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2016/0224 (COD)

Amended proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing a common procedure for international protection in the Union and  
repealing Directive 2013/32/EU**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Context and reasons for the proposal**

In September 2019, European Commission President Ursula von der Leyen announced a New Pact on Migration and Asylum, involving a comprehensive approach to external borders, asylum and return systems, the Schengen area of free movement and the external dimension.

The Communication on a New Pact on Migration and Asylum, presented together with a set of legislative proposals, including this proposal amending the 2016 proposal for a recast Asylum Procedures Regulation, represents a fresh start on migration. The aim is to put in place a broad framework based on a comprehensive approach to migration management, promoting mutual trust among Member States. Based on the overarching principles of solidarity and a fair sharing of responsibility, the new Pact advocates integrated policy-making, bringing together policies in the areas of asylum, migration, return, external border protection and relations with key third countries.

The challenges of migration management, including those related to irregular arrivals and return, should not have to be dealt with by individual Member States alone, but by the EU as a whole. A European framework that can manage the interdependence between Member States' policies and decisions is required. This framework must take into account the ever-changing realities of migration, which have meant increased complexity and an intensified need for coordination. Although the number of irregular arrivals to the Union has dropped dramatically by 92% since 2015, there are still a number of structural challenges, which put Member States' asylum, reception and return systems under strain. These include an increasing proportion of applicants for international protection who are unlikely to receive protection in the EU with a resulting increased administrative burden and delays in granting protection for those in genuine need of protection as well as a persistent phenomenon of onward movement of migrants within the EU. Moreover, the challenges for Member States' authorities in ensuring the safety of applicants as well as their staff when facing the COVID-19 crisis must be acknowledged also.

Whilst the number of irregular arrivals has decreased since 2015, the share of migrants arriving from countries with recognition rates lower than 20% has risen from 13% in 2015 to 55% in 2018. At the same time, there has also been an increasing share of complex cases, which are more resource consuming to process, as the arrival of third-country nationals with clear international protection needs in 2015-2016 has been partly replaced by mixed arrivals of persons with more divergent recognition rates. Furthermore, notwithstanding the EU-wide decrease in irregular arrivals, the number of applications for international protection has continued to climb, reaching a fourfold difference to the number of arrivals. This trend points towards applicants not applying in the first Member State of arrival, multiple applications for international protection within the EU, and the need for reform of the current Dublin system. Finally, in 2019 half of all irregular arrivals by sea were disembarked following search and rescue operations putting a particular strain on certain Member States solely due to their geographical location.

The increased proportion of asylum applicants unlikely to receive international protection in the EU leads to an increased burden not only in relation to the processing of asylum applications in general but also in relation to the return of those migrants not in need of

international protection. An average of 370,000 third-country nationals every year see their application for international protection rejected and they need to be channelled into the return procedure, which represents around 80% of the total number of return decisions issued every year. A seamless link between asylum and return procedures is therefore necessary to increase the overall efficiency and coherence of the asylum and migration system. Irregular migrants who have no protection needs, or no intention to apply for international protection should be quickly channelled into the return procedure. Existing procedural loopholes need to be addressed, such as the issuance of asylum and return decisions in separate acts and a delayed issuance of the return decision, separate remedies, and applicants delaying procedures for the sole purpose of trying to hamper their return from the Union, misusing the protection provided by the asylum system, and the possibility to allow applicants to remain on Member States' territory during a second or further level of appeal.

It is equally important to work towards a more European return system. The Commission tabled in 2018 a proposal to recast the Return Directive to improve the management and effectiveness of returns. That proposal aims at preventing and reducing absconding and unauthorised movements, reinforcing the links with asylum procedures, boosting the use of assisted voluntary return programmes and improving monitoring and implementation with the support of national case-management systems. Beyond the procedural issues covered by this proposal for a Regulation and the proposal for a recast Return Directive, a more European return system requires the full implementation of the European Border and Coast Guard Regulation, with Frontex as the EU's operational arm in returns, a comprehensive operational tool to improve case management in return, a sustainable return and reintegration strategy, engaging with third countries on readmission, and a structured high-level cooperation led by an EU return coordinator.

Likewise, the current migration management system continues to put a heavy burden on Member States of first arrival as well as on the asylum systems of other Member States through unauthorised movement. The current system is not sufficiently effective to address these realities. In particular, there is currently no effective solidarity mechanism in place and no clear rules to discourage and address unauthorised movements.

The New Pact builds on the Commission proposals to reform the Common European Asylum System from 2016 and 2018 as well as adding additional new elements to ensure the balance needed for a common framework bringing together all aspects of asylum and migration policy.

This proposal amending the 2016 proposal for an Asylum Procedure Regulation<sup>1</sup>, together with a new proposal for a Regulation on Asylum and Migration Management, the proposal introducing a screening<sup>2</sup>, the proposal amending the Eurodac proposal, and the proposal establishing procedures and mechanisms addressing situations of crisis together establishes the legislative framework that puts this comprehensive approach to migration and asylum management into practice.

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<sup>1</sup> OJ L [...], [...], p. [...].

<sup>2</sup> COM (2020)xxx, XX.09.2020, Proposal for a Regulation of the European Parliament and the Council introducing the screening of third-country nationals apprehended in connection with unauthorised crossing of external borders, disembarked following search and rescue operations or who request international protection at border crossing points and amending Regulation (EU) No 2019/817, Regulation (EU) No 2019/818, Regulation (EU) No 2017/2226, Regulation (EU) No 2018/1240, Regulation (EC) No 767/2008 and Regulation (EC) No 2019/816

Together with the proposal for a Regulation introducing a screening, it ensures a seamless link between all stages of the migration procedure, from a new pre-entry phase to the outcome of an asylum application, i.e. either the integration of those recognised to be in need of protection or the return of applicants without the right to remain in the Union. The pre-entry phase comprises a screening consisting of identity, health and security checks on arrival, in view of fast channelling into the procedure for the examination of an application for international protection or the return procedure or the refusal of entry.

The proposal amending the 2016 proposal for a recast Eurodac Regulation puts in place a clear and consistent link between specific individuals and the procedures they are subjected to in order to better assist with the control of irregular migration and the detection of unauthorised movements. It also supports the implementation of the new solidarity mechanism established by the Regulation on Asylum and Migration Management, provides the necessary consequential amendments that will allow Eurodac to function within the interoperability framework, and will support Member States in monitoring the granting of assistance for voluntary return and reintegration.

Finally, the Commission is presenting, together with these proposals, a proposal for a Regulation on the management of crisis situations in order to set out the tools necessary to deal with crisis. This crisis instrument covers exceptional situations of mass influx of third country nationals or stateless persons arriving irregularly in a Member State being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional, as well as situations where there is an imminent risk of such arrivals, which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union. The Regulation establishes procedures to address situations of crisis and *force majeure* in the field of migration and asylum within the EU, it establishes possible derogations from the applicable EU acquis on asylum and return and sets out specific rules for the application, in situations of crisis, of the solidarity mechanism set out in the Regulation on Asylum and Migration Management.

The reform aims to tackle the fact that, despite significantly increased cooperation at EU level, including as regards support from EU agencies, Member States' asylum, reception and return systems remain largely not harmonised. This creates inefficiencies and has the unintended consequence of not providing the same fair treatment to asylum seekers throughout Europe and incentivising therefore the movement of large numbers of migrants across Europe to seek the best conditions and prospects for their stay. In this context, the Commission supports the provisional political agreements already reached on the Qualification Regulation, the Reception Conditions Directive, the EU Resettlement Framework Regulation and the EU Agency for Asylum Regulation. These should be finally adopted as soon as possible. The negotiations on the Return Directive should also be swiftly concluded, together with the reform of the Common European Asylum System, to ensure that EU rules are successful in preventing absconding, providing assistance to voluntary returns and streamlining administrative and judicial procedures, reinforcing the effective functioning of the migration and asylum system.

- **Objectives of the proposal**

The objectives of the 2016 proposal for an Asylum Procedure Regulation are still relevant and need to be pursued. It is necessary to establish a common asylum procedure, which replaces the various divergent procedures in the Member States and which is applicable to all applications made in the Member States. To ensure an effective and high-quality decision-making process, it is also necessary to put in place simpler, clearer and shorter procedures

together with adequate procedural safeguards and tools to respond to abuses of asylum procedures and preventing unauthorised movements. This will lead to a more efficient use of resources improving the rights of applicants, allow those in need of international protection to receive it faster and ensure the swift return of rejected applicants without a right to stay in the Union.

Procedural guarantees for the applicants should be safeguarded in particular ensuring the right to be informed of their rights, obligations and consequences of not complying with their obligations, as well as the right to be heard in a personal interview, interpretation, free legal assistance and representation. All these essential elements for a fair asylum procedure, which are part of the 2016 Commission's proposal, remain valid and need to be agreed upon by the co-legislators.

Moreover, streamlined and harmonised rules related to safe countries of origin and safe third countries are also needed. EASO can support co-legislators with analysis in order to have updated information of the current situation in the relevant countries.

