Bundesrat **Document 503/16 (Resolution)**

4 November 2016

Resolution
of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

COM(2016) 467 final. Council document 11317/16

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

1. The Bundesrat welcomes the Commission proposal for replacing the Asylum Procedures Directive with a Regulation on a common asylum procedure in the EU in order to achieve a genuine common EU asylum system. It particularly welcomes the objective of ensuring that asylum seekers are treated in an equal and appropriate manner in every EU Member State.

2. In the two proposals contained in the Bundesrat documents 503/16 (‘Procedural Regulation’) and 499/16 (‘Qualification Regulation’), the Commission proposes two legislative acts intended to harmonise the law on asylum and asylum procedures throughout Europe.

   According to the Explanatory Memoranda accompanying the two proposals for regulations, which are closely interlinked, the objective is essentially to create the formal legal conditions for integrated, sustainable and holistic EU migration policy. The proposals are thus intended to be building blocks in the ‘Common European Asylum System’.

   The purpose of legislating for harmonisation of the asylum procedure is to eliminate the current differences between Member States in their reception of refugees. In particular, the Commission hopes in this way to avoid incentives for refugees deliberately to seek protection in the country with the most favourable reception conditions (‘pull factors’), thereby contributing to a more even distribution of the burden across Member States.

   The Bundesrat welcomes the intended aim of the Commission in presenting these proposals, namely to harmonise refugee reception procedures and

conditions throughout the EU. However, it does not consider that a definitive assessment of the proposals can be made until they have been thoroughly examined in terms of the law on asylum, asylum procedures and residence to determine whether and, if so, how implementing the proposed acts might seriously alter the current legal situation in ways that affect the way Germany's *Länder* and municipalities are required to perform their duties in respect of those seeking protection or asylum. This relates both to the doctrine of the law on asylum and asylum procedures currently applied in Germany and to administrative matters regarding the rules on the asylum procedure, such as the binding time limits and the rights of asylum seekers.

The Bundesrat therefore asks the Federal Government to draw up an account of these issues and distribute it to the *Länder* as the basis for an assessment of the proposals for regulations. The Federal Government is also asked to provide an assessment of the likely impact on the flow of asylum seekers into Germany of the changed legal situation when the regulations enter into force.

3. The Bundesrat welcomes the proposal's aim to make the granting and withdrawal of international protection in the EU more effective and to harmonise it among the Member States. However, in so far as the proposal aims to create partially harmonised, specific law in this area for the court proceedings for the award of international protection, the Bundesrat wishes to raise the question of whether, in view of the procedural autonomy of the Member States, the legislative powers of the EU to create a common European asylum system extend to such detailed prescription of the form of court proceedings. Moreover, the proposal would introduce additional special procedural provisions, which would make application of the law more difficult. The Bundesrat therefore has reservations about certain individual provisions.

4. It considers it essential that Article 7(4) of the proposed Regulation be amended to the effect that applicants must always specify their place of residence and address (and not merely a telephone number) so as to ensure that, in court proceedings, a summons can be duly served and the court's decision notified. An addition should also be made to the provisions specifying that public service of notifications in accordance with the procedural law of the Member States is still admissible.

5. The Bundesrat rejects Article 8(3) of the proposed Regulation, which requires the determining authority to provide the applicant with an interpreter for the submission of their case before the courts as well. Instead, a corresponding provision in Chapter V should ensure that the appointment of an interpreter is a matter to be dealt with by the court with jurisdiction.

6. The Bundesrat requests reconsideration of Article 13(2) (recording of personal interview using audio-visual means of recording) in terms of its impact on the court proceedings. In particular, this raises the question of whether and how an audio-visual recording of the personal interview could be introduced in the court proceedings - perhaps at the request of the applicant or his or her legal representative. It is unclear what the status of the audio-visual recording (Article 13(2)) is in relation to the factual report or transcript (Article 13(1) or how the court is to treat each of them in its appraisal of the arguments. Furthermore, since the court is required to undertake a full *ex-nunc* examination of all the facts and points of law (Article 53(3), first sentence), and applicants may bring forward only new elements (Article 53(3), second sentence), it would in any case seem problematic, because of the right to effective legal remedy, not to introduce the audio-visual recording into the court proceedings even if this is requested. This can be relevant in particular if, as often happens in court proceedings, the correctness of the report is challenged.

