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accompanying the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on minimum standards on procedures in Member States for granting and withdrawing
international protection**

Summary of the Impact Assessment

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1. PROBLEM DEFINITION

Despite the measures adopted in the first phase of the Common European Asylum System (CEAS), asylum seekers still have very different prospects of finding international protection depending on where in the EU their applications are examined. The majority of Green Paper respondents pointed to serious deficiencies in *Council Directive 2005/85/EC of 1 December 2005 ('the Asylum Procedures Directive' or 'the directive')* capable to open protection gaps and lead to a risk of *refoulement*.

Most of the directive's provisions are optional and have allowed Member States (MSs) to continue with their existing procedures. The result is inconsistencies across the EU and uncertainty for applicants which make it difficult to speak of a common asylum system. As attested by asylum statistics, the ambiguities and possibilities for derogations have led to wide divergences in the application of the Qualification Directive (QD). To cite only a few examples:

- Percentages of total positive decisions in the different MSs in 2007 varied from 52.2% in Luxemburg to 27.5% in Germany, to 0.8% in Greece;
- Recognition rates in different MSs for applicants from the same nationality for the period 2005-2007 varied significantly: for instance, for asylum seekers from Russia (mostly of Chechen background), from 63% in Austria to 0% in Slovakia.

The impact assessment focuses on the issues which have proved to be the most controversial and are likely to raise different reaction between the MSs, and require additional financial investments, namely:

- Obstacles to requesting international protection;
- Room for administrative error;
- Divergent procedural notions;
- Concerns about efficiency and quality of decision-making.

2. ADDED VALUE OF EU ACTION AND RESPECT FOR THE PRINCIPLE OF SUBSIDIARITY

The Tampere conclusions provide that the CEAS should include, in the short term, *common standards for fair and efficient asylum procedures* and, in the longer term, *Community rules leading to a common asylum procedure in the EC*. The Hague Programme set as an aim of the second-phase CEAS the establishment of a common asylum procedure in the Union.

The development of a CEAS became an EU priority due to a range of factors. In particular, some MSs receive much higher numbers of applicants for international protection than others. Almost 1/5th of applications are multiple claims. Asylum seekers evidently find certain MS more "attractive" destinations than others e.g. in 2006, Belgium, Germany, France, Sweden and the United Kingdom received more than 3000 multiple applications while Cyprus and Portugal received under 100. Some persons in need of protection are not being granted it.

A reason for these disparities is the uneven application of procedures for examining applications. This has led to a continuation of asylum "lottery" and, consequently, secondary movements between the MSs, undermining the justification of the Dublin Regulation which is based on the assumption that applicants have access to protection under equivalent conditions in all MSs. The directive goes to the heart of the CEAS, as it connects and backs up all the

asylum instruments, and any deficiencies in it negatively affect the application of the other Community rules.

EU action is therefore necessary to attain higher and more harmonised standards, based on the existing minimum standards on asylum procedures.

3. POLICY OBJECTIVES

General objective:

To achieve higher standards of protection across the EU for persons in need of international protection.

Specific objectives:

- (1) To ensure that asylum procedures are accessible;
- (2) To improve fairness of procedures;
- (3) To ensure consistent application of common procedural devices;
- (4) To improve the quality and efficiency of procedures;
- (5) To improve access to effective remedy;
- (6) To ensure consistency between different EU asylum instruments.

4. POLICY OPTIONS

The diverse nature of the problems makes it impossible to identify one single all-embracing policy option. Therefore, the Impact Assessment proposes separate policy options for each of the policy objectives. Two or three legislative sub-options are then described for each of these policy options. In the area of procedural asylum legislation only legislative measures may ensure systemic and durable impacts on the quality and efficiency of examination procedures. The sub-options are almost all cumulative. They are accompanied by envisaged practical cooperation activities. To determine the elements of the preferred option, the IA assesses all the sub-options against the baseline scenario in terms of effectiveness, efficiency and coherence, but also in terms of their proportionality and their social impacts and impacts on fundamental rights.