Against this background, the Commission does not consider necessary to make far-reaching amendments to the 2016 proposal on which the co-legislators have already made significant progress. However, negotiations so far did not allow for finding an agreement between Member States on the conditions for the use of the border procedure, and the extent to which this should be an obligation for the Member States. This issue was flagged as a key element of an overall compromise on the package of proposals as a whole by most Member States in the consultations. In addition, many Member States stressed the challenges posed by subsequent applications by persons not in need of international protection and by ineffective appeal procedures, both issues which seriously hamper return efforts. This proposal therefore makes targeted amendments to the 2016 proposal to address these specific challenges which will further the objectives and put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return.

The increased pressure resulting from arrivals of migrants with low chances of receiving protection needs to be dealt with through new migration management tools, including more harmonised procedures, in particular at the external border. For this purpose, a pre-entry phase is established consisting of a screening and a border procedure for asylum and return. During the screening, migrants will be registered and screened to establish identity and health and security risks. Migrants will then be referred to the appropriate procedure, be it asylum, refusal of entry or return. Finally, it will be determined whether an asylum application should be assessed without authorising the applicant's entry into the Member State's territory in an asylum border procedure or in a normal asylum procedure. Where an asylum border procedure is used and determines that the individual is not in need of protection, a return border procedure will follow.

The purpose of the joint asylum and return border procedure is to quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union. The joint asylum and return border procedure is an important migration management tool to prevent unauthorised entries and unauthorised movements, in particular as mixed flows include a significant share of asylum applicants who come from countries with a low recognition rate. At the same time, for it to serve its purpose, it needs to be easy to be implemented and provide the necessary flexibility to Member States in carrying it out effectively, while fully respecting fundamental rights.

At the same time, the use of the border procedure would be beneficial to the system of asylum generally, as a better management of abusive and inadmissible asylum requests at the border, would benefit the efficient treatment of genuine cases inland.

- **Consistency with existing policy provisions in the policy area**

This proposal is fully consistent with the initiatives accompanying the Pact, notably the proposal for a Regulation on Asylum and Migration Management, the proposal for a Regulation introducing a screening and the amended proposal for a recast Eurodac Regulation.

A close link is ensured between this proposal and the proposal for a Regulation introducing a screening. Following such a screening, third-country nationals would be referred either to asylum or return procedures and, where relevant, to the border procedure. In both cases, the information collected during the screening would be taken into account when examining the asylum application or launching return procedures.

The proposal is also consistent with, and complements the proposal for a recast of the Return Directive, which already put forward specific measures aimed at better linking asylum and return procedures, notably concerning the issuance of a return decision following termination of legal stay, the appeals against a return decision following a final decision rejecting an application for international protection and a return border procedure. The provisions included in this proposal for a Regulation would reinforce the seamless link between asylum and return procedures, closing existing loopholes and further reducing the possibilities to abuse the asylum system. As a result of those proposed amendments, negotiation of the return border procedure should take place in the context of this Regulation.

As concerns the proposal for a Regulation on Asylum and Migration Management, this proposal, together with the proposal for a Regulation introducing a screening, ensures that migrants entering the pre-entry phase can, at any stage, be subject to relocation or return sponsorship as part of the new mechanism for solidarity, or, where applicable, be transferred to the Member State responsible for examining an application for international protection based on the objective criteria set out in the legislation. It also ensures that, following such relocation or transfer, the relocating or transferring Member State can continue the border procedure on its territory. This proposal also ensures consistency with the special regime proposed for the treatment of migrants disembarked following a search and rescue operation in the Regulation on Asylum and Migration Management and in the amended proposal for a recast Eurodac Regulation, notably in how the categories of persons eligible for relocation are defined and by the introduction of a new category in Eurodac for those migrants.

Finally, consistency is also ensured with the provisional political agreements already reached on the Qualification Regulation, the Reception Conditions Directive, the EU Resettlement Framework Regulation, and the EU Agency for Asylum Regulation.

- **Consistency with other Union policies**

This proposal is consistent with the comprehensive, long-term approach to migration management set out in the New Pact on Migration and Asylum, involving putting migration policy at the heart of relations with third country partners; creating effective legal pathways to the EU; integrating the management of external borders into the wider EU's migration management policy; building seamless, fair and efficient procedures for asylum and return; reinforcing the Schengen area of free movement based on trust between Member States; and developing dedicated policies to help the integration of third country nationals into European societies.

The proposal implements the New Pact and in particular the objective to relaunch the asylum reform proposed by the Commission in 2016 by *inter alia* looking at ways to put in place a seamless asylum and return system. In this respect, the pre-entry phase – before the person has been authorised to enter the territory, and consisting of the screening and the border procedure - addresses multiple challenges related to the entire migration process, from first arrival to channelling into the appropriate asylum or return procedure. Those challenges include the need to sustain a reduced pressure from irregular arrivals and strong external borders, reduced onward movements as well as a swift and effective return and readmission system.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **• Legal basis**

The legal bases for the proposal are Articles 78(2)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union. These foresee the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status as well as illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, respectively. The former legal basis was also used in the Commissions 2016 proposal for an Asylum Procedure Regulation. It is necessary to add the latter legal basis to provide for specific provisions regulating the return of rejected asylum seekers, notably in relation to the joint issuance of a return decision following a negative decision on an application, the joint remedy against such decisions and the seamless asylum and return border procedures.

### **• Variable geometry**

In accordance with Protocol No 21 on the position of Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union (TEU) and to the TFEU, Ireland may decide to take part in the adoption and application of measures establishing a Common European Asylum System.

In this respect, Ireland has given notice of its wish to take part in the adoption and application of Directive 2005/85/EC and of its decision not to participate in the adoption of Directive 2013/32/EU. Consequently, the provisions of Directive 2005/85/EC apply to Ireland, while the provisions of the current Directive do not apply to Ireland. Ireland has not given notice of its wish to take part in the adoption of the new Asylum Procedure Regulation. The position of Ireland in these regards does however not affect its possible participation in the application of the new Regulation in accordance with Protocol No 21.

In accordance with Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Directive 2005/85/EC and Directive 2013/32/EU are not binding on Denmark nor is Denmark subject to their application. Denmark is also not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

### **• Subsidiarity**

The objective of this proposal is to make targeted amendments to the 2016 proposal for an Asylum Procedure Regulation and to put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return. For this purpose, more harmonised procedures are needed, in particular a new pre-entry phase comprising a screening and connected asylum and return border procedures.

The objective is also to introduce in the common procedure for granting and withdrawing international protection further harmonisation as regards the issuance of asylum and return decisions in the same act or, if in separate acts, at the same time and together, and subject to the same effective remedy and the possibility to allow applicants to remain on Member States' territory during a second or further level of appeal. The purpose is to further prevent migrants from delaying procedures for the sole purpose of preventing their removal from the Union and misusing the asylum system.

The new procedures should be governed by the same rules, regardless of the Member State applying them, to ensure equity in the treatment of the applicants, third-country nationals or stateless persons subject to them and clarity and legal certainty for the individual. Furthermore, Member States cannot individually establish common rules, which will reduce incentives for asylum shopping and unauthorised movements between them. Therefore, the objectives of this proposal cannot be sufficiently achieved by the Member States and can, by reason of the scale and effects of this Regulation, be better achieved at Union level. The Union must therefore act and may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

- **Proportionality**

In accordance with the principle of proportionality, as set out in Article 5 of the Treaty on the European Union, this Regulation does not go beyond what is necessary in order to achieve its objectives.

As regards the objective to establish new procedures, in particular a new pre-entry phase comprising a screening and the seamless asylum and return border procedure, all elements of the proposal are limited to what is necessary to set up and enable such a common procedure, to streamline and simplify it, to ensure equality of treatment in terms of rights and guarantees for applicants and avoid discrepancies in national procedures, which have the undesired consequence of encouraging unauthorised movements.

Concerning the objective to introduce, in the common procedure for granting and withdrawing international protection, further harmonisation as regards the issuance of asylum and return decisions in the same act or, if in separate acts, at the same time and together and subject to the same effective remedy, and as regards limiting appeal possibilities to one level of effective remedy for decisions taken in the border procedure, this is necessary in order to streamline the procedures and enhance their effectiveness. The aim of these changes is to strike the right balance between the right of applicants to an effective remedy and the need to ensure that the asylum systems of the Member States are not abused by applicants, third-country nationals or stateless persons who only aim at preventing their removal from the Union. All necessary safeguards are however in place to ensure that nobody falls in between the cracks and that the right to asylum is always guaranteed.

- **Choice of the instrument**

The amended proposal does not change the choice of instrument of the 2016 proposal for an Asylum Procedure Regulation. In this respect, the degree of harmonisation of national procedures for granting and withdrawing international protection that was achieved through Directive 2013/32/EU has not proven to be sufficient to address differences in the types of procedures used, the time limits for the procedures, as well as the rights and procedural guarantees for the applicants. Only a Regulation establishing a common asylum procedure in the Union, and whose provisions shall be directly applicable can provide the necessary degree

of uniformity and effectiveness needed in the application of procedural rules in Union law on asylum.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Collection of knowledge of implementation and application of existing legislation**

In 2016, the Commission commissioned a study in order to determine whether the provisions of the Asylum Procedures Directive (2013/32/EU) are correctly reflected in the legal framework of each Member State. The study assessed whether the obligations in the Directive are introduced into the national legal orders and if the Member States complied with their notification duty (transposition check) and whether the national implementing measures were compatible with the Directive's provisions (conformity check). For the purposes of the assessment, an exhaustive account of the national legislation of each Member State was given so as to include all relevant national acts that contribute to the implementation of the Directive, not limited to the direct transposing measures.