7. The Bundesrat considers it essential that applicants be provided with reliable information about the asylum procedure and that they are supported in the drafting of their applications and at their hearings. The entitlement to support in the form of legal assistance contributes to fair proceedings on the award of international protection.

   However, there is a need for a clearer definition of what exactly this entitlement refers to and at what stage in the proceedings it arises. Article 14(1) and (2) refer to ‘all stages of the procedure’. Article 15(1) defines this more precisely as ‘in the administrative procedure provided for in Chapter III and in the appeal procedure’. According to Article 25(1), the administrative procedure provided for in Chapter III begins when a third-country national or stateless person expresses a wish for international protection to the determining authority or other authorities referred to in Article 5(3) or (4). This could be interpreted to mean that the entitlement to legal assistance begins as soon as the request for asylum is made. However, legal assistance going beyond the advice given during the asylum process is only useful from the point at which the asylum application is submitted, and in Germany, under the Legal Services Act (*Rechtsdienstleistungsgesetz*) may be provided only by certain narrowly defined categories of person, generally lawyers. This advice is concerned with the administrative procedure implemented by and under the responsibility of the Federal Office for Migration and Refugees, as the determining authority within the meaning of the proposal for a Regulation, and not with any other procedural steps. A clear distinction must be ensured here between this advice

and the free legal assistance and representation under the future Article 26 of the Reception Directive, the advice given during the asylum process in the German Länder, which has proved its worth in many respects, and legal assistance and representation provided by the Federal Government in the asylum procedure.

The Bundesrat therefore advocates defining more clearly the scope of the legal assistance and representation provided for in Article 14 *et seq.* of the proposal.

8. As regards Article 16(2), second subparagraph, of the proposal, the Bundesrat considers that it must be clarified that, at least in the case of court proceedings under Chapter V, the provisions of Member States' administrative procedural law on the submission of documents or files which are confidential because of their content will apply in the final analysis.

9. It also opposes the imposition of a strict time limit in Article 22(1) of the proposal. It is not possible within this time limit to conduct a judicial procedure to appoint a guardian with appropriate procedural safeguards (hearing, interpreter, etc.) or any necessary investigations - for example, to ascertain whether the applicant is a minor and whether the persons with rights of custody are really unable to exercise parental responsibility so that the suspension of parental custody rights can be determined (Section 1674 of the German Civil Code). This is even more true if the commencement of the time limit is linked to the time when an application for international protection within the meaning of Article 25(1) is made to one of the instances specified therein or in Article 5(3) or (4). At this point it is often not known whether the applicant is a minor, nor has there been the opportunity to consult the youth welfare service or make the necessary assessments. Until it has been established whether the minor could be put in touch with relatives and where he or she will reside during the application process, it is not even possible to select a regular contact person locally. A rigid deadline for decisions would also conflict with the independence of the courts (Article 47, second paragraph, of the Charter of Fundamental Rights of the European Union, Article 97(1) of the *Grundgesetz* (German constitution)), and potentially also with the constitutionally guaranteed rights of parents.

10. The Bundesrat asks the Commission to ensure that, in the transitional phase prior to the appointment of a guardian by the courts, any form of representation that is provided for by the Member State, independent of the determining authority and capable of protecting the child's best interests be deemed sufficient. At the same time, the provisions on making an application for international protection and registering and lodging applications in Articles 22,

25, 27, 28 and 32 of the proposal must be such as to ensure that until a guardian has been appointed for unaccompanied minors and they have had their first contact with their guardian, no time limits should begin running and no legal disadvantages regarding time limits should be attached to any actions of the minors.

