

4 November 2016

## **Decision of the Bundesrat**

**Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)**

**COM(2016) 270 final; Council doc. 8715/16**

At its 950th session, on 4 November 2016, the Bundesrat adopted the following position pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG):

### General remarks

1. The Bundesrat stresses the importance of international cooperation to tackle the challenges faced by asylum and migration policies – an importance highlighted not least by the selection of the Portuguese diplomat and former head of the UN Refugee Agency, António Guterres, as the UN Secretary-General. The Bundesrat expects the EU to pull its weight as a world political player and to find appropriate solutions to the challenges in the face of the large number of refugees and people seeking protection.
  
2. The Bundesrat is disappointed by the little progress made in the fair relocation of refugees in the EU. It shows the lack of willingness by Member States to comply with the values and goals of the EU laid down in Articles 2 et seq. TEU. In the light of this troubling state of affairs, the Bundesrat fully acknowledges the hard work done by the Commission in setting up a shared European framework and joint standards for asylum policies.

3. The Bundesrat basically shares the Commission's goals of improving the Common European Asylum System (CEAS) and of ensuring, through increased harmonisation, that asylum seekers receive the same fair and appropriate treatment and necessary protection throughout the EU, as well as ensuring, through the recast Dublin Regulation, that responsibilities are shared fairly between Member States.
4. It stresses that the measures required to achieve these goals must respect the EU Charter of Fundamental Rights, in particular Article 18, as well as the Geneva Convention of 28 July 1951 and its Protocol of 31 January 1967 on the status of refugees, and the existing EU treaties.

#### Criteria for determining the Member State responsible

5. The Bundesrat notes that the checks for whether there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in Member States, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights, are often applied differently by Member State authorities and courts, which can lead to the unequal treatment of asylum applicants. It therefore considers it essential that a fast and binding procedure be introduced at EU level for Member State authorities and courts, so that there are standard checks for identifying any systemic flaws.

#### Rules for unaccompanied minors

6. The Bundesrat welcomes the fact that the Proposal for a regulation put forward by the Commission in principle takes into account the interests and welfare of minors. In this context, it points out that the principle concerned should also be applied when determining the Member State responsible (Article 3 in conjunction with Article 10), the consequences of non-compliance with the Dublin Regulation (Article 5), the rules for taking into account children's welfare when consideration is given to transferring them under the Dublin Regulation (Article 10), the procedures for detention (Article 29) and the corrective allocation mechanism (Chapter VII).
7. The Bundesrat considers that the problems that can arise through infringements of the Dublin Regulation should not result in unaccompanied minors being left less protected. Rather, it is to be ensured that unaccompanied minors have access to a regular procedure granting them international protection at all times

and under all circumstances, so that the protection of each and every minor can be guaranteed at all times irrespective of the individual actions of the unaccompanied minor.

8. The Bundesrat considers it essential, when taking into account child welfare under Article 10 of the Proposal for a regulation, that a detailed examination rather than a quick check be carried out into whether risk to the child's welfare can be ruled out or whether the child's welfare requires that they not be transferred.
9. It considers the detention of unaccompanied minors under the 'Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person' permissible only for reasons of national security or of a severe disruption of public order.
10. The Bundesrat considers further checks essential on whether the current rules for data exchange ensure that, during the transfer of unaccompanied minors, all data relevant to the child's welfare are (or can be) exchanged between the authorities in charge of the accommodation and care of unaccompanied minors.

#### Priority to voluntary departure

11. The Bundesrat calls on the German government to urge the Commission and the Council to ensure, as they reform the Dublin III Regulation, that, as with Directive 2008/115/EC (Return Directive), they give priority to voluntary departure, as this has proven to be more humane, efficient and cost-effective than forced return and permits departures with due respect for the dignity and welfare of the child.

