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BRIEFING NOTE

Policy Department C
Citizens' Rights and Constitutional Affairs

PROPOSAL FOR A REGULATION ESTABLISHING THE CRITERIA AND MECHANISMS FOR DETERMINING THE MEMBER STATES RESPONSIBLE FOR EXAMINING AN APPLICATION FOR INTERNATIONAL PROTECTION LODGED IN ONE OF THE MEMBER STATES BY A THIRD-COUNTRY NATIONAL OR A STATELESS PERSON (RECAST), COM (2008) 820 final

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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Abstract:

The note offers an assessment of the following aspects: extension of the scope of application for subsidiarity protection, the question of effective judicial protection, detention, the extension of the term "family member", the discretionary clauses, the new mechanism of temporary suspension of transfers.

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I. General observations

a. Extended information to applicants for international protection

One of the major aims of the amended regulations is to provide better legal safeguards for the persons falling under the Dublin procedure. Although there are certainly some gaps concerning legal protection, it seems that the proposed modifications contain excessively detailed provisions. As an example of "over-perfect" legislation, Art. 3 para. 4 on the information on the application of the regulation may be quoted. It is doubtful whether it promotes the aims of the regulation that an applicant must be informed about the "objectives of the regulation", the "criteria for allocating responsibility" etc. It seems to me that the Commission has a legal seminar for applicants asking for international protection in mind rather than informing the asylum seeker about essential rights and consequences of challenging a transfer decision.

Suggestion: replace the modification by a reference to the possibilities to challenge a transfer decision and its consequences.

b. Extension of the scope of application for subsidiary protection

In principle, the extension of the scope of application is useful. However, the extension may lead to difficulties in determining the scope of application of the regulation. The definition of application for international protection (Art. 2 para. 9 Directive 2004/83, "who can be understood to seek refugee status or subsidiary protection status and does not explicitly request another kind of protection, outside the scope of this directive that can be applied for separately") may lead to a new category of disputes between Member States as well as to a delay of procedures. Therefore, the extension of the dispute settlement mechanism appears to be a useful modification.

c. Applicability of the regulation on minimum standards for the reception of asylum seekers (recital No. 9)

Although in principle it is appropriate to ensure equal treatment of all asylum seekers during the procedure including the procedure on the determination of the responsible Member State, one must take into account that some provisions of the Reception Directive are obviously not suitable for the accommodation of an applicant and his/her family members for the time period until a transfer to the responsible state can be made.

2. Effective judicial protection (recital No. 17 and Art. 26)

Article 26 grants the right to an effective judicial remedy in accordance with the jurisprudence of the European Court of Human Rights and the general principles of EC law as applied by the European Court of Justice. Therefore, the principle in Art. 26 para. 1 can hardly be challenged. The effectiveness of a right to seek a remedy, however, does not require necessarily a suspensive effect. The amended Art. 26 provides for a decision of the authority referred to in Art. 26 para. 1 to decide as soon as possible and in any case not later than 7 working days whether or not the person concerned may remain on the territory of the Member State pending the outcome of the appeal or review. In principle, this solution can be considered as an acceptable balance between the public interest to have an efficient and speedy transfer procedure and the private interest to remain on the territory in order to file an asylum claim. The provision does not mention any criteria for the decision on the suspension of a transfer decision. As a rule, within the Dublin context there is no danger of an irreversible harm in case of non-suspension unlike in case of return to a third state (in which case there must be clearly a suspension in case of doubt about a risk of persecution). Generally speaking, the assumption of the Dublin regulation is that all EU Member States are applying common standards and are subject to common procedural and substantive rules on asylum.

Suggestion: add a sentence in Art. 26 para. 4, replacing the second sentence:

> "The decision whether a person concerned may remain on the territory of the Member State concerned pending the outcome of his/her appeal or review shall be made on the basis of a summary examination of the merits of the claim and assessment of the public interest to have an efficient and speedy transfer procedure and the private interest to remain on the territory in order to file an asylum claim."

3. Detention

Article 27 para. 1 states that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive 2005/8/EC. Although this sentence is correct, it is largely irrelevant to the problems of detention in the context of the Dublin Regulation. The practice of states indicates that applicants are not detained for the sole reason that he/she is an applicant for international protection but for the purpose of ensuring the effective application of the Dublin Regulation,

in particular to effect a transfer to another responsible state. Therefore, the question arises less in connection with Art. 27 para. 1 but with regard to the precise conditions laid down in Art. 27 para. 2. The wording of Art. 27 para. 2 seems to indicate that a detention is only possible if "there is a *significant* risk of him/her absconding". However, the clause is "without prejudice" to Art. 8 (2) of the Reception Conditions Directive which contains a variety of reasons to detain including protection of national security and public order.