According to the study, the Directive has been transposed in a conform manner by the majority of Member States overall. However, the study detected cases of incomplete or incorrect implementation in almost all Member States in relation to matters such as the requirements for a personal interview, guarantees for unaccompanied minors or the examination procedure. The Commission has been addressing these concerns with the Member States concerned, including by opening infringement procedures.

In 2019, the European Asylum Support Office (EASO) published its *Guidance on asylum procedure: operational standards and indicators*, whose overall objective is to support Member States in the practical implementation of key provisions of the Asylum Procedures Directive (2013/32/EU). The Guidance is an important contribution to the formulation of common operational standards and indicators that are realistic and achievable across all Member States, as well as a compilation of good practices. The Guidance was preceded by evidence collected by EASO in particular on appeals and special asylum procedures. EASO has also issued two practical guides: *Practical Guide on Age Assessment* (2018) and *Practical guide on the best interests of the child in asylum procedures* (2019). Moreover, EASO has issued a report on asylum procedures for children, highlighting good practices and providing recommendations on issues such as the best interest of the child principle, safeguards and special conditions related to children, referral mechanisms and training of staff.

Significant information concerning Member States' asylum systems as well as the positions of Member States and the European Parliament was also collected during the almost four years of negotiations on the Commission's proposal for an Asylum Procedure Regulation, presented on 13 July 2016. The European Parliament adopted its position on the proposal on 22 May 2018. Despite significant progress on the text, the Council has not yet been able to adopt a common approach, mainly due to disagreements as concerns the border procedure. In addition, the Council did not come to a position on the European list of safe countries of origin as proposed by the Commission. The Council also considered, without coming to a position, whether the proposed Regulation should also include a European list of safe third countries.

As concerns the use of accelerated and border procedures, in 2016, the Commission proposed that the accelerated examination procedure should become obligatory in certain cases, with

specific rules with regard to the possibility to apply it with respect to unaccompanied minors. The Commission proposed in 2016 an optional border procedure. The European Parliament agreed that the accelerated procedure should become an obligation in certain cases, but in more limited cases compared to the Commission proposal, in particular not for unaccompanied minors. The European Parliament also excluded unaccompanied minors from the border procedure. The Council has leaned towards extending the situations in which the accelerated procedure can be used, including for unaccompanied minors. Concerning the border procedure, the Council has been divided as to whether or not to make the border procedure compulsory, at least to a certain extent. Member States in favour of an obligation to apply the border procedure have pointed to its importance as a migration management tool, in particular where a large share of asylum applicants are coming from countries with a low recognition rate. The border procedure can hence increase the chances of successful returns directly from the external border within a short period of time after the arrival, notably thanks to the swifter procedure for return and the stronger links between asylum and return, and decrease the risk of applicants absconding or performing unauthorised movements. Member States that were sceptical during the negotiations towards an obligation to apply the border procedure, pointed to some challenges in applying such procedures systematically, such as: difficulties in quickly assessing whether an applicant could qualify for examination, in the border procedure and the need in the meantime to keep the applicant at the border; appeal procedures that take too long and therefore the deadline for completing the border procedure expires before a decision can be taken on the application; the need for important investments and resources (infrastructure, staff and equipment); and limited relevance of applying the border procedure where there is no prospect of returning the rejected applicant.

In the 2018 proposal for a recast Return Directive, the Commission proposed that Member States should issue a return decision immediately after a decision ending the legal stay of a third-country national, notably a decision rejecting an application for international protection. The same proposal also established a return border procedure applicable to third-country nationals whose applications for international protection had been rejected in the context of the asylum border procedure. While the European Parliament has not yet adopted a position on the Commission's proposal, the Council reached a partial general approach in May 2019, which covers all elements of the proposal except on the return border procedure due notably to its links with the asylum border procedure of the 2016 proposal for an Asylum Procedure Regulation on which no agreement could be found.

As concerns the right to an effective remedy, in order to reduce possibilities for abuse of the asylum system, in 2016, the Commission proposed that second- or higher-level appeals before a court or tribunal should not have an automatic suspensive effect unless a court or tribunal decides otherwise, acting *ex officio* or at the request of the applicant. The European Parliament supported in its report this provision, while the Council considered that the asylum procedure as regulated by EU law should end following the decision by a first instance appeal court. The Commission also proposed to set harmonised time limits for applicants to lodge appeals before courts or tribunals of first instance as well as time limits for the courts to decide on appeals. The European Parliament agreed on time limits for applicants to lodge appeals but could not support on introducing time-lines for the courts or tribunals to rule. The Council favoured time-ranges to be defined in national law rather than harmonised time limits at European level for applicants to lodge appeals and could not support the introduction of time-lines within which the courts or tribunals have to rule. The Council could nevertheless accept that such time limits are set at national level.

- **Stakeholder consultations**

The Commission consulted Member States, the European Parliament and stakeholders on a number of occasions to gather their views on the new Pact on Migration and Asylum. In parallel, the Romanian, Finnish and Croatian Presidencies have held both strategic and technical exchanges on the future of various aspects of migration policy, including asylum, return, relations with third countries on readmission and reintegration. These consultations showed support for a fresh start on European asylum and migration policy to urgently address the flaws in the Common European Asylum System (CEAS), to improve the effectiveness of returns and establish a genuine European return system, to reinforce our relations with third countries on readmission and to ensure a sustainable reintegration of migrants following their return to the countries of origin.

Ahead of the launch of the New Pact on Migration and Asylum, the Commission has engaged in continuous intense consultations with the European Parliament. The Commission has also held two rounds of intense visits and bilateral consultations with each Member State individually in the first 100 days in office and also, more recently, before the presentation of the Pact. Member States and the European Parliament supported the need for progress in solving the weaknesses of the current system, the need for a new system of fair sharing of responsibility to which all Member States can contribute, strong border protection, respect for fundamental rights in all aspects of the EU's migration policy, importance of the external dimension of migration, including legal and safe pathways, and improved returns.

A number of workshops and discussions were organised during the Finnish Presidency in various Council fora, including the Tampere 2.0 Conference held on 24-25 October 2019 in Helsinki and the Salzburg Forum held in Vienna on 6-7 November 2019, where Member States welcomed the intention of the European Commission to relaunch the Dublin reform in order to find new forms of solidarity to which all Member States would be required to contribute. Member States underlined that solidarity measures need to be part of the reformed system but that they should go hand in hand with measures of responsibility. Furthermore, they underlined the urgent need to combat unauthorised movements within the EU as well as to enforce returns for those who are not in need for international protection. The European Parliament stressed on several occasions the need to sufficiently protect families with children and take special care as regards unaccompanied minors. Commissioner Johansson held on several occasions targeted consultations with international organisations, civil society organisations, relevant local non-governmental organisations in the Member States, social and economic partners. In this consultation process, specific recommendations were presented in relation to the need for further developing a common approach on child-specific standards in line with the Communication of 2017 on Children in Migration<sup>3</sup>. Civil society has also been consulted in the process of the Consultative Forum set up by EASO, on topics such as the initial steps in the asylum procedure (2019).

The Commission has also taken into consideration specific recommendations of national and local authorities<sup>4</sup>, non-governmental and international organisations, such as United Nations

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<sup>3</sup> The Initiative for Children in Migration called for a common approach to address the issue of missing (unaccompanied and separated) children, to establish effective mechanisms to tackle the risks of trafficking, and the adoption of child-specific standards for asylum procedures.

<sup>4</sup> For example, Berlin Action Plan on a new European Asylum Policy, 25 November 2019, signed by 33 organisations and municipalities.

High Commissioner for Refugees (UNHCR)<sup>5</sup>, the International Organisation for Migration (IOM)<sup>6</sup>, as well as think-tanks and academia, on how to envisage a fresh start on migration and address the current migration challenges whilst safeguarding human rights standards. In their view, a fresh start on the reform should revise certain rules for the determination of responsibility and provide for a mechanism of mandatory solidarity including for persons disembarked further to a SAR operation. Non-governmental organisations also advocate for a common understanding of responsibility among Member States and called for the revised Dublin rules to include a more permanent relocation mechanism<sup>7</sup>.

The Commission also took into account the contributions and studies of the European Migration Network<sup>8</sup>, which have been launched at its initiative and which over the last years have produced several specialised studies and ad hoc queries.

### **Evidence-based policy-making**

The Commission favours an evidence-based policy-making and refers to the separate document (XXX) which includes the relevant data and elements supporting the proposed approach for the various challenges identified since 2016 for the finalisation of the CEAS reform and the strengthening of the European return legal framework.

- **Fundamental rights**

This proposal respects fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, as well as the obligations stemming from international law, in particular from the Geneva Convention on the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant for Civil and Political Rights, the United Nations Convention against Torture, and the United Nations Convention on the Rights of the Child.

The right to liberty and freedom of movement is protected given that, if detention is used in the context of the border procedure, pursuant to the Reception Conditions Directive and the Return Directive it would be justified only on specific grounds clearly defined in those Directives, when it proves necessary and proportionate, on the basis of an individual assessment of each case subject to judicial review, and as a measure of last resort if other less coercive alternative measures cannot be applied effectively.

