

General programme "Solidarity and Management of Migration Flows": European Refugee Fund (ERF) 2008-2013

2009/0127(COD) - 09/03/2012 - Commission communication on Council's position

In its communication concerning the position of the Council on the adoption of a proposal for a Decision of the European Parliament and of the Council of amending Decision no 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013, the Commission states that the Common Position satisfies the Commission's original objective to ensure more refugee resettlement to the European Union by increasing both the numbers of resettled refugees and the number of the Member States having ongoing national resettlement schemes.

The issue of delegated acts: the Commission recalls that the Council's position is a result of a long negotiation process. Following the first reading position of the European Parliament (issued on 18 May 2010), the co-legislators did not reach a compromise due to the institutional issue of the choice of procedure for the establishment of annual resettlement priorities at European level (delegated vs. implementing acts procedure).

The stalemate in negotiations was overcome with the proposal submitted by the Presidency in late December 2011. The compromise proposal is based on the fact that the European Refugee Fund runs only up to the end of 2013. This means that the pledging exercise to take place in 2012 is the last one under the present Fund. This, in turn, implies that there is no need to establish a procedure for setting annual resettlement priorities, as such priorities will only be defined once before the present Fund ceases to exist.

The solution found is to insert the specific EU resettlement priorities for 2013 as an integral part of the Decision in Annex I.

Further to the first reading position of the European Parliament (adopted on 18 May 2010), an agreement on the substance of the proposal was finally reached between the co-legislators on the outstanding issues in a Trilogue on 9 February 2012.

The only open point concerned the **legal basis for this proposal**.

On 10 February the Chairman of the LIBE Committee sent a letter to the Council Presidency confirming the agreement of the rapporteurs and the Shadow-rapporteurs on the text supported by the Council, and stating that if that text was to be transmitted formally to the European Parliament during a forthcoming plenary session as the Council's First Reading Position for this legislative proposal, he would recommend that the Members of the LIBE committee and subsequently the plenary session accept it without amendments. Coreper on 22 February confirmed the agreement on the text to be submitted to the Council for adoption.

The main differences between the Common Position and the original Commission proposal are set out below:

- **Establishment of common EU priorities** (Article 1(1)(a)): the Common Position lists the resettlement priorities in the Decision as opposed to the initial proposal by the Commission according to which the common EU resettlement priorities were to be established in the comitology procedure on an annual basis. Since the current European Refugee Fund covers the period until the end of 2013, the Decision establishes resettlement priorities for one year only. It is, therefore, in line

with Commission's proposal to list the priorities for that year in this Decision. A mechanism for the establishment of the common

- EU resettlement priorities is provided for in the instrument creating a new Asylum and Migration Fund for the period 2014-2020.
- **Common EU resettlement priorities for 2013** (Article 1(1)(a)): the common EU resettlement priorities for 2013 as set out in the Common Position cover 3 sets of priorities. The first two sets of priorities are formulated as general ones and they draw closely on the categories set out in Article 13 (3) of Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013. In comparison with Decision No 573/2007/EC the Common Position adds the following vulnerable groups to the list: survivors of violence and torture as well as persons in need of emergency resettlement or urgent resettlement for legal or physical protection needs. The third set of priorities is referred to as specific common EU priorities for 2013 and the list of these priorities can be found in the Annex to this Decision. This list is established on the basis of the UNHCR resettlement criteria and the UNHCR annual resettlement forecast taking into account where EU common action would have a significant impact in addressing the protection needs. This is in line with the Commission's proposal.
- **The fixed amount to be received for each resettled person** (Article 1(1)(b)): the Common Position amends the Commission proposal by proposing a higher fixed amount for each person resettled according to the priorities to be received from the Fund by those Member States that have not used the Fund for this purpose before. The Common Position foresees an amount of 6000 EUR for each resettled person for those Member States which shall receive the fixed amount from the Fund for the first time and an amount of 5000 EUR for those Member States which have received the fixed amount from the Fund only once before. The purpose of this amendment is to encourage those Member States that have not done so until now to launch resettlement programmes.

Legal basis of the proposal: the Commission proposal of 2009 was originally based on Article 63 (2) (b) TEC but the Omnibus Communication on consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures indicated Articles 78 and 80 TFEU (the latter on internal EU solidarity) as the new legal basis. The reference to this article, together

with article 78 TFEU, aimed at underlining that the purpose of the proposed measures was to ensure a "balance of efforts" as mentioned in former article 63 TEC. However, the Council is of the opinion that the correct lisbonisation of the legal basis is art. 78 (2) (g) TFEU, and that **art. 80 TFEU cannot constitute a legal basis, not even a complementary one.**

On 13 February the DK Presidency issued a paper with two options, one of which was to propose an inclusion of a recital including a reference to Article 80 TFEU. The Coreper on 15 February decided to keep only art. 78 (2) (g) TFEU as the legal basis for the proposal. This position was confirmed by Coreper on 22 February. The text was forwarded for the adoption by the Council on March 8.

Although not in line with the Omnibus Communication, the Commission may support the legal basis to be composed solely of art. 78 (2) (g) TFEU as the non-inclusion of Article 80 TFEU which does not as such constitute a legal basis does not affect the substance of the proposal and is in line with the equivalence tables of the Lisbon Treaty. Furthermore, it is consistent with recent MFF proposals in home affairs area which have been adopted with no reference to article 80 TFEU. The recital as added can be supported by the Commission as it underlines the importance of Solidarity in the Common European Asylum System and makes explicitly reference to art. 80 TFEU.

The European Parliament asked the Commission to issue a Declaration on its future right of initiative with regard to the choice of legal bases. The Commission agreed to this request. The text of the Declaration is the following: "The Commission, in a spirit of compromise and in order to ensure the immediate adoption

of the proposal, supports the final text; however it notes that this is without prejudice to its right of initiative with regard to the choice of legal bases, in particular in reference to the future use of Article 80 TFEU”.