



## EUROPEAN COMMISSION

Brussels, 9.3.2017  
C(2017)1569 final

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinions on the proposal for a 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 a stateless person (Recast) {COM(2016) 270 final} and on the proposals on standards for the reception of applicants for international protection (recast) {COM(2016) 465 final}, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted {COM(2016) 466 final} as well as on a common procedure for international protection in the Union {COM(2016) 467 final}.*

*These proposals form part of a broader package of measures to reform the Common European Asylum System.*

*The Commission is pleased that the Bundesrat supports the improvement of the Common European Asylum System (CEAS), in particular the objectives to establish a common procedure for international protection through a Regulation, to further harmonise reception conditions, to safeguard the rights of asylum applicants, and to ensure a fair sharing of responsibility among Member States.*

*As regards the proposal for a new Dublin Regulation, the challenge of achieving a fair sharing of responsibility among Member States, in line with the principle of solidarity and fair sharing of responsibility, and ensuring the correct application of the Dublin system, including in times of crises, are cross-border problems by nature. The Commission therefore agrees with the Bundesrat that a common EU approach to these problems is necessary and that EU level action would allow the above objectives to be better achieved, in line with Article 5(3) of the Treaty on European Union.*

*Discussions between the Commission and the co-legislators concerning the proposals are now underway and the Commission hopes that agreement will soon be reached on all proposals. The Bundesrat's Opinions have been made available to the Commission's representatives in the ongoing negotiations with the co-legislators and will inform these discussions.*

*Ms Malu DREYER  
President of the Bundesrat  
Leipziger Straße 3 - 4  
D – 10117 BERLIN*

*In response to the more technical questions and comments in the Bundesrat's Opinions, the Commission would like to refer the Bundesrat to the attached annex.*

*The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing our political dialogue in the future.*

*Yours faithfully,*

*Frans Timmermans  
First Vice-President*

*Dimitris Avramopoulos  
Member of the Commission*

## ANNEX

*The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinions and is pleased to offer the following clarifications.*

### ***1. Proposal for a 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 a stateless person (Recast) {COM(2016) 270 final}***

*Point 1: The Commission agrees that international cooperation is important to tackle the challenges of asylum and migration policies. In its capacity as an observer in the United Nations General Assembly, the European Union actively supported the adoption by the United Nations General Assembly of the New York Declaration for Refugees and Migrants (A/71/L.1) at the Summit on large movements of refugees and migrants on 19 September 2016. The Declaration underlines the central role international cooperation plays in the refugee protection regime. One of the key elements of the Declaration is the commitment to implement a Comprehensive Refugee Response Framework and to work towards the adoption of a global compact on refugees in 2018 based on the Comprehensive Refugee Response Framework. The European Union is actively contributing to these processes.*

*Point 5: In view of the objective to ensure greater convergence in the asylum and reception systems of Member States, the Commission has chosen to propose the establishment of a monitoring mechanism in the Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 {COM(2016) 271 final}. The aim of the monitoring mechanism is to ensure that any shortcomings in the asylum and reception systems of Member States are identified as early as possible, and to ensure that Member States have the necessary tools in place to address situations of disproportionate pressure.*

*Points 6, 7, 8, 9 and 10: The Commission agrees that unaccompanied minors constitute a vulnerable group of applicants in need of special protection. In order to ensure that unaccompanied minors are given swift access to the asylum procedure, the proposal clarifies that the Member State responsible should be the country where the minor lodged the first application for international protection, unless it is demonstrated that this is not in the best interest of the minor. The principle that the best interest of the child shall be a primary consideration in all procedures provided for in the Dublin Regulation remains valid. To clarify the best interest assessment and to make the provision on the guarantees for unaccompanied minors more operational, the Commission has chosen to introduce a mechanism to share information on the best interest of the child between Member States in Article 8(4). The provision seeks to support the Member States in their assessment by linking the Dublin procedure to the guarantees provided for in Directives 2013/33/EU and 2013/32/EU. As regards the actual information exchange during transfer, Articles 32 and 33 ensure that the relevant information is exchanged between Member States. No issues or cases*

were brought to the attention of the Commission during the evaluation of the Dublin III Regulation or during the technical discussions on the proposal.