The proposal guarantees that the best interest of children will always be protected, notably by excluding as a rule the application of the border procedure in the case of unaccompanied minors and families with children under the age of 12, unless when they are considered to be a danger to the national security or public order of a Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.

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<sup>5</sup> UNHCR Recommendations for the European Commission's proposed Pact on Migration and Asylum, January 2020.

<sup>6</sup> IOM Recommendations for the new European Union Pact on Migration and Asylum, February 2020.

<sup>7</sup> CEPS Project Report, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?*, June 2019.

<sup>8</sup> All studies and reports of the European Migration Network are available at: [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en).

The right to effective remedy is adequately ensured, as it is only in duly justified cases set out in this Regulation, where applications are likely to be unfounded, that an applicant should not have an automatic right to remain for the purpose of the appeal.

The respect of the principle of *non-refoulement* is ensured, as the proposal establishes that all the effects of a return decision shall be suspended for as long as the applicant has a right to remain or is allowed to remain for the purpose of an application for international protection. In addition, by virtue of the provisions of the Return Directive, the principle of non-refoulement must be respected during all phases of return procedures and appeals against return decisions shall automatically suspend the enforcement of decisions which risk breaching that principle.

#### **4. BUDGETARY IMPLICATIONS**

This proposal does not impose any financial or administrative burden on the Union. Therefore it has no impact on the Union budget. Member States will be able to make use of the funds allocated under their national programmes under both the existing Asylum, Migration and Integration Fund and the new Asylum and Migration Fund to support any investments needed in the infrastructure for the use of the border procedure. EASO and Frontex can support Member States with staff for the same purpose, within their respective mandates.

- **Monitoring, evaluation and reporting arrangements**

The Commission shall report on the application of the Asylum Procedure Regulation to the European Parliament and to the Council within two years from its entry into force and every five years thereafter. Member States shall be required to send relevant information for drafting the report to the Commission and to the European Union Agency for Asylum. The Agency will also monitor compliance with the Regulation by Member States through the monitoring mechanism, which the Commission proposed to establish in its revision of the mandate of the Agency.<sup>9</sup>

- **Detailed explanation of the specific provisions of the proposal**

The aim of this proposal is to make targeted amendments to the 2016 Commission proposal for an Asylum Procedure Regulation to put in place, together with the proposal for a Regulation introducing a screening and the proposal amending the Return Directive, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and granting of international protection, or, where applicable, the return of those not in need of international protection.

1. **New pre-entry phase**

The increased pressure resulting from the arrivals of mixed flows with a high proportion of those with low chances of receiving international protection needs to be addressed with new and effective migration management tools, including more harmonised procedures, in particular at the external border, to ensure a quick identification and channelling of migrants into the right procedure and quick examination of their claims. For this purpose, a new pre-entry phase is established consisting of a screening in [COM (2020)xxx final], a more developed accelerated procedure and a border procedure for asylum and return.

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<sup>9</sup> COM (2016) 271 final.

As concerns the border procedure, and as further explained above, this proposal aims on the one hand to make the border procedure more flexible but equally more effective for the Member States in practice by adapting it to practical experience and actual flows on the main migration routes. This involves providing additional grounds to use it while extending the maximum length of such a procedure. A more effective border procedure such as this will allow asylum and migration authorities to more efficiently assess genuine claims inland, deliver faster decisions and thereby contribute to a better and more credible functioning of asylum and return policies, in full respect of fundamental rights. On the other hand, the obligatory nature of a border procedure for certain categories of applicants needs to be seen in the broader context of the overall set of measures presented by the Commission in the Pact and in the accompanying, as well as the pending, proposals. Also in this regard, practical experiences need to be taken into account. In particular, the criteria for assessing whether an application is to be assessed in a border procedure needs to be easy and quick to apply in practice. Finally, it also needs to be borne in mind that a certain number of persons whose asylum applications have been rejected will, at least in the short term, not be returned due to lack of cooperation of third countries.

A border procedure is easier to use, if it can be concluded from the outset – upon entry, during the screening – based on an objective criterion, whether a person should be subject to it.

It is also important to clarify at which moment the asylum border procedure starts to apply. That is why Articles 26 and 27 are modified, to clarify that Member State are to register the asylum application once the screening has ended. . This does not affect the right of the person to make an asylum application immediately when arriving on the territory of a Member State, it only means that his/her application will be registered once the screening has ended and the necessary information is at hand to decide whether the border procedure should be used.

2. Scope of the asylum border procedure: determining to whom the border procedure can be applied, and to whom it should be applied :

- First, the new Article 41(1) and (2) clarifies that only such applications can be assessed in a border procedure where applicants have not yet been authorised to enter the Member State’s territory and without meeting the entry conditions under the Schengen Borders Code. The border procedure will follow the screening carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], where applications were made at an external border crossing point or transit zone, following apprehension in connection with an irregular crossing of the external border or following disembarkation after a search and rescue operation.
- Decisions in a border procedure may only be taken on the admissibility of the application or on the merits of the application where the application is examined in an accelerated procedure. This includes the possibility to carry out the border procedure for the cases where a Member State may consider a third country as a ‘safe country of origin’ or a ‘safe third country’ for the applicant which require a more in-depth assessment of the situation of an applicant. Therefore a new acceleration ground is added, which is based on a more objective and easy-to-use criteria, according to to which Member State shall accelerate the examination of applications made by applicants coming from third countries for which the share of positive asylum decisions in the total number of asylum decisions is, according to the latest available yearly Union-wide average Eurostat data, less than 20%. This percentage is justified by the significant increase in the number of applications made by

applicants coming from countries with a low recognition rate, lower than 20%, and hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded.

- According to the new Article 41(7), while applying the asylum border procedure, the Member States may also carry out the procedure for determining the Member State responsible for examining the application.
- The new Article 41(6), clarifies that applicants subject to the asylum border procedure shall not be authorised to enter the Member State's territory.
- **Obligation of Member States to apply the asylum border procedure in certain cases:** The new Article 41(3) obliges Member States to apply the border procedure in cases of irregular arrival at the external border or following a disembarkation after a search and rescue operation and if one of the following grounds apply: 1, the applicant poses a risk to national security or public order 2, the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision 3, the applicant is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 percent.
- **Exceptions from the obligation to carry out the asylum border procedure:** According to the joint reading of the new Article 41(3) and (5), unaccompanied minors and minors below the age of 12 and their family members are only subject to the border procedure in case they are considered to be a danger to the national security or public order of the Member State. The new Article 41(4) also allows Member States to make exceptions from the obligation to carry out the asylum border procedure in cases where from the outset it is unlikely that the readmission of the persons, in case of a negative decision on their asylum application, would be successful. The exception will be applicable for nationals of third countries for which that Member State has submitted a notification to the Commission in accordance with paragraph 3 of Article 25a of the Visa Code. Such a notification may be made where the Member State is confronted with substantial and persisting practical problems in cooperating with the third country in question on the readmission of irregular migrants. Article 41(4) further specifies the situations and applicable procedures for when Member States may continue to apply this exception or when they shall cease to do so and hence apply the border procedure to the nationals of the third country concerned.
- **Duration of the asylum border procedure:** The new Article 41(11) specifies that the border procedure shall have a maximum duration of 12 weeks from when the application is registered for the first time. By way of derogation from the normal 10 day deadline for lodging, the application shall be lodged no later than five days after such registration or, in case the applicant has been relocated in accordance with Article [x] of the Regulation on Asylum and Migration Management, five days from when the applicant identifies himself or herself to the competent authorities in the Member State responsible (new Article 41(10)). This derogation is justified by the fact that in these cases the applicant has not been authorised to enter the territory, and a delayed lodging should not be allowed to delay the border procedure and the corresponding 12 week deadline.
- **Guarantees in the asylum border procedure:** The new Article 41(5) and (9) specifies the cases where the asylum border procedure shall not be applied.

Unaccompanied minors and families with children below the age of 12 may only be subject to a border procedure for reasons linked to national security or public order, namely when the unaccompanied minor, or, in the case of families, any member of the family, are considered to be a danger to the national security or public order of the Member State, or have been forcibly expelled for serious reasons of public security or public order under national law. According to the new Article 41(9), Member States shall not apply or cease to apply the border procedure in certain cases, including where the grounds for applying the border procedure are not or no longer met, where the necessary support cannot be provided to applicants with special procedural needs, where there are medical reasons for not applying the border procedure, and where the conditions for detention in accordance with the Reception Conditions Directive cannot be met and the border procedure cannot be applied without detention. Where the border procedure is not or no longer applied, the applicant shall be granted entry to the Member State's territory and his application examined in the applicable asylum procedure (including in an accelerated procedure if relevant).