It is doubtful whether the requirements of Art. 27 para. 2 and para. 2 provide in practice sufficient possibilities to effect a transfer within the timeframe provided for by the Dublin Regulation. There is evidence that in practice a substantial number of asylum seekers temporarily or permanently go into hiding upon the notice of transfer to another responsible Member State. This is even more likely since Art. 27 para. 4 provides that detention may only be applied from the movement a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Art. 25, until that person is transferred to the responsible Member States. As a rule, this will exclude an order of detention to be served at the moment of notification since by that time the person concerned may provide alternatives which will have to be taken into consideration when making a detention decision. In former US practice, similar rules have been commonly described as "run-away-orders". Therefore, it seems doubtful whether Art. 27 ensures an effective application of the Regulation in case of asylum seekers trying to escape transfer to another responsible state.

The major purpose of the amendment can be achieved if it is specified that the detention in order to enforce a transfer decision can only be ordered if on the basis of the individual examination the responsible authorities may reasonably assume that there is a risk of absconding. It should be noted in this context that the definition in Art. 2 lit. l also only speaks of a "risk of absconding". Therefore, if the requirement of a "*significant*" risk would be maintained, it would logically not be considered as sufficient to fulfil the criteria of Art. 2 lit. l.

Suggestion: modify Art. 27 para. 2 by deleting "significant" in para. 2 and delete Art. 27 para. 3.

Article 27 No. 11 excludes categorically detention under any circumstances for unaccompanied minors. It can be assumed that somewhat contrary to the categorical wording "shall *never* be detained" it cannot be assumed that unaccompanied minors cannot be detained for public order reasons (this interpretation is confirmed by the fact that Sec. V applies in case of detention for the purpose of transfers only). But even for the purpose of transfer it is doubtful whether enforcement of a transfer order should be categorically excluded under any circumstances. Although the intention of the provision to protect the particular situation of unaccompanied minors is reasonable, it should be kept in mind that the provision does not only contain a substantial potential of abuse since frequently it may be very difficult if not impossible to determine the precise age. The provision also does not sufficiently consider different circumstances and conditions under which the need may arise to transfer unaccompanied minors, who may have moved irregularly from one EU Member State to another EU Member State. The possibility of transfer in these cases arises only if the largely extended humanitarian clauses on change of responsibility are not applicable.

Suggestion: "unaccompanied minors can only be detained for the purpose of transfer as a last resort and if special arrangements have been taken to restrict the duration of detention to the shortest possible period and to make sure that the interests of the minor and his/her special circumstances are properly taken into account during any stage of the transfer procedure.

4. Extension of the term "family member" (Art. 2 i)

a. Family members

The amendment includes married minor children of couples "where it is in their best interest to reside with the applicant". There are no criteria under which conditions it is in their best interest to reside with the applicant. The amend text is very vague and will probably lead to a right of determination of the married minor children.

Suggestion: delete Art. 2 lit. i (iii); under the general provisions special circumstances may sufficiently be taken into account.

b. Guarantees for minors (Art. 6)

The principle of best interests of the child as laid down in the UN Convention on the Rights of Children is obligatory for EU Member States. However, it is doubtful whether the repetition of the clause does significantly add to the content of the provision. In my view, it would be sufficient to make a reference to general principles such as the best interests of the child in the recitals referring to the relevant international treaties in force.

c. Derogation of criteria (Art. 7 para. 3)

Article 7 para. 3 provides for a derogation in order to "ensure respect for the principle of family unity and of the best interests of the child". Responsibility is determined in accordance with the criteria laid down in Art. 8-12 "… on the basis of the situation obtaining when the asylum seeker lodged his/her most recent application for international protection". The derogation of responsibility criteria on the basis of such vague clauses like the "best interest of the child" leads to a high degree of uncertainty and may be a source of further disputes (see also Art. 8 para. 3 and para. 4). The uncertainty is increased by the use of the term "another relative" (Art. 8 para. 4) or "relative" (Art. 8 para. 3). While the family members are defined in Art. 2 lit. i, the term "another relative" is not defined.