As regards the detention of unaccompanied minors, Article 11(2) and (3) of Directive 2013/33/EU provides that Member States can only detain minors, for the shortest period of time, as a measure of last resort and after having established that other less coercive alternative measures cannot be applied effectively. Unaccompanied minors can also only be detained in exceptional circumstances. No changes are being proposed to the corresponding article in the Proposal for a Directive laying down standards for the reception of applicants for international protection (recast) {COM(2016) 465 final}.

Point 11: Article 7 of the Commission Regulation (EC) No 1560/2003 provides three options for transfer which depends on the expected behaviour of the applicant. Article 7(1)(a) ensures that a voluntary departure may be arranged by a Member State upon request from the person in question. This provision is not affected by the Commission proposals in question.

Points 12, 13 and 14: The Commission considers that it is necessary to harmonise time limits and specify the scope of the appeal in order to increase the effectiveness of the right to judicial review. To clarify and harmonise the scope of the remedy in the Dublin procedure, the Commission deliberately decided to limit the scope of the appeal to an assessment of whether there is a risk of inhumane or degrading treatment, or of violating the right to family life or the best interests of the child, if an applicant was transferred to another Member State. Specifications of timelines for courts exist in other areas of EU law and the Commission considers that the proposed time limit is sufficient to examine whether there is a risk of violation of these fundamental rights. The Commission points out that introducing time limits in the Dublin Regulation does not limit the judicial independence of the national courts or tribunals.

The Commission acknowledges that it is not clear from the wording of Article 28(3) whether the 15-day time limit and the suspensive effect will be taken into account also for appeals beyond the first instance. However, the objective behind introducing the time limits is to ensure that the transfer is carried out as soon as possible in order to give the applicant swift access to the asylum procedure in the Member State responsible. The Commission will take this issue into account in bringing its work forward.

Point 16: As regards the delegated acts, no provisions concerning delegated acts are proposed to be changed.

## **2. Proposal for a Directive laying down standards for the reception of applicants for international protection (recast) {COM(2016) 465 final}**

Points 2 and 3: The Commission takes note of the Bundesrat's views. The Commission would like to draw the Bundesrat's attention to the fact that Article 8(3b) of Directive 2013/33/EU laying down standards for the reception of applicants for international protection already uses the term "risk of absconding" which is translated to "Fluchtgefahr" in the German version of the directive.

*Point 4: In view of the strengthened restrictions put on applicants in Article 7 and in particular the consequences in case a decision on residence is not complied with (detention), the Commission considers that additional procedural safeguards must be added. All decisions under the article need to be based on the particular situation of the person concerned, taking into account any special reception needs of applicants and the principle of proportionality. Nevertheless, the Commission's intention was not to limit Member States' possibilities to decide on the residence of applicants in order to ensure effective processing of applications and equal distribution of applicants within the Member State.*

*Point 5: The Commission takes good note of the Bundesrat's suggestion to require applicants to always inform the authorities of their place of residence and address, and not merely of a telephone number.*

*Points 7, 8 and 9: The Commission takes good note of the Bundesrat's concerns and proposals. The Commission believes that in order to ensure the security and well-being of unaccompanied minors and ensure that they do not abscond or disappear, it is essential that the guardians are appointed as soon as possible. Current delays in some Member States do not seem reasonable. On the other hand, a number of Member States, also with a large number of unaccompanied minor applicants, are able to appoint guardians within the proposed timeline of five working days.*