- **Location of applicants subject to the asylum border procedure:** The new Article 41(15) makes it possible to accommodate applicants subject to the border procedure not only at locations at external borders or transit zones but also in proximity to such locations.
- However, Member States do not need to provide for the necessary facilities to apply the border procedure at every border crossing point or at every section of the external border where migrants may be apprehended or disembarked. They can choose the locations where to set up the necessary facilities for that purpose anywhere at the external border or in the proximity of the external border and transfer those applications covered by the border procedure to those locations regardless of where the asylum application was initially made. However, to avoid too many and overly time consuming transfers of applicants for this purpose Member States should aim at setting up the necessary facilities where they expect to receive the most applications falling within the scope of the border procedure.
- In case where the operational capacity of those locations is exceeded for the purpose of processing those applicants for which the border procedure is applied, Member States may on a temporary basis and for the shortest time necessary, accommodate applicants at other locations within the territory of the Member State. This exception should only be applicable when the operational capacity at those locations is temporarily exceeded, since Member States should aim at providing a sufficient capacity at those locations having regard to the expected caseload of applications.
- **A new border procedure for carrying out return:** The new Article 41a introduces a border procedure for carrying out return, which replaces the return border procedure included in the 2018 proposal for a recast Return Directive. The border procedure for carrying out return applies to applicants, third-country nationals or stateless persons whose applications have been rejected in the context of the border procedure for asylum. Persons subject to this procedure are not authorised to enter the Member State's territory and should be kept at the external borders, or in their proximity, or in transit zones; however, where Member States are unable to keep them in those locations, they can use other locations within their territory. Third-country nationals and stateless persons subject to the procedure can be granted a period for voluntary departure not exceeding 15 days, without prejudice to the possibility to voluntarily comply with the obligation to return departing from a

border area or transit zone at any moment. This would reduce the risk of unauthorised entry and movement of illegally staying third-country nationals subject to the border procedure for carrying out return without preventing their possibility to return voluntarily and, if allowed by national law, receive logistical, financial or other assistance. The border procedure for carrying out return cannot exceed 12 weeks, starting from when the person concerned no longer has a right to remain and is no longer allowed to remain, i.e. when a request by the applicant to be granted the right to remain has been denied by a court. This period is additional to the one set for the border procedure for the examination of applications for international protection. During this period or part of it, in order to facilitate and secure return, illegally staying third-country nationals may be held in detention in individual cases; the procedural safeguards and guarantees set by the Return Directive will apply. Third-country nationals who were already detained (with all the applicable safeguards provided for by the Receptions Conditions Directive) during the examination of an application for international protection as part of the asylum border procedure may be held in detention in order to prevent unauthorised entry and carry out return. In other cases, and notably when the third-country nationals were not detained during the asylum border procedure, detention may be used, within the same maximum period of duration, if the grounds for detention set out in the recast Return Directive are met (there is a risk of absconding, the person concerned avoids or hampers the preparation of return or the removal process, or the person poses a risk to public policy, public security or national security). However, the maximum period of detention set by Article 15(5) and (6) of the Return Directive (maximum 6 months, which can be prolonged in certain circumstances by an additional period of up to 12 months) remains unchanged, hence the period of detention that may take place during the border procedure for carrying out return shall be included within that time-limit.

- **Termination of the border procedure and right to enter in the territory:** Where the asylum procedure is still ongoing at the end of the deadline for concluding the border procedure, the applicant shall be authorised to enter the Member State's territory for the completion of the asylum procedure. Entry shall not be authorised where the applicant no longer has a right to remain and is not allowed to remain. In case a return decision has already been issued, the applicant shall instead be subject to the return border procedure, which cannot last longer than 12 weeks; once this period expires, the illegally staying third-country national would be subject to the return procedure established by the Return Directive.
- **Transferability of the asylum and return border procedure:** The asylum and return border procedure may be applied in another Member State than the one in which the asylum application was made. According to the new Article 41(8), where the conditions for applying the border procedure are met in the Member State where the application was made, the Member State to which the applicant was relocated in accordance with Article [x] of Regulation (EU) No XXX/XXX [Asylum and Migration Management Regulation] may apply the asylum and return border procedures. The asylum and return border procedures may also be applied by the Member State of relocation where an application for international protection is only made in that Member State following a relocation (new Article 41(1)(d)).

**In summary, an asylum border procedure should be applied to** asylum claims that are clearly abusive, or where the applicant poses a threat to security or is unlikely to be in need of international protection due to their nationality's recognition rate. In addition, Member States

can choose to use an asylum border procedure on the basis of the admissibility of the application or on the merits of the application, where the application should be examined in an accelerated procedure. Finally, in cases where, from the outset, it is unlikely that the readmission of these persons, in case of a negative decision on their asylum application, would be successful, Member States may decide not to apply the asylum border procedure but instead use the normal asylum procedure. The normal asylum procedure would apply to all other asylum claims. Unaccompanied children and children under 12 years old with their family members will be exempt from the border procedure unless there are security concerns.

### 3. An end-to-end asylum and return procedure

A seamless link between all stages of the migration process also needs to be established for migrants who have circumvented the screening or been authorised to enter the Member State's territory to have their asylum requests processed in the normal asylum procedure. For this purpose, targeted changes to the Commission's 2016 proposal are necessary to prevent migrants from delaying procedures for the sole purpose of preventing their removal from the Union and misusing the asylum system. This concerns in particular the effectiveness of the appeal procedure, especially in relation to the border procedure, and related right to remain (suspensive effect) of the applicant, notably in relation to subsequent applications, an issue raised by a number of the Member States during the consultations on the new Pact.

#### – **Streamlining asylum and return procedures including appeals**

- The new Article 35a requires Member States to issue the asylum and return decisions in the same act or, if in separate acts, at the same time and together. The new Article 53(1) streamlines asylum and return appeal procedures by ensuring the right to an effective remedy for both asylum and return decisions before the same court or tribunal and within the same judicial proceedings and time limits. These rules ensure that the return procedure is not unnecessarily delayed and reduce the risk that the rejected asylum applicant absconds or prevents his or her removal, while ensuring respect of the fundamental right to an effective remedy before a court or tribunal.
- In the 2016 proposal the Commission proposed that Member States may provide an exception from the right to remain on their territory in case of subsequent applications where a subsequent application has been rejected by the determining authority as inadmissible or manifestly unfounded, or in case of a second subsequent application. Taking into account the consultations of the Member States, the Commission considers that there is room to provide for further exceptions to the right to remain in case of subsequent applications, provided that such exceptions are carefully framed. Therefore, according to the new point (a) of paragraph 1 of Article 43, an applicant who lodges a subsequent application should not be authorised to remain pending the finalisation of the decision declaring the application inadmissible where the following cumulative conditions are met: the removal is imminent; it must be clear that the application is made merely in order to delay or frustrate the removal; and it must be immediately clear to the determining authority that no new elements have been presented; there is no risk of refoulement; and the subsequent application was presented within one year of the decision by the determining authority on the initial application. In order to be able to apply this rule, Member States will need to organise procedures in such a way that the determining authority can take such a decision, assessing whether all of these criteria are fulfilled as swiftly as possible after which the subsequent

application has been made, as otherwise the main rule of the applicant having the right to remain while the subsequent application is examined will apply.

- In the interest of clarity, Articles 53 and 54 are included in their entirety in this proposal. No significant changes to the 2016 proposal are proposed as to the provisions related to the basic principle of an effective remedy, interpretation and translation at the appeal stage, and the procedure related to the granting of a right to remain.
- The new Article 53(2) retains the possibility, which exist today, under the Asylum Procedures Directive to consider an appeal against a decision rejecting an application as unfounded in relation to refugee status as inadmissible in accordance with national law where subsidiary status granted by the Member State offers the same rights and benefits as refugee status under Union and national law.
- The new Article 53(7) provides for minimum and maximum timeframes for applicants to lodge first level appeals rather than exact time limits as proposed in 2016 in order to ensure a certain level of harmonisation while taking into account Member States' views as expressed in negotiations on the 2016 proposal. For this purpose, a distinction is made between decisions taken in the accelerated or border procedure, for which the deadlines for making an appeal can be shorter, including as regards subsequent applications, and other decisions.
- In accordance with the new Article 53(9), Member States shall not grant to applicants a possibility to lodge, against a decision taken in the border procedure, a further appeal against a first appeal decision.
- The new Article 54(1) clarifies that all the legal effects of a return decision issued together with a decision rejecting an application for international protection shall be suspended for as long as the applicant has a right to remain or is allowed to remain in accordance with the Regulation. This is in line with the judgment of the Court of Justice of the European Union in case C-181/16, Gnandi, which clarified that the legal effects of a return decision must be suspended when an appeal against a rejection of an application for international protection is ongoing and if the third-country national enjoys a right to remain in accordance with the Asylum Procedure Regulation.
- The new Article 54(3) extends the circumstances where the applicant shall not have an automatic right to remain for the purpose of an appeal to also include decisions rejecting subsequent applications, decisions to withdraw international protection in the specific cases where an exclusion ground applies or where the beneficiary is considered a danger to the security of a Member State or where he or she has been convicted of a particularly serious crime .
- For the situations mentioned above the proposal retains the general principle that applicants' shall have a right to remain on the Member States' territory until the time limit for requesting a court or tribunal to be allowed to remain has expired and, where the applicant has made such a request, pending the decision of the court or tribunal on whether or not the applicant shall be allowed to remain. However, by way of exception, the new Article 54(7) provides for the possibility not to grant such a right to remain in case of an appeal against a decision rejecting a subsequent application, without prejudice

to the respect of the principle of non-refoulement. In these situations the applicant has already had his applications assessed on the merits at least three times – the initial application by the determining authority, at least one level of appeal, and yet another assessment on the merits of his/her subsequent application. It is therefore proportionate in these circumstances to allow for the return decision to be enforceable immediately. Such a possibility should however only be provided subject to the same conditions as in Article 43 (see above), with the exception of the one year rule as in any case the appeal of the decision on the subsequent application needs to be made within the deadlines set therefore.