Given the level of complexity of the proposed options, this summary is limited to a description of the main elements composing the preferred option.

i. Status quo

The existing legal framework would remain unchanged. Commission monitoring would contribute to better compliance with the current standards. ECJ and ECtHR rulings and findings which, for example, stress the principle of a rigorous scrutiny of applications, might reduce arbitrariness in the application of the directive. However, these developments would be of *ad hoc* and not of systemic nature. Disparate asylum procedures as allowed for by the directive would continue though possibly lessened by practical cooperation particularly if the European Asylum Support Office were to develop training programmes or provide specific specialist support when needed through a pool of experts.

ii. Ensuring access to asylum procedures

- provide for a competent authority responsible for registration of applications for international protection;
- specify that the police, border guards and other authorities likely to be addressed by someone who wishes to make an application for international protection should be provided with clear instructions on how to deal with these cases, including the obligation to forward the application to the competent authority;
- introduce the obligation to make information on the procedures for lodging an application, counselling and interpretation services accessible to *de facto* asylum seekers who are present in the entry points;
- provide for the obligation of MSs to register applications within a reasonable time limit;
- revise the inadmissibility grounds and provide for arrangements enabling an applicant to make known her/his views as regards the grounds and information on which the authorities intend to base their decision;
- delete the European safe third country notion.

iii. Improving procedural guarantees

- remove derogations from the basic principles and guarantees and provide for free legal assistance to unaccompanied minors as well as other asylum applicants who lack financial resources in procedures at first instance;
- make sure that extradition treaties are not used to return an asylum applicant to her/his country of origin;
- entitle an asylum applicant to access and comment on the report of a personal interview before a decision on her/his application is taken;
- provide that communication during the personal interview should take place in a language in which the applicant is able to communicate and present the elements of her/his application properly.

iv. Improving equal access to protection for persons with special needs

- introduce the notion of applicants with special needs;
- provide for the right of a child to lodge an application for international protection, delete the current possibility to refrain from appointing a representative where an unaccompanied minor is 16 years old or older;
- define the qualifications of the guardian and specify the right of the guardian to apply for asylum on behalf of an unaccompanied minor;
- require MSs to inform each adult in private of her/his right to make a separate application for international protection and to give dependent adults the opportunity of presenting their individual circumstances to the personnel of the determining authority;
- define the role of and procedures for obtaining medico-legal reports to document signs of torture, provide survivors of torture with necessary time to prepare for a personal interview on the substance of the application, and introduce gender and age sensitive requirements for interviewing applicants;

- clarify that gender considerations and international obligations as regards the rights of the child should be duly taken into account when applying the directive and exempt survivors of torture, persons with mental disabilities and unaccompanied minors from accelerated procedures which are based on the notion of manifestly unfounded applications;
- exempt unaccompanied minors from border and safe third country procedures;
- provide for including gender, trauma and age related issues in training programmes for asylum personnel.

v. Approximating accelerated procedures

- introduce a limited and exhaustive list of grounds for accelerated procedures, based on the notion of manifestly unfounded applications, while preserving MS' discretion to prioritise other claims;
- require MS to conduct personal interviews, and specify that the determining authority should be given the necessary time to conduct a rigorous assessment of the application.

vi. Clarifying the notion of safe country of origin

- delete the notion of a minimum common list of safe countries of origin and derogations from the material requirements for the designation of third countries as safe countries of origin at national level;
- provide for a regular follow up review of the situation in third countries designated as safe.

vii. Improving access to effective remedy

- clarify that the scope of review should include both facts and points of law at least in procedures before a first level court or tribunal and be based on *ex nunc* assessment of the protection needs;
- provide for automatic suspensive effect of appeals against first instance decisions subject to limited exceptions. In the latter case, interim measures could be granted by a court (tribunal) on a case by case basis;
- provide for an unrestricted right of courts (tribunals) to receive the materials used as a basis for a decision of the determining authority;
- provide for reasonable time limits for lodging appeals against first instance decisions.

viii. Improving consistency between different EU asylum instruments

- set the key elements of a single asylum procedure in the directive;
- expand the directive's provisions on the withdrawal of refuge status to cases of withdrawal of subsidiary protection;
- underline that the directive covers persons who are the subject to the Dublin procedures and that the notion of implicit withdrawal of the application does not apply to persons transferred to the responsible MS pursuant to the Dublin Regulation.

ix. Increasing the efficiency and quality of decision making

- reduce the current derogations from the principle of a single determining authority;

- provide that a determining authority should dispose sufficient numbers of competent personnel;
- introduce minimum requirements for the content of the interview;
- specify the minimum requirements for the content of the training programmes;
- merge the procedure for dealing with subsequent applications with the admissibility procedure;
- require MSs to take into account further representations before a final decision on the substance is taken;
- lay down a reasonable time limit for taking first instance decisions on the merits.