5. Discretionary clauses (Art. 17)

a. Requirement of agreement (Art. 17 para. 1)

The new requirement seems to be in principle acceptable although it may reduce the possibility of states to exercise the discretionary clause of Art. 17 for the purpose of facilitating and speeding up an asylum procedure.

b. Right of Member States to request another Member States (Art. 17 para. 2)

The right of Member States to request another Member State to take charge of an applicant in order to bring together family members as well as other relatives on humanitarian grounds, even where the latter Member State is not responsible, is somewhat unclear. It seems that there is no obligation involved. However, this is somewhat in contradiction to the obligation to state the reasons since there are no criteria to determine the "humanitarian grounds". In my view the provision is superfluous.

Suggestion: delete.

c. Obligation of Member States to take back (Art. 18 para 1 and para. 2)

The obligation to take back has been modified somehow with regard to an applicant who is in the territory of another Member State "without a residence document". It is doubtful whether the residence document can be really considered as decisive in cases in which under national law a residence document has to be issued even for persons having no residence permit (certificate of toleration or a suspension of execution of return decisions etc).

Suggestion: replace by "without a residence permit"

Article 18 para. 2 contains an obligation to complete the examination in spite of the withdrawal of an application. The wording seems to be misleading; the provision should be restricted to the case of withdrawal as a result of moving to another Member State. If an applicant has voluntarily withdrawn an application for other reasons, there is no reason to revoke the decision and complete the examination.

Suggestion: replace the wording by "as a result of the applicant moving in an irregular manner to another Member State".

d. Cessation of responsibilities (Art. 19)

Again the term "residence document" is used in an unclear way. It is not clear whether it means a document certifying a residence permit or whether it is meant as a document certifying duration or the status as an applicant for international protection.

6. Procedure (Art. 25 et seq.)

In Art. 25 the notification of a transfer decision is regulated. The amended provision provides for an obligation to notify within a period of 15 working days from the date of receipt the reply from the requested Member State. The obligation to notify the transfer decision within 15 working days from the date of receipt of the reply from the requested Member State may increase the risk of absconding and will not contribute to a higher efficiency of the procedure. The provision of Art. 25 para. 2, whereby the transfer decisions must include "a description of

the main steps in the procedure leading to the decision" seems unnecessary and irrelevant for the applicant. It may contribute to a confusion about the meaning of such descriptions.

7. Temporary suspension of the transfer mechanism (recital No. 21 and Art. 31)

The new mechanism of temporary suspension of transfers is intended to contribute to achieve "a higher degree of solidarity" towards those Member States facing particular pressures on their asylum systems (recital No. 21). It is not clear on what basis this assumption is made by the European Commission. The suspension mechanism applies only in case of secondary movements and shifts the burden to those Member States which happen to be the destination countries in case of irregular secondary movements, as a rule adjacent states. In effect this has very little to do with a higher degree of solidarity unless one would assume that irregular movements from the responsible Member States to other EU Member States lead to a better distribution of burdens (?). In practical effect the mechanism does only allow for a "legalization" of an infringement of the Dublin responsibility rules.

It is doubtful whether the recognition of a non-application of the Dublin Regulation contributes to the efficiency of the Dublin Regulation. In addition it may be a dangerous precedent to ease the burden and provide an incitement to create a situation of pressure leading to a request for temporary suspension of Dublin transfers. It may also work as a pull-factor since it encourages asylum seekers to profit from irregular movements to other Member States considered as more favourable on economic and other terms.

The conditions prescribed under Art. 31 ("particularly urgent situation", exceptionally heavy burden") are extremely vague and do not provide sufficient criteria to justify the non-application of the Dublin system.

The political inability to cope with a situation like the one in Italy cannot be solved by prescribing for a general suspension mechanism which does not contribute to any distribution mechanism but only to a shifting of burdens. The solution of the problem to arrive at a distribution mechanism within the EU in case of a numerically definable unproportionally high level of asylum seekers or a sudden influx of asylum seekers leading to a overburdening

of the system cannot be solved by this provision. A distribution mechanism on the EU-level is required.

In addition, it is doubtful whether a suspension decision should be within the competence of the Commission. The problem to be solved is mainly a political problem between the Member States. Therefore, one may question whether it is reasonable to entrust the Commission with the power to make a decision to suspend transfers rather than requesting the Member States to take up their responsibility for a burden sharing solution.