11. The Bundesrat also opposes the excessively restrictive wording of Article 22(4), second sentence, of the proposal, which provides that the person acting as guardian shall be changed only when the responsible authorities consider that he or she has not adequately performed his or her tasks as a guardian. It must also be possible to remove a guardian from his or her duties for other reasons of a material nature or relating to the person of the representative. For instance, it may also be necessary to change a representative if the existing one is prevented from exercising his or her duties by illness, a change of place of residence or employment, or for other important reasons. Equally, if the unaccompanied minor changes his or her place of residence it may be necessary to appoint another representative in the new location.

12. The Bundesrat welcomes the fact that the proposal for a Regulation fundamentally takes account of the interests and welfare of minors. In this connection it would point out that this principle is also applicable to the procedural provisions on lodging an asylum application (Articles 31, 32 and 41 of the proposal for a Regulation) and on medical examination to determine age (Article 24 of the proposal).

13. The Bundesrat considers that a rigid time limit for lodging an application for international protection of 10 working days from initial contact as provided in Article 32(2) of the proposal is too short to allow the guardian to get to know and fully assess the personal circumstances of an unaccompanied minor. The time limit for the guardian to lodge applications must be such as ensure that he or she always has time to thoroughly investigate and assess the situation.

14. The Bundesrat considers it essential that legal representation of unaccompanied minors at every point in the procedure and constant evaluation of the individual case, taking account of the child's interests, be compulsory. It must also be ensured that no procedural steps are taken without legal representation and the administrative files are as a rule also explained to the legal representative.

    The provision that the determining authorities may lodge applications for minors without, or disregarding, the legal representative is categorically rejected.

    Furthermore, minors should be exempted from border procedures and accelerated procedures, since it may be assumed that unaccompanied minors

will not generally be able to adequately and successfully explain their needs in such a shortened procedure.

15. The Bundesrat considers that the barring of elements whose significance applicants initially neglected to recognise (Article 53(3), second sentence, of the proposal) is far too sweeping and very dubious.

16. It would point out that the provision on the translation of relevant documents in court proceedings (Article 53(5)) may have a substantial impact on the cost and duration of such proceedings. This is particularly true in view of the large number of relevant documents (e.g. situation reports by NGOs, untranslated reports of the future EU Asylum Agency, judicial guidance, information from the authorities) that may need to be translated in the proceedings. Longer source documents may take a considerable time to translate. Accordingly, particularly as regards documents in the English language, it should be clarified that translation into the language of the national court concerned may be dispensed with where the parties to the proceeding/applicants agree to this.

17. The Bundesrat considers Article 53(6), third subparagraph, of the proposal, under which appeal time limits are to run, *inter alia*, from the moment when the legal adviser or counsellor is appointed, to be unsatisfactory. It is likely to conflict with the principle of accelerating procedures and may lead to confusion about the expiry of appeal deadlines. In particular, it is unsatisfactory in view of the fact that where an application is made for free legal assistance, it will be rejected and no legal adviser appointed if it is made after expiry of the 'regular' appeal deadline. A restitutio in integrum model based on national procedural law would avoid these confusions and also take sufficiently flexible account of other reasons for missing a deadline through no fault of the person concerned.

18. The Bundesrat considers that Article 54 of the proposal needs to be revised. The relationship between paragraphs 1 and 3 requires clarification. The normative text and the reasons given do not make clear whether, in the cases referred to in paragraph 2, it is necessary for the authorities to issue an order for immediate enforcement or whether the suspensive effect lapses by the operation of the law itself. If it is necessary for the authorities to issue an immediate enforcement order, an authorisation of the authorities to do so should be included in the proposal. Articles 35 to 43 of the proposed Regulation do not, so far as we can see, contain any provisions on this matter. Furthermore, it is not clear from Article 54(3) whether it refers exclusively to the interim procedures provided for in paragraph 2, i.e. it abolishes the suspensive effect, or if it also covers cases of suspensive effect other than those

provided for in paragraph 2. It should also be made clear whether a request within the meaning of paragraph 2 has to be made within a specific time limit, or whether the time limits in Article 53(6) also apply to requests under Article 54(2).

