



EUROPEAN COMMISSION

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Dear President,

Thank you for your Opinion regarding the Commission's proposals to amend the Asylum Procedures and Reception Conditions Directives {COM(2011) 319 final and COM(2011) 320 final}. The Commission welcomes the interest of the Dutch Senate for these two proposals and I am happy to provide below the Commission's comments to your concrete questions, whilst apologising for the delay in this response.

General questions

Regarding the question of how to ensure that all Member States correctly implement the EU rules regarding asylum in order to reduce incentives for secondary movements, effective harmonisation of both law and practice is one of the main objectives of a Common European Asylum System. The Commission fulfils its responsibilities under the Treaties to monitor the application of Union law. In the past, the Commission has taken the necessary procedural steps against Member States in cases where it had sufficient and credible evidence of serious and systematic flaws in those Member States' asylum systems. At the same time, as shown by the Commission's evaluation of existing asylum instruments, the lack of clarity and the vagueness of the current instruments of the EU asylum acquis make monitoring of application more difficult. This is one of the reasons why the Commission has proposed more precise and clearer standards in its asylum legislative proposals.

In addition, the example of Greece has shown that the traditional instruments of supervision of application of the acquis (such as infringement proceedings and regular evaluations of legal instruments) could be complemented. For example, specific solidarity measures to help a Member State get back on track can be activated, in the interest of both, other Member States and the asylum applicants. In this respect, the Commission together with the European Asylum Support Office and with Member States, is strongly engaged in helping Greece implement its National Action Plan on Migration and Asylum. Another instrument which could provide a mechanism to foster mutual trust between Member States is the proposed 'evaluation and early warning mechanism', which could be part of the Dublin Regulation which is currently being debated in the European Parliament and in the Council, and the Commission supports its principles.

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These issues are discussed more in depth in the Commission's Communication on enhanced intra-EU solidarity in the field of asylum¹.

Questions about the amended proposal for the Reception Conditions Directive

Concerning the issue of access to free legal assistance, the Commission's proposal does not prevent Member States from establishing relevant procedural rules provided that they are in line with the proposed Article 9. Such rules may include the recovery of costs of the legal assistance provided if the asylum applicant made fraudulent representations regarding his or her inability to pay such costs.

Regarding the concern that the 72 hours deadline for ensuring access to a court in cases of detention is too short, it should be noted that this amendment is inspired by the current practice of some Member States, some of which apply even shorter deadlines. It is essential to always ensure a speedy judicial confirmation of detention, taking into consideration the seriousness of such a sanction and its interference with the person's fundamental rights.

Finally, I would like to confirm your interpretation of the proposed wording in Article 17(5). Indeed, Member States may provide part of the material support in kind, in combination with support provided in money.

Questions about the amended proposal for the Asylum Procedures Directive

Regarding the question concerning the uniform status, the rules set out in the Asylum Procedures Directive proposal aim to ensure compliance with the Treaty on the Functioning of the European Union, the Geneva Convention and the general principles of EU law, especially the right to an effective remedy. The general principle of EU law of the right to an effective remedy requires that private individuals should be able to enjoy effective judicial protection of the rights that derive from EU law. Thus, the right to appeal against the refusal of refugee status even when subsidiary protection is granted must be provided. Regarding the question concerning the automatic suspensive effect of appeals, the European Court of Human Rights, while underlining the importance of this principle in the applicable case-law², has never stated that automatic suspensive effect is an absolute principle and must be provided in all circumstances.

The Commission considers that in some limited cases, it may be legitimate for Member States not to provide automatic suspensive effect, under the condition that a court or tribunal has the power to rule whether or not the applicant may remain on the territory pending the outcome of the appeal, either upon request of the applicant or acting of its own volition. The cases where the Commission considers it could be legitimate are those set out in Article 46(6) of the amended proposal, namely applications which are considered abusive or manifestly unfounded under the limited grounds of Article 31(6),

¹ COM(2011) 835.

² ECtHR, *Abdolkhani and Karimnia*, Application nr. 30471/08, 22 September 2009; ECtHR, *Muminov*, Application no. 30471/08, 11 December 2008; ECtHR, *Gebremedhin*, Application nr. 25389/05, 26 April 2007; ECtHR, *Baysakov and Others*, Application no. 54131/08, 18 February 2010; ECtHR, *K.R.S.* Application no. 32733/08, 2 December 2008.

cases where the applicant is a refugee in another Member State, and subsequent applications where there are no new elements compared to the previous examinations, with the exception of border procedures. As for the assessment of the current practice in the Netherlands, the Commission continues to supervise the application of Union law in the Netherlands, including in the light of the evolving case-law of European Courts, and will liaise with the Dutch authorities and take action in accordance with the Treaties if necessary.

Regarding the question on the possibility to deny access to procedure, the amended proposal, just as the current Directive, guarantees access to the procedure in all circumstances, in accordance with Article 6. Once access has been granted, an application may be considered inadmissible under a reduced number of grounds stipulated in Article 33(2) of the amended proposal. These grounds point to the fact that either sufficient protection is available elsewhere to the applicant (grounds (a) to (c)) or that the applicant's protection needs have already been examined (grounds (d) and (e)). Grounds (b) and (c) relate to the application of the first country of asylum and safe third country concepts, both of which can be challenged by the applicant in accordance with Articles 35 and 38(2)(c). In addition to inadmissibility, Member States may also provide that no, or no full, examination of the application takes place where the applicant is seeking to enter or has entered illegally into its territory from a European safe third country' determined in accordance with Article 39. However, contrary to the premise of the question asked, both inadmissibility decisions and decisions to apply the European safe third country concept are subject to appeal, in line with the general rule stipulated in Article 46(1)(a) of the proposal that applicants have the right to an effective remedy against any decision taken on their application.

Finally, regarding the question concerning derogations and a possible standstill clause, the Commission removed any derogations (allowing Member States to retain national standards adopted before a certain date and falling below those of the Directives) from the proposals as such derogations go against the very objective of harmonisation. The Commission does not consider it necessary to introduce a standstill clause.

The Commission is committed to supporting the co-legislators in the negotiations on these and other important files (such as the Dublin and Eurodac Regulations), in order to come to an agreement in 2012 in line with the objectives set out by the European Council in the Stockholm Programme. It is emphasised that the Common European Asylum System should be based on high protection standards and that due regard should be given to fair and effective procedures capable of preventing abuse. The Commission also stresses that it is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.

To achieve this, the Commission presented proposals for an improved legal framework. At the same time, it continues to monitor the application of Union law by Member States, as detailed above.

I hope that you will find the above replies useful.

Yours faithfully,

*Maroš Šefčovič
Vice-President*