- **Subsequent applications:** In order to discourage abusive or last minute subsequent applications, stronger rules are proposed for when Member States can authorise applicants to remain in the case of subsequent applications.
  - Taken together the rules explained above mean that the following will apply for subsequent applications:
    - A subsequent application has as a general rule automatic suspensive effect at the administrative stage.
    - By way of exception, a subsequent application has no suspensive effect at the administrative stage if it is made during the last stages of the return procedure to frustrate the removal and it is immediately clear that no new elements have been presented. This exception is only applicable within one year of the moment when a decision has been taken on the first application
    - An appeal against a subsequent application has no automatic suspensive effect , but can be requested by the applicant, and while this request is pending in the Court, the applicant shall have the right to remain
    - Member States however can derogate from this rule and provide, that there is no suspensive effect in the appeal stage, and the applicant has no right to remain pending a request to be granted such a right if certain conditions are met as explained above.
    - A second, or subsequent, appeal to a subsequent application does not have automatic suspensive effect.

Amended proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**establishing a common procedure for international protection in the Union and  
repealing Directive 2013/32/EU**

The proposal COM (2016) 467 final for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU is amended as follows:

(1) The first citation is replaced by the following:

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(d) and 79(2)(c) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(2) Recital 31 is replaced by the following:

‘(31) In order to guarantee the rights of the applicant, a decision concerning his or her application should be given in writing. Where the decision does not grant international protection, the applicant should be given reasons in fact and in law, information on the consequences of the decision and the modalities for challenging it.

(31a) In order to increase the efficiency of procedures and to reduce the risk of absconding and the likelihood of unauthorised movements, there should be no procedural gaps between the issuance of a negative decision on an application for international protection and of a return decision. A return decision should immediately be issued to applicants whose applications are rejected. Without prejudice to the right to an effective remedy, the return decision should either be part of the negative decision on an application for international protection or, if it is a separate act, be issued at the same time and together with the negative decision.’

(3) The following recital is inserted after recital 39:

‘(39a) In the interest of swift and fair procedures for all applicants, whilst also ensuring that the stay of applicants who do not qualify for international protection in the Union is not unduly prolonged, including those who are nationals of third countries exempt from the requirement to be in a possession of a visa pursuant to Regulation (EU) No 2018/1806, Member States should accelerate the examination of applications of applicants who are nationals or, in the case of stateless persons, formerly habitual residents of a third country for which the share of decisions granting international protection is lower than 20% of the total number of decisions for that third country. Where a significant change has occurred in the third country concerned since the

publication of the relevant Eurostat data and taking into account the guidance note pursuant to Article 10 of Regulation XX/XX on the European Asylum Agency, or where the applicant belongs to a specific category of persons for whom the low recognition rate cannot be considered as representative of their protection needs due to a specific persecution ground, examination of the application should not be accelerated. Cases where a third country may be considered as a safe country of origin or a safe third country for the applicant within the meaning of this Regulation should remain applicable as a separate ground for respectively the accelerated examination procedure or the inadmissible procedure.

(4) Recital 40 is replaced by the following:

‘(40) Many applications for international protection are made at the external border or in a transit zone of a Member State, often by persons apprehended in connection with unauthorised crossings of the external border or disembarked following a search and rescue operation. In order to conduct identification, security and health screening at the external border and direct the third-country nationals and stateless persons concerned to the relevant procedures, a screening is necessary. There should be seamless and efficient links between all stages of the relevant procedures for all irregular arrivals. After the screening, third-country nationals and stateless persons should be channelled to the appropriate asylum or return procedure, or refused entry. A pre-entry phase consisting of screening and border procedures for asylum and return should therefore be established.’

(5) The following recitals are inserted after recital (40) :

‘(40a) The purpose of the border procedure for asylum and return should be to quickly assess at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection. Member States should therefore be able to require applicants for international protection to stay at the external border or in a transit zone in order to assess the admissibility of applications. In well-defined circumstances, Member States should be able to provide for the examination of the merits of an application and, in the event of rejection of the application, for the return of the third-country nationals and stateless persons concerned at the external borders.

(40b) Member State should assess applications in a border procedure where the applicant is a danger to national security or public order, where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision and where it is likely that the application is unfounded because the applicant is of a nationality for whom decisions granting international protection is lower than 20% of the total number of decisions for that third country. In other cases, such as when the applicant is from a safe country of origin or a safe third country, the use of the border procedure should be optional for the Member States.

(40c) When applying the border procedure for the examination of an application for international protection, Member States should ensure that the necessary arrangements are made to accommodate the applicants at or close to the external border or transit zones, in accordance with Directive XXX/XXX/EU [Reception Conditions Directive]. Member States may process the applications at a different location at the external border than that where the asylum application is made by

transferring applicants to a specific location at or in the proximity of the external border of that Member States where appropriate facilities exist. Member States should retain discretion in deciding at which specific locations at the external borders such facilities should be set up. However, Member States should seek to limit the need for transferring applicants for this purpose, and therefore aim at setting up such facilities with sufficient capacity at border crossing points, or sections of the external border, where the majority of the number of applications for international protection are made, also taking into account the length of the external border and the number of border crossing points or transit zones. They should notify the Commission of the specific locations at the external border, transit zones or proximity of the external border where the border procedures will be carried out.

In cases where the border procedure is applied and the capacity of the locations at or in proximity of the external border as notified by a Member State is temporarily exceeded, Member States may process those applications at another location within its territory, for the shortest time possible.

- (40d) In case where the use of the border procedure is an obligation, Member States should by way of exception not be required to apply it for the examination of applications for international protection from nationals of a third country that does not cooperate sufficiently on readmission, since a swift return of the persons concerned, following rejection of their applications, would be unlikely in that case. The determination of whether a third country is cooperating sufficiently on readmission should be based on the procedures set out in Article 25a of Regulation (EC) No 810/2009.
- (40e) The duration of the border procedure for examination of applications for international protection should be as short as possible while at the same time guaranteeing a complete and fair examination of the claims. It should in any event not exceed 12 weeks. This deadline should be understood as a stand-alone deadline for the asylum border procedure, encompassing both the decision on the examination of the application as well as the decision of the first level of appeal, if applicable. Within this period, Member States are entitled to set the deadline in national law both for the administrative and for the appeal stage, but should set them in a way so as to ensure that the examination procedure is concluded and that subsequently, if relevant, the decision on the first level of appeal is issued within this maximum 12 week. After that period, if the Member State nevertheless failed to take the relevant decisions, the applicant should in principle be authorised to enter the territory of the Member State. Entry into the territory should however not be authorised where the applicant has no right to remain, where he or she has not requested to be allowed to remain for the purpose of an appeal procedure, or where a court or tribunal has decided that he or she should not be allowed to remain pending the outcome of an appeal procedure. In such cases, to ensure continuity between the asylum procedure and the return procedure, the return procedure should also be carried out in the context of a border procedure for a period not exceeding 12 weeks. This period should be counted starting from the moment in which the applicant, third-country national or stateless person no longer has a right to remain or is no longer allowed to remain.
- (40f) While the border procedure for the examination of an application for international protection can be applied without recourse to detention, Member States should nevertheless be able to apply the grounds for detention during the border procedure in accordance with the provisions of the [Reception Conditions] Directive (EU)

XXX/XXX in order to decide on the right of the applicant to enter the territory. If detention is used during such procedure, the provisions on detention of the [Reception Conditions] Directive (EU) XXX/XXX should apply, including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention.

- (40g) When an application is rejected in the context of the border procedure, the applicant, third-country national or stateless person concerned should be immediately subject to a return decision or, where the conditions of Article 14 of Regulation (EU) No 2016/399 of the European Parliament and of the Council<sup>10</sup> are met, to a refusal of entry. To guarantee the equal treatment of all third-country nationals whose application has been rejected in the context of the border procedure, where a Member State has decided not to apply the provisions of Directive XXX/XXX/EU [Return Directive] by virtue of Article 2(2), point (a), of that Directive and does not issue a return decision to the third-country national concerned, the treatment and level of protection of the applicant, third-country national or stateless person concerned should be in accordance with Article 4(4) of Directive XXX/XXX/EU [Return Directive] and be equivalent to those applicable to persons subject to a return decision.
- (40h) When applying the border procedure for carrying out return, certain provisions of the [recast Return Directive] should apply as these regulate elements of the return procedure that are not determined by this Regulation, notably those on definitions, more favourable provisions, *non-refoulement*, best interests of the child, family life and state of health, risk of absconding, obligation to cooperate, period for voluntary departure, return decision, removal, postponement of removal, return and removal of unaccompanied minors, entry bans, safeguards pending return, detention, conditions of detention, detention of minors and families and emergency situations. To reduce the risk of unauthorised entry and movement of illegally staying third-country nationals subject to the border procedure for carrying out return, a period for voluntary departure not exceeding 15 days may be granted to illegally staying third-country nationals, without prejudice for the possibility to voluntarily comply with the obligation to return at any moment.
- (40i) Where an applicant, third-country national or stateless person who was detained during the border procedure for the examination of their application for international protection no longer has a right to remain and has not been allowed to remain, Member States should be able to continue the detention for the purpose of preventing entry into the territory and carrying out the return procedure, respecting the guarantees and conditions for detention laid down in Directive XXX/XXX/EU [Return Directive]. An applicant, third-country national or stateless person who was not detained during the border procedure for the examination of an application for international protection, and who no longer has a right to remain and has not been allowed to remain, could also be detained if there is a risk of absconding, if he or she avoids or hampers return, or if he or she poses a risk to public policy, public security or national security. Detention should be for as short a period as possible and should not exceed the maximum duration of the border procedure for carrying out return. When the illegally staying third-country national does not return or is not removed

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<sup>10</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 077 23.3.2016, p. 1).

within that period and the border procedure for carrying out return ceases to apply, the provisions of the [recast Return Directive] should apply. The maximum period of detention set by Article 15 of that Directive should include the period of detention applied during the border procedure for carrying out return.

