

# **International protection: criteria and mechanisms for determining the Member State responsible for examining an application lodged by a third-country national or a stateless person.**

## **Recast**

2008/0243(COD) - 10/06/2013 - Commission communication on Council's position

In its communication on the position of the Council on the adoption of a proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection, the Commission indicates its full support for the compromise text arising from the negotiations of the two co-legislators because it adds value to the current standards of treatment of applicants found under a Dublin procedure. It guarantees their right to information and access to effective remedy against transfer decisions and it introduces clear rules on detention and access to free legal assistance, issues which the current instrument does not address. It provides a more predictable environment for the relations between Member States and more favourable conditions for reuniting vulnerable persons, in particular unaccompanied minors, with their family or relatives.

Analysis of the main differences between the common position and the Commission's 2011 modified proposal:

**Enhancing the system's efficiency: the common position limits the possibility to make a request on humanitarian grounds to the period previous to the first decision in substance.** The Commission understands this change as preventing abuse in the form of a repeated application in case the first decision on substance is negative. The deadlines for submitting requests, replying to requests and carrying out transfers have been reduced in case of people detained under the specific ground of the Dublin procedure.

### **Enhancing the protection of applicants under the Dublin procedure**

**- suspension of transfers/early warning system:** the common position does not endorse the introduction of a mechanism in the Dublin Regulation, initially proposed by the Commission, for fears it could result in a pull factor for irregular migration, an encouragement for Member States not to respect their obligations under EU law. The common position replaced the provisions on suspension of transfers with the set-up of an early warning, preparedness and crisis management system. This system focuses on detecting and addressing the root causes of problems that might develop into asylum crises. It also reinforces language on solidarity and protection of fundamental rights. Moreover, it ensures the same level of protection for the applicants as was intended under the Commission proposal for a suspension of transfers.

**- effective remedy against transfer decision:** no provisions exist in the current Dublin Regulation on effective remedy. The common position provides for the following option-based system:

- an automatic suspensive effect (where an appeal is lodged, the person is always granted the right to remain on the territory until the appeal is judged);
- an automatic suspensive effect for a limited period of time (the period should be sufficient to allow for a rigorous scrutiny of the request);

- suspensive effect on request (whereby the suspension of the transfer is not automatically applied to all applicants appealing a transfer decision, but only to those asking for it; the transfer is consequently suspended for the period of time during which the court or tribunal is expected to pronounce on the matter).

In addition, a new provision was introduced, foreseeing that an applicant cannot be transferred to a Member State where there is a risk of violation of fundamental rights.

**- detention:** no specific provisions currently exist on the detention of persons found under a Dublin procedure. The Commission proposal aimed at ensuring that detention of persons during the Dublin procedure is not arbitrary. During negotiations the approach was taken that, for reasons of legal coherence, it is better to have all the necessary provisions regarding the guarantees applicable to persons in detention and detention conditions together in only one asylum instrument – the Reception Conditions Directive. Only the Dublin specific ground and conditions need to be defined in the Dublin Regulation itself.

The common position reflects this point and foresees:

- reference to the Reception Conditions Directive, whose guarantees and detention conditions apply to persons detained during the Dublin procedure, along with the clarification that a person under Dublin procedure can only be detained for the Dublin-related ground;
- introduction of the principle that a person **cannot be detained only for the reason that is subject to the Dublin procedure**;
- introduction of clear time limits for each leg of the Dublin procedure, **ensuring that a person cannot be detained in total for longer than 3 months** (otherwise the entire Dublin procedure can last up to 11 months), or else the person is released.

**- minors and dependants: the common position restricts the concept of family to the nuclear family**, as agreed in the Qualification Directive, but introduces references to members of the extended family in the relevant articles. It accepts to include married minors in the definition of unaccompanied minors. It introduces a definition of the term "relative", referring to the uncle, aunt or grandparent of a minor. It foresees the obligation for Member States to be proactive and start looking for the family of an unaccompanied minor. It allows the reunification of a married unaccompanied minor with family and siblings, when he/she is not accompanied by the spouse.

As regards the criterion relative to dependants, it is moved outside the hierarchy of criteria, under the norm "shall normally".

As regards the situation of an unaccompanied minor with no family or relatives on EU territory, **the common position foresees that the Member State responsible is that where the minor has lodged an application for international protection**. A Declaration is attached to the draft Regulation, providing that the Commission will put forward a new proposal on this issue as soon as the Court of Justice of the European Union will have delivered its judgment in the preliminary case C-648/11. The European Parliament and the Council will then both exercise their legislative competences, taking into account the best interests of the child.

**- Right to information and personal interview:** the common position makes the personal interview compulsory subject to limited exceptions, and inserts the obligation to inform the applicant not only on the criteria, but also on its hierarchy, including the fact that the application may end up in being examined by a Member State that is not the one responsible under the hierarchy of criteria (**sovereignty clause**), as well as on the fact that the person may ask for the suspension of the transfer.

**Delegated and implementing acts:** the common position foresees an empowerment for the Commission to adopt delegated acts containing supplementary rules on the reunification of minors and dependents with family and relatives; a recital stresses that the Commission should carry out consultations with experts, including all relevant national authorities. The possibility to adopt supplementary rules on the costs of transfers was not retained as the Council considers that the rules of the basic act are sufficient in this respect.

**As regards transfers, the common position foresees only the possibility to adopt uniform rules of implementation, but not supplementary rules.**

The period granted to the Parliament and to the Council to possibly object to a delegated act adopted by the Commission has been set at four months, extendable at the European Parliament's or Council's initiative by another two.

As regards the power to adopt implementing acts, the common position foresees a limitation to its powers, providing that the Commission cannot adopt an act where the assisting Committee delivers no opinion on the draft proposal.