19. The Bundesrat also requests clarification of Article 54(3)(a) and (b) of the proposal:

Point (a) could be understood to mean that an interpreter and legal assistance within the meaning of the statutory requirement to be represented by a lawyer must be constantly present for the court decision on the right to remain in the territory of a Member State and that where necessary a legal assistant must be appointed free of charge even where there are not sufficient prospects of the application to the court succeeding. This is probably not what was intended and would in any case be incompatible with Article 15(5) of the proposal.

Point (b), under which the court or tribunal examines the decision refusing to grant international protection in terms of fact and law, raises the question of whether in the case of an accelerated decision on whether the applicant may remain, a summary - provisional - examination of issues of fact and law is admissible. It should be clarified whether a definitive examination in the accelerated court procedure under Article 54(2) and (3) of the proposal is not yet required.

20. The Bundesrat rejects the setting of deadlines for court/tribunal decisions (Article 54(4), second sentence, (5), second sentence and Article 55(1) of the proposal). The same reservations apply to these deadlines as to the (15-day) deadline for a decision under Article 28(3) of the proposal for a recast of the Dublin Regulation (BR document 390/16). Moreover, Article 55 of the proposal does not make clear whether the deadlines are binding or are merely regulatory guidelines.

In so far as Article 54(2) of the proposal provides for a (rigid) time limit for (accelerated) court decisions, it raises considerable concerns as regards the right to effective legal remedy and legal protection (first paragraph of Article 47 of the EU Charter of Fundamental Rights, Article 13 of the European Convention on Human Rights, Article 19(4) of the *Grundgesetz*) and the independence of the courts (second paragraph of Article 47 of the EU Charter of Fundamental Rights, Article 97 of the *Grundgesetz*). Particularly in view of the high level of requirements in Article 54(3)(a) of the proposal (interpreting, legal assistance, sufficient time to prepare the request), the time limit of one month for a decision is questionable, and it is likely that it could not be complied with in practice in many court cases.

The staggered and detailed time limits for appeal in Article 55(1) and (2) apply only 'without prejudice to an adequate and complete examination'. Consequently they can only be regulatory guidelines. The courts are also given exact time limits for decisions with only a one-off extension of three months for complex cases. This raises the question of how the exact, detailed provisions on time limits relate to the general reservation ('without prejudice to an adequate and complete examination'). In this respect too, the exact time limits are likely to give rise to irreconcilable conflicts with the right to effective legal remedy and with the independence of the courts.

It should also be stressed that a court decision on appeal is often not possible within the time limits specified if guaranteed procedural rights are to be upheld (own-initiative investigation by the court, decision on the appeal on the basis of an oral hearing, necessary time for summoning witnesses, statement of position and instruction of a legal assistant, complete translation of the necessary documents, prior decision on an application for legal aid, possible appeal if legal aid is not granted).

21. The Bundesrat considers the power to adopt implementing acts to be potentially problematic and believes that further review is needed to establish whether, by means of the implementing acts, provisions that affect the *Länder* would be taken centrally in cases in which far-reaching consultation with the *Länder* is required to ensure that the procedures can be implemented.

22. It would point out that a transitional period of six months after entry into force of the Regulation (second paragraph of Article 62 of the proposal) would lead to substantial difficulties for the courts in practice. The same applies to the transitional periods in the proposed Qualification Regulation (BR document 499/16) and the proposed recast of the Reception Directive (BR document 513/16). Some of the far-reaching arrangements proposed in these documents will entail substantial adjustments of national law on asylum and asylum procedures. It is unlikely that these can be completed within a transitional period of six months. The courts will therefore, until national law has been adapted, face a complex and confusing legal situation in which they will have to try to square the provisions of national law with those of directly applicable EU law. This would increase the overall complexity of the procedures, lead to temporary legal uncertainty and, in many cases, considerably increase the duration of court proceedings. A longer transitional period of at least a year is therefore needed. The Bundesrat also advocates introducing transitional provisions for proceedings still pending when the Regulation enters into force.

23. The Bundesrat is sending this position directly to the Commission.