5. ASSESSMENT OF IMPACTS

Each of the sub-options implies impacts, to a varying degree, in the following areas.

- Increased access to protection and justice as room for administrative error in asylum procedures would be significantly reduced because of improved procedural safeguards, better consistency between asylum instruments and enhanced quality of decision making;
- Increased access to social protection as persons seeking asylum would have increased chances of accessing asylum procedures and, where applicable, obtaining protection, including the necessary social and healthcare. The same consideration applies to better public health;
- Increased equality/non-discrimination: in particular the provisions that promote *de facto* equality in asylum procedures (special guarantees for women and vulnerable applicants), the provisions on access to effective remedy and improved procedural guarantees are key components of the preferred option that will enhance equality and non-discrimination;
- Good governance: would be better achieved within MSs through the introduction of a single determining authority and providing personnel with necessary skills and expertise.

Quantifying costs of changes to the CEAS is particularly difficult. Protection is granted on a *case by case basis*, based on a complex analysis which is context specific, and depends on a number of legal and factual circumstances. No data exist as to why, over a given period, certain applications have been accepted and others rejected. The size or profile of asylum flows cannot be predicted from year to year. The available indications concerning the principal elements of the preferred option are the following:

10 MS that would be potentially affected by the envisaged provisions on personal interviews received in total 111 650 applicants in 2008. If accessibility of interviews improve by 5 %, the proposed provision will affect at least 5 582 applicants requiring some **266 149,76 EUR** per year¹. 5 MS that would be affected by envisaged measures on facilitating access to procedures at the maritime border received 56 985 applicants in 2008. Provisions on free legal assistance at first instance would affect at least 11 MS which received 125 255 applicants in 2008. Up to 48 400 persons (20 % of all applicants) might be in need of the envisaged measures regarding torture victims. Some 45 140 persons might benefit from better access to effective remedy in 8 MS. The likely total administrative costs of the preferred option are estimated at EUR 2 857 555.

¹ Estimates are based on the average hourly labour costs of asylum officials (EUR 23.84).

Many costs could be largely off-set by financial gains in the longer term. Potential savings may result from diminished secondary movements and improved efficiency of first instance procedures. By frontloading services, expertise and examinations, the preferred option should reduce recourse to appeals leading to administrative and financial savings. There are indications that appeals can double the cost of an asylum claim whereas an estimated 110 846 appeals were lodged in 2007. Additionally, it would entail a reduction of the costs involved in reception services. On average, 1 reception year may cost EUR 11 000 per person whereas the envisaged length of first instance procedures is 6 months, while appeal procedures often take at least 1 year.

National measures to implement the standards of the proposal are eligible for co-funding under the European Refugee Fund at a level of 50% or 75%.

6. COMPARISON OF OPTIONS

The preferred option provides for setting essential procedural principles, safeguards and notions in Community Law. By harmonising the procedural arrangements, the preferred option has the potential of ensuring access to protection under equivalent conditions across the Union and a better distribution of the 'burden' carried by MSs. It is also an important step towards achieving the EU aim of ensuring respect for the right to asylum, the principle of *non-refoulement* and more generally for Fundamental Rights.

The preferred option is expected to improve both the efficiency and the quality of procedures by "frontloading" services, advice and expertise and encouraging MSs to deliver, within a reasonable time, robust determinations at first instance. This should (i) enable MSs to quicker distinguish between asylum seekers and other migrants in mixed arrivals, (ii) improve the defendability of negative first instance decisions; (iii) enable the asylum personnel to better identify cases of unfounded and abusive claims; (iv) support MSs' efforts to remove failed asylum seekers from the territory.

7. MONITORING AND EVALUATION

Monitoring and evaluation arrangements will be in the form of a Commission evaluation report due every five years. Regular experts' meetings will continue to take place in view of discussing implementation problems and exchanging best practices between MSs. The European Asylum Support Office will be instrumental in collecting up to date information on the implementation of the directive in MSs.