#### Remedies

12. The Bundesrat is opposed to the setting of a fixed time limit of 15 days for the court to decide on appeals against transfer decisions (Article 28(3) of the Proposal for a regulation). Setting a fixed time limit for the court to decide is not compatible with the right to an effective remedy or to effective legal protection (Article 47(1) of the EU Charter of Fundamental Rights, Article 13 of the European Convention on Human Rights and Article 19(4) of the Basic

Law [*Grundgesetz*]) and to an independent and impartial tribunal (Article 47(2) of the EU Charter of Fundamental Rights and Article 97(1) of the Basic Law). Ensuring effective legal protection in the main proceedings will normally not be possible within the 15-day time limit. Checking whether there is a risk of inhuman or degrading treatment due to systemic flaws, as well as establishing the family situation or dealing with humanitarian concerns, may require the court to carry out extensive investigations. The principle of the investigation of the facts by a court of its own motion cannot be overridden in administrative actions against a transfer decision. Legal remedies (main proceedings) must be decided on in oral proceedings. The party involved should be given an appropriate time limit within which to receive notices, make statements and find out about their rights. For applicants without sufficient financial means, a decision can be made only once they have applied for legal aid and, if it has been refused, once a decision has been made about any appeals (see Article 47(3) of the EU Charter of Fundamental Rights).

Moreover, it should be stressed that a merely summary or provisional examination is not admissible when a decision is to be made in a case (main proceedings) within the time limit. A fixed time limit for the decision may ultimately result in the proceedings compulsorily being given priority over other proceedings that may also be urgent, and this prioritisation may not be justifiable in individual cases.

13. Irrespective of this, the Bundesrat considers it essential to clarify whether the 15-day time limit for a decision and the suspensive effect of legal remedies will be taken into account also for decisions on any appeals against the decision in the court of first instance, and to what extent appeals should be allowed against transfer decisions. Thus, the question is whether a decision on an appeal must also be made within 15 days and whether a transfer can proceed before a final decision has been made in the appeal, which would seem to be supported by Article 30(2) of the Proposal for a Regulation.
14. The Bundesrat is critical of any limits on judicial reviews (Article 28(4) of the Proposal for a regulation) from the perspective of the rule of law and in any case considers a clarification of the guarantees under paragraph 3 of Article 30(1) of the Proposal for a regulation to be essential. The judicial review of a transfer decision and the manner of its implementation (supervised departure or departure under escort) must take into account all of the subjective rights of the person concerned that might be harmed by the transfer decision and its implementation, particularly with regard to the right to an effective remedy (Article 47 of the EU Charter of Fundamental Rights, Article 13 of the

European Convention on Human Rights and Article 19(4) of the Basic Law) and refugees' right to free access to the courts (Article 18 of the EU Charter of Fundamental Rights in conjunction with Article 16 of the Geneva Convention of 28 July 1951 on the status of refugees). With regard to appeals against transfer decisions or their implementation, it should therefore be checked whether a transfer (in individual cases and irrespective of systemic flaws) should be overturned on humanitarian grounds or due to the risk of self-harm or the severe deterioration of the health of the person concerned, or whether the excessive duration of the Dublin Regulation procedure would invalidate the transfer. However, if Article 28(4) of the Proposal for a regulation is taken to mean only that infringement of objective rules of procedure other than the jurisdictional and procedural provisions of the Dublin Regulation referred to explicitly in the draft does not give the person concerned subjective rights and therefore does not need to be examined in the appeals procedure, then this should be stated more clearly in the text of the Proposal for a regulation than has been the case so far.

15. The Bundesrat asks the German Government to ensure that the appeals procedure against decisions under the Dublin Regulation – as laid down in current national legislation, based on the current Dublin Regulation and compatible with Article 19(4) of the Basic Law, does not undergo any detrimental changes in the draft recast text.

#### Delegated acts

16. The Bundesrat is critical of the authorisation for the adoption of implementing acts and considers that there needs to be a further examination of whether the implementing acts do not affect provisions which are of vital interest to the Länder and in connection with which further coordination is required with the Länder to ensure that the procedure is implemented properly.

#### Direct transmission of the opinion

17. The Bundesrat is sending this position statement directly to the Commission.