application of this Regulation and of the Dublin Implementing Regulation.

Article 43: *Repeal*

This is a standard Article specifying the result of adopting this Regulation.

Article 44: *Entry into force and applicability*

This Article corresponds to former Article 29 and only includes terminology adaptations.

[12] OJ L 199, 31.7.2007, p.23.