- (40j) It should be possible for a Member State to which an applicant is relocated in accordance with Regulation (EU) No XXX/XXX [Asylum and Migration Management Regulation] to examine the application in a border procedure provided that the applicant has not yet been authorised to enter the territory of the Member States and the conditions for the application of such a procedure by the Member State from which the applicant was relocated are met.’
- (6) The following recital is inserted after recital 44:
- ‘(44a) An applicant who lodges a subsequent application at the last minute merely in order to delay or frustrate his or her removal should not be authorised to remain pending the finalisation of the decision declaring the application inadmissible in cases where it is immediately clear to the determining authority that no new elements have been presented and there is no risk of refoulement and provided that the application is made within one year of the decision by the determining authority on the first application. The determining authority shall issue a decision under national law confirming that these criteria are fulfilled in order for the applicant not to be authorised to remain.’
- (7) Recitals 65 and 66 are replaced by the following:
- ‘(65) For an applicant to be able to exercise his or her right to an effective remedy against a decision rejecting an application for international protection, all effects of the return decision should be automatically suspended for as long as the applicant has the right to remain or has been allowed to remain on the territory of a Member State. To improve the effectiveness of procedures at the external border, while ensuring the respect of the right to an effective remedy, appeals against decisions taken in the context of the border procedure should take place only before a single level of jurisdiction of a court or tribunal.
- (66) Applicants should, in principle, have the right to remain on the territory of a Member State until the time-limit for lodging an appeal before a court or tribunal of first instance expires, and, where such a right is exercised within the set time-limit, pending the outcome of the appeal. It is only in the limited cases set out in this Regulation, where applications are likely to be unfounded, that the applicant should not have an automatic right to remain for the purpose of the appeal.
- (8) The following recitals are inserted after recital (66):
- ‘(66a) In cases where the applicant has no automatic right to remain for the purpose of the appeal, a court or tribunal should still be able to allow the applicant to remain on the territory of the Member State pending the outcome of the appeal, upon the applicant’s request or acting of its own motion. In such cases, applicants should have a right to remain until the time-limit for requesting a court or tribunal to be allowed to remain has expired and, where the applicant has presented such a request within the set time-limit, pending the decision of the competent court or tribunal. In order to discourage abusive or last minute subsequent applications, Member States should be able to provide in national law that applicants should have no right to remain during that period in the case of rejected subsequent applications, with a view to preventing further unfounded subsequent applications. In the context of the procedure for

determining whether or not the applicant should be allowed to remain pending the appeal, the applicant's rights of defence should be adequately guaranteed by providing him or her with the necessary interpretation and legal assistance. Furthermore, the competent court or tribunal should be able to examine the decision refusing to grant international protection in terms of facts and points of law.

- (66b) In order to ensure effective returns, applicants should not have a right to remain on the Member State's territory at the stage of a second or further level of appeal before a court or tribunal against a negative decision on the application for international protection, without prejudice to the possibility for a court or tribunal to allow the applicant to remain. Furthermore, Member States should not grant applicants the possibility to lodge a further appeal against a first appeal decision in respect of a decision taken in a border procedure.
- (66c) To ensure the consistency of the legal review carried out by a court or tribunal on a decision rejecting an application for international protection and the accompanying return decision, and with a view to accelerating the examination of the case and reducing the burden on the competent judicial authorities, such decisions should be subject to common proceedings before the same court or tribunal.
- (66d) In order to ensure fairness and objectivity in the management of applications and effectiveness in the common procedure for international protection, time-limits should be set for the administrative procedure.
- (9) [UK- Recital 77]
- (10) In Article 4 paragraph 1 the following point is added
- (i) 'family member'
- (11) In Article 26, the following paragraph is added:
- '3. For third-country nationals subject to the screening referred to in Article 3(1) of Regulation (EU) XXX/XXX [Screening Regulation], paragraphs 1 and 2 shall apply only after the screening has ended.'
- (12) In Article 27, the following paragraphs are added :
- '5. For third-country nationals subject to the screening referred to in Article 3(1) of Regulation (EU) No XXX/XXX [Screening Regulation], paragraphs 1 to 4 shall apply only after the screening has ended.
6. Where biometric data could not be taken during the screening in accordance with Regulation (EU) No XXX/XXX [Eurodac Regulation] or where the applicant was not subject to a screening, the competent authorities shall take the biometric data at the latest upon the registration of the application for international protection and transmit them together with the data referred to in Article 12 (c) to (p) of Regulation (EU) No XXX/XXX [Eurodac Regulation] to the Central System and to the Common Identity Repository respectively in accordance with that Regulation.'
- (13) The following new Article 35a is inserted:

*'Article 35a*

**Rejection of an application and issuance of a return decision**

Where an application is rejected as inadmissible, unfounded or manifestly unfounded with regard to both refugee status and subsidiary protection status, or as implicitly or explicitly

withdrawn, Member States shall issue a return decision that respects Directive XXX/XXX/EU [Return Directive]. The return decision shall be issued as part of the decision rejecting the application for international protection or, in a separate act. Where the return decision is issued as a separate act, it shall be issued at the same time and together with the decision rejecting the application for international protection.’

(14) Article 40 is amended as follows:

(a) in paragraph 1 the following point is added:

‘(i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;’

(b) in paragraph 5, the following point is added:

‘(c) the applicant is of a nationality or, in the case of stateless persons, a former habitual residence of a third country for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;’

(15) Article 41 is replaced by the following:

*‘Article 41*

**Border procedure for the examination of applications for international protection**

1. Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], and provided that the applicant has not yet been authorised to enter Member States’ territory, a Member State may examine an application in a border procedure where that application has been made by a third-country national or stateless person who does not fulfil the conditions for entry in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:
  - (a) following an application made at an external border crossing point or in a transit zone;
  - (b) following apprehension in connection with an unauthorised crossing of the external border;
  - (c) following disembarkation in the territory of a Member State after a search and rescue operation;
  - (d) following relocation in accordance with Article [X] of Regulation (EU) No XXX/XXX [Ex Dublin Regulation].
2. Where a border procedure is applied, decisions may be taken on the following:

- (a) the inadmissibility of an application in accordance with Article 36;
  - (b) the merits of an application in an accelerated examination procedure in the cases referred to in Article 40(1).
3. Member State shall examine an application in a border procedure in the cases referred to in paragraph 1 where the circumstances referred to in Article 40(1), point (c), (f) or (i), apply.
4. A Member State may decide not to apply paragraph 3 to nationals or stateless persons who are habitual residents of third countries for which that Member State has submitted a notification to the Commission in accordance with Article 25a(3) of Regulation (EC) No 810/2009.

Where, following the examination carried out in accordance with Article 25a(4) of Regulation (EC) No 810/2009, the Commission considers that the third country is cooperating sufficiently, the Member State shall again apply the provisions of paragraph 3.

Where the Commission considers that the third country concerned is not cooperating sufficiently, the Member State may continue not to apply paragraph 3:

- (a) until an implementing act previously adopted by the Council in accordance with Article 25a(5) of Regulation (EC) No 810/2009 is repealed or amended;
  - (b) where the Commission does not consider that action is needed in accordance with Article 25a of Regulation (EC) No 810/2009, until the Commission reports in its assessment carried out in accordance with paragraph 2 of that Article that there are substantive changes in the cooperation of the third country concerned.
5. The border procedure may only be applied to unaccompanied minors and to minors below the age of 12 and their family members in the cases referred to in Article 40(5) (b).
6. Applicants subject to the border procedure shall not be authorised to enter the territory of the Member State, without prejudice to paragraphs 9 and 11.
7. When applying the border procedure, Member States may carry out the procedure for determining the Member State responsible for examining the application as laid down in Regulation (EU) No XXX/XXX [Regulation on Asylum and Migration Management], without prejudice to the deadlines established in paragraph 11
8. Where the conditions for applying the border procedure are met in the Member State from which the applicant is relocated, a border procedure may be applied by the Member State to which the applicant is relocated in accordance with Article [x] of Regulation EU (No) XXX/XXX [Regulation on Asylum and Migration Management], including in the cases referred to in paragraph 1, point (d).
9. Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:
- (a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;
  - (b) the necessary support cannot be provided to applicants with special procedural needs in the locations referred to in paragraph 14;

- (c) there are medical reasons for not applying the border procedure,;
- (d) detention is used in individual cases and the guarantees and conditions for detention as provided for in Articles 8 to 11 of Directive XXX/XXX/EU [Reception Conditions Directive] are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

In such cases, the competent authority shall authorise the applicant to enter the territory of the Member State.