***3. Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents {COM(2016) 466 final}***

*Point 1: As regards the issue of the five-day time limit in Article 36 (1), the Commission points out that the Proposal for a Regulation seeks to ensure that rules on guardianship are strengthened as compared to the recast Qualifications Directive (Directive 2011/95/EU). The Commission considers the five-working day rule to be important in order to secure the safety and the best interests of vulnerable applicants, such as unaccompanied minors, as soon as possible.*

*Point 2: As regards the regular performance assessment of the appointed guardian in Article 36 (2), the Commission points out that a regular assessment has already been included in the current Qualifications Directive. The changes in wording reflect the chosen legal instrument.*

*The Commission considers that performance assessments contribute to ensuring that the guardian would safeguard the best interests of the child and his or her general well-being in the procedure for international protection. In the Commission's opinion, a regular performance assessment does not undermine the appointed guardian's independence or his/her ability to act in the best interest of the child.*

#### **4. Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU {COM(2016) 467 final}**

Point 4: See reply to point 5 of the Opinion on the draft Reception Conditions Directive.

Point 5: The Commission takes due note of the Bundesrat's suggestion that a provision on interpretation services for submitting cases to courts and tribunals could be included in Chapter V instead of Article 8.

Point 6: The Commission takes good note of the Bundesrat's request to reconsider Article 13(2) on the recording of personal interviews using audio or audio-visual means, in view of its possible impact on national rules on court proceedings. The Commission will reflect on the possibility of clarifying this provision further in the course of the legislative process.

Point 7: The Commission considers that free legal assistance should only be provided after the lodging of the application. The Commission does not consider that it can be inferred from Article 25(1) that the administrative procedure begins with the making of the application. Article 25 provides that a third country national or a stateless person should be considered as an applicant from the making of the application but does not set rules on the administrative procedure of examination of this application. It is actually the lodging, i.e. the act formalising the application (see recital 24) which as such constitutes the starting point of the administrative procedure. This interpretation is confirmed by Section II ("Examination Procedure") and more specifically Article 34, which provides that the time-limits for concluding this procedure start to run from the moment of the lodging and not of the making of the application.

Point 8: The Commission takes good note of the position of the Bundesrat regarding the second subparagraph of Article 16(2). However, the Commission would like to underline that its proposal sets an obligation instead of a possibility under Article 23(1) of Directive 2013/32 for the determining authority to grant access to relevant information to legal advisors and counsellors who have undergone security checks. It would therefore not be consistent with this provision to provide that Member States' administrative procedural law on this matter would actually apply instead of the common rule proposed. Nevertheless, the Commission will pay great attention to concerns regarding national rules on court proceedings that could be raised in the course of the legislative process.

Points 9, 10, 11, 12, 13, 14: The Commission takes good note of the Bundesrat's concerns in relation to the time-limits for the appointment of guardians for unaccompanied minors in the proposed Regulation. Nevertheless, as already stressed above in relation to the proposed Reception Conditions Directive, the Commission believes that it is essential that guardians be appointed as soon as possible. For the purposes of the procedure for international protection, the assistance of a guardian should be ensured from the beginning and at every step of the procedure, as rightfully underlined by the Bundesrat. This is the reason why the Commission proposed that the time-limit for lodging an application should only start to run from the moment a guardian is appointed and has met with the minor. The Commission considers that, in view of this guarantee, ten working days is a reasonable time-limit for lodging an

*application including in the case of an unaccompanied minor. As for the possibility for the determining authority to lodge an application on behalf of the unaccompanied minor, the intention of the Commission is to protect the minor's right to have his or her application processed without undue delay. It is important to note that the determining authority would only be able to do so in case where the guardian fails to lodge the application and that, following the lodging, the minor would benefit from the appropriate guarantees. The Commission also takes good note of the Bundesrat's proposal that unaccompanied minors be exempted from border and accelerated procedures. However, the Commission would like to stress that these procedures would be applied to unaccompanied minors in a strictly limited number of cases and that they would be assisted during these procedures by their guardians. It is also important to note that, in accordance with Article 19 of the proposal, if adequate support cannot be provided to applicants with special procedural needs, including unaccompanied minors, Member States would have an obligation not to apply or to cease to apply these procedures. The Commission therefore considers that the proposed legal framework provides sufficient guarantees to ensure that unaccompanied minors' rights are protected.*