- 10. By way of derogation from Article 28 of this Regulation, applications subject to a border procedure shall be lodged no later than five days from registration for the first time or, following a relocation in accordance with Article [x] of Regulation EU (No) XXX/XXX [Regulation on Asylum and Migration Management], five days from when the applicant arrives in the Member State responsible following a transfer pursuant to Article 56(1), point (e), of that Regulation.
- 11. The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. It shall encompass the decision referred to in paragraph 2 and 3 and any decision on an appeal if applicable and shall be completed within 12 weeks from when the application is registered. Following that period, the applicant shall be authorised to enter the Member State's territory except when Article 41a(1) is applicable.

By way of derogation from the time limits set in Articles 34, 40(2) and 55, Member States shall lay down provisions on the duration of the examination procedure and of the appeal procedure which ensure that, in case of an appeal against a decision rejecting an application in the framework of the border procedure, the decision on such appeal is issued within 12 weeks from when the application is registered.

- 12. By way of derogation from paragraph 11 of this Article, the applicant shall not be authorised to enter the Member State's territory where:
  - (a) the applicant's right to remain has been revoked in accordance with Article 9(3), point (a);
  - (b) the applicant has no right to remain in accordance with Article 54 and has not requested to be allowed to remain for the purposes of an appeal procedure within the applicable time-limit;
  - (c) the applicant has no right to remain in accordance with Article 54 and a court or tribunal has decided that the applicant is not to be allowed to remain pending the outcome of an appeal procedure.

In such cases, where the applicant has been subject to a return decision issued in accordance with the Directive XXX/XXX/EU [Return Directive] or a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399, Article 41a shall apply.

- 13. During the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones. Each Member State shall notify to the Commission, [*two months after the date of the application of this Regulation*] at the latest, the locations where the border procedure will be carried out, at the external borders, in the proximity to the external border or transit zones, including when applying paragraph 3 and ensure that the capacity of those locations is sufficient to process the applications covered by that paragraph. Any changes in the identification of the locations at which the border procedure is applied, shall be notified to the Commission two months in advance of the changes taking effect.

14. In situations where the capacity of the locations notified by Member States pursuant to paragraph 14 is temporarily insufficient to process the applicants covered by paragraph 3, Member States may designate other locations within the territory of the Member State and upon notification to the Commission accommodate applicants there, on a temporary basis and for the shortest time necessary.

(16) The following new Article 41a is inserted:

*Article 41a*

**Border procedure for carrying out return**

1. Third-country nationals and stateless persons whose application is rejected in the context of the procedure referred to in Article 41 shall not be authorised to enter the territory of the Member State.
2. Persons referred to in paragraph 1 shall be kept for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones; where a Member State cannot accommodate them in those locations, it can resort to the use of other locations within its territory. The 12-week period shall start from when the applicant, third-country national or stateless person no longer has a right to remain and is not allowed to remain.
3. For the purposes of this Article, Article 3, Article 4(1), Articles 5 to 7, Article 8(1) to (5), Article 9(2) to (4), Articles 10 to 13, Article 15, Article 17(1), Article 18(2) to (4) and Articles 19 to 21 of Directive XXX/XXX/EU [recast Return Directive] shall apply.
4. Without prejudice to the possibility to return voluntarily at any moment, persons referred to in paragraph 1 may be granted a period for voluntary departure not exceeding 15 days.
5. Persons referred to in paragraph 1 who have been detained during the procedure referred to in Article 41 and who no longer have a right to remain and are not allowed to remain may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process.
6. Persons referred to in paragraph 1 who no longer have a right to remain and are not allowed to remain, and who were not detained during the procedure referred to in Article 41, may be detained if there is a risk of absconding within the meaning of Directive XXX/XXX/EU [Return Directive], if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security.
7. Detention shall be maintained for as short a period as possible, as long as removal arrangements are in progress and executed with due diligence. The period of detention shall not exceed the period referred to in paragraph 2 and shall be included in the maximum periods of detention set in Article 15 (5) and (6) of Directive XXX/XXX/EU [Return Directive].
8. Member States that, following the rejection of an application in the context of the procedure referred to in Article 41, issue a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399, and that have decided not to apply Directive

XXX/XXX/EU [Return Directive] in such cases pursuant to Article 2(2), point (a), of that Directive, shall ensure that the treatment and level of protection of the third-country nationals and stateless persons subject to a refusal of entry are in accordance with Article 4(4) of Directive XXX/XXX/EU [Return Directive] and are equivalent to the ones set out in paragraphs 2, 4 and 7 of this Article.’

(17) Article 43 is amended as follows:

‘(a) Point (a) is deleted.

The following point (c) is added in Article 43:

(c) a first subsequent application has been lodged within one year of the decision of the determining authority on the first application merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant’s imminent removal from the Member State, pending the finalisation of the decision declaring that application inadmissible in cases where it is immediately clear to the determining authority that no new elements have been presented in accordance with Article 42(4)’

(18) Articles 53 and 54 are replaced by the following:

#### *Article 53*

#### **The right to an effective remedy**

1. Applicants shall have the right to an effective remedy before a court or tribunal against:

- (a) a decision rejecting an application as inadmissible;
- (b) a decision rejecting an application as unfounded in relation to both refugee and subsidiary protection status;
- (c) a decision rejecting an application as implicitly withdrawn;
- (d) a decision withdrawing international protection;
- (e) a return decision.

Return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as decisions referred to in points (a), (b), (c) and (d).

2. Persons recognised as eligible for subsidiary protection shall have the right to an effective remedy against a decision considering their application unfounded in relation to refugee status. Where subsidiary protection status granted by a Member State offers the same rights and benefits as refugee status under Union and national law, the appeal against that decision in that Member State may be considered as inadmissible where provided for in national law.

3. An effective remedy within the meaning of paragraph 1 shall provide for a full and *ex nunc* examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) No XXX/XXX [Qualification Regulation].

4. Applicants shall be provided with interpretation for the purpose of a hearing before the competent court or tribunal where such a hearing takes place and where appropriate communication cannot otherwise be ensured.
5. Where the court or tribunal considers it necessary, it shall ensure the translation of relevant documents that have not already been translated in accordance with Article 33(4). Alternatively, translations of those relevant documents may be provided by other entities and paid for from public funds in accordance with national law.
6. If the documents are not submitted in time for the court or tribunal to ensure their translation, the court or tribunal may refuse to take those documents into account if they are not accompanied by a translation provided by the applicant.
7. Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1:
  - (a) at least one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply;
  - (b) between a minimum of two weeks and a maximum of two months in all other cases.
8. The time-limits referred to in paragraph 7 shall start to run from the date when the decision of the determining authority is notified to the applicant or his or her representative or legal adviser. The procedure for notification shall be laid down in national law.
9. Member States shall provide for only one level of appeal in relation to a decision taken in the context of the border procedure.

#### *Article 54*

#### **Suspensive effect of appeal**

1. The effects of a return decision shall be automatically suspended for as long as an applicant has a right to remain or is allowed to remain in accordance with this Article.
2. Applicants shall have the right to remain on the territory of the Member States until the time-limit within which to exercise their right to an effective remedy before a court or tribunal of first instance has expired and, where such a right has been exercised within the time-limit, pending the outcome of the remedy.
3. The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one of the following decisions:
  - (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;
  - (b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];
  - (c) a decision which rejects an application as implicitly withdrawn;

- (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded;
  - (e) a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation).
4. In the cases referred to in paragraph 3, a court or tribunal shall have the power to decide, following an examination of both facts and points of law, whether or not the applicant shall be allowed to remain on the territory of the Member States pending the outcome of the remedy upon the applicant's request. The competent court or tribunal may under national law have the power to decide on this matter *ex officio*.
5. For the purpose of paragraph 4, the following conditions shall apply:
- (a) the applicant shall have a time-limit of at least 5 days from the date when the decision is notified to him or her to request to be allowed to remain on the territory pending the outcome of the remedy;
  - (b) the applicant shall be provided with interpretation in the event of a hearing before the competent court or tribunal, where appropriate communication cannot otherwise be ensured;
  - (c) the applicant shall be provided, upon request, with free legal assistance and representation in accordance with Article 15(4) and (5);
  - (d) the applicant shall have a right to remain:
    - (i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired;
    - (ii) where the applicant has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant shall be allowed remain on the territory.
6. In cases of subsequent applications, by way of derogation from paragraph 6, point (d) of this Article, Member States may provide in national law that the applicant shall not have a right to remain, without prejudice to the respect of the principle of *non-refoulement*, if the appeal has been made merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal from the Member State, in cases where it is immediately clear to the court that no new elements have been presented in accordance with Article 42(4).
7. An applicant who lodges a further appeal against a first or subsequent appeal decision shall not have a right to remain on the territory of the Member State, without prejudice to the possibility for a court or tribunal to allow the applicant to remain upon the applicant's request or acting *ex officio*.