*Points 15 and 16: The Commission takes note of the concerns expressed by the Bundesrat as regards Article 53(3) and the Bundesrat's suggestion that translation is not needed where the applicants agree that it would not be necessary (Article 53(5)).*

*Point 17: The Commission considers that the time-limits for lodging an appeal should only start to run from the appointment of the legal advisor or other counsellor in order to ensure that the rights to legal assistance and to a judicial remedy remain effective. If an applicant does not appeal a negative administrative decision within the set time-limit, such a decision would become final. The Commission therefore believes that in such a case the applicant would no longer be entitled to free legal assistance.*

*Point 18: The Commission would like to clarify that the special procedural guarantees provided for in Article 54(3) of the proposal would apply only in cases where the appeal against a negative decision would not have automatic suspensive effect in accordance with paragraph 2 of that provision. In all other cases, in accordance with paragraph 1, the appeal should have an automatic suspensive effect and the additional procedural safeguards provided for in paragraph 2 would not be required.*

*The Commission would also like to clarify that the decisions referred to in paragraph 2 are decisions on applications for international protection and not decisions on the return of the persons concerned. As explained in recital 31 of the proposed Regulation, decisions on applications for international protection may include, or may be issued together with, return decisions. However, Union law on the return of persons whose applications for international protection have been rejected and who no longer have the right to remain on the territory of the Member States is set in Directive 2008/115/EC ('Return Directive'). It would therefore not be justified to include rules on the enforcement of return decisions in the proposed Regulation. This being said, an appeal against a negative decision on an application for international protection would have the effect of suspending the enforceability of a return*

*decision. As a rule, this suspensive effect is automatic, as provided for in Article 54(1), except in the cases referred to in paragraph 2. In those cases, if an applicant requests a court or a tribunal's ruling on his or her right to remain on the territory, or if a court or tribunal examines this matter ex officio, the person cannot be returned pending the decision of that court or tribunal. The time-limits set in Article 53(6) only apply to an appeal against a negative decision on an application for international protection. The proposed Regulation does not set time-limits for an applicant to request a court ruling on the right to remain on the territory of the Member State pending the appeal against the international protection decision. These time-limits should nevertheless be reasonable and should not render the exercise of the right to an effective remedy impossible or extremely difficult, in accordance with the general principle of Union law.*

*Point 19: Article 54(3)(a) provides for specific guarantees that should be ensured during the examination by a court or a tribunal of the applicant's right to remain on the territory of the Member State, in the situations where the appeal against a negative decision on the application for international protection does not have an automatic suspensive effect. The elements listed in this provision (i.e. access to interpretation, legal assistance and sufficient time to prepare) are requirements in order for the procedure described in paragraph 2 to be applicable. The Commission takes good note of the Bundesrat's comments regarding the relationship between this provision and Article 15(5).*

*With regard to Article 54(3)(b), the Commission would like to underline that it should be for the court or tribunal responsible for the examination of the appeal against the international protection decision to take a final decision on this matter.*

*Point 20: See reply to points 12-15 of the Opinion on the draft Dublin Regulation.*

*Point 21: Implementing acts are used where uniform conditions for implementing legally binding Union acts are required. For the purposes of this proposal, the implementing acts are adopted in accordance with the committee procedure known as the examination procedure as set out in Regulation (EU) No 182/2011.*

*Point 22: The Commission takes good note of the concerns expressed by the Bundesrat regarding the duration of the transitional periods set out in Article 62(2) of the proposed Regulation and in the other proposed instruments.*