# Common procedures for granting and withdrawing international protection. Recast

2009/0165(COD) - 10/06/2013 - Commission communication on Council's position

In its communication on the Council's position on the adoption of a proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, the Commission indicates that it supports the compromise text agreed upon by the co-legislators, since the text preserved the key objectives of the Commission's proposal and is a significant improvement compared to Directive 2005/85/EC.

**While the Commission regrets a small number of changes**, it can nevertheless endorse the compromise and recommend its adoption by the Parliament. The text makes a step change in the level of harmonisation of procedural guarantees in asylum procedures by introducing clear, detailed and compulsory rules, and by deleting derogations and stand-still clauses.

The main new provisions in the position on first reading is as follows:

**Reinforced procedural guarantees to improve the quality of asylum procedures**: the Council's position conforms to the principle of **'frontloading'** and provides a strong set of guarantees for all asylum seekers. It ensures fast and easy access to the asylum procedure. Member States must actively inform third-country nationals present at border crossing points and in detention facilities of the possibility of applying for international protection, wherever there are indications that they may wish to apply. Basic interpretation arrangements will also have to be provided to ensure access to the asylum procedure in those areas. Although the time limits to register an asylum application (even expressed very informally) have been extended compared to the Commission's proposal, it has been clarified that a person who has expressed a wish to request international protection immediately becomes an applicant and is entitled to all relevant rights, regardless of formal registration or lodging of the application.

With regard to **training of personnel**, standards are slightly higher than the Commission’s proposal on training of personnel involved in the procedure. The Council's compromise specifies that authorities other than the determining authorities conducting personal interviews on the admissibility of an application should have basic training in asylum issues.

A key element of 'frontloading' as proposed by the Commission was the general deadline of six months, extending to twelve, to complete the examination of an application. This key element has been preserved, **although the maximum duration has been extended**. However, compared to the proposal, the Council's position frames better the possibility of suspending the procedure if there is an uncertain situation in the country of origin which means it is not reasonable to take a decision within the normal deadlines.

**Applicants with special procedural needs, including unaccompanied minors**: while the Commission regrets that the level of guarantees for unaccompanied minors has been lowered in the Council's position, the Commission can nevertheless accept this compromise since it provides an adequate level of protection. The Commission proposed to exempt unaccompanied minors from accelerated and border procedures, as well as from non-automatic suspensive effect of appeals because these procedural devices significantly reduce the time available to prove one's claim, while minors require special support to help them fully express their international protection needs.

**As for border procedures, they involve detention, which the Commission believes should generally not be applied to unaccompanied minors.** Lastly, non-automatic suspensive effect could jeopardise an unaccompanied minor's access to an effective remedy, guaranteed by the Charter.

The Council's position makes it possible to apply accelerated procedures to unaccompanied minors, but only in a small number of circumstances. Among those, the nationality of a safe country of origin is an objective indication that the application is likely to be unfounded; an accelerated examination of a subsequent application can be justified by a full examination of the previous application; and the third ground is a legitimate national security or public order concern.

There are **six grounds allowing Member States to use border procedures**. In addition to the three grounds for accelerated procedures, two circumstances related to admissibility are added (subsequent applications and possible application of the safe third country concept). Two more substantial additions are situations where the applicant misleads the authorities by presenting false documents, or destroys or disposes of an identity or travel document in bad faith. In themselves, those grounds would not have been acceptable to the Commission since unaccompanied minors cannot generally be expected to fully understand the necessity to cooperate with the asylum authorities. However, in the Council's position, these grounds can be used only where there are serious grounds to consider that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision, and there are additional procedural safeguards.

As regards **rules on appeals**, while there is a possibility of non-automatic suspensive effect, this is only possible with significant additional guarantees. In particular, the applicant will have at least one-week and the necessary legal assistance and interpretation to prepare the request to remain on the territory.

Regarding other categories of **persons with special needs**, the Council's position contains an unequivocal obligation to create an effective identification mechanism and to provide adequate support in the procedure. Moreover, persons whose special needs mean they cannot participate in special rapid procedures are excluded from accelerated and from border procedures and receive additional guarantees in appeals in case of non-suspensive effect, which are the same as those for unaccompanied minors. Asylum procedures also continue to be **gender-sensitive** with the possibility for applicants to request and obtain same-sex interpreters and interviewers, and gender-specific violence being taken into account in assessment of special needs. The provisions on special needs thus preserve the Commission's key objectives.

The question of **special needs** is closely linked with the use of medical reports or examinations in the asylum procedure. In this respect, the Council's position preserves the main objectives of the proposal. However, the Commission regrets that the use of the Istanbul Protocol on identification and documentation of symptoms of torture has been rendered facultative, even though the Union encourages third countries to promote the systematic application of the Protocol for documentation of torture cases.

**Accelerated and border procedures and effective remedy**: harmonisation of the use of accelerated border procedures, allowed in all cases under Directive 2005/85/EC, was one of the key objectives of the proposal. This objective has been preserved as the Council's position contains an exhaustive list of grounds for the use of these procedures. The compromise text adds three more grounds to the Commission' s list: (i) subsequent applications **which are not inadmissible**; (ii) applicants who refuse to have their fingerprints taken for the use in the EURODAC system; and (iii) applicants who entered the territory or prolonged their stay unlawfully and, without good reason, have not presented themselves to the authorities and/or filed an application for asylum as soon as possible given their circumstances of their entry. The additional ground with most substantial impact is the last one. However, it contains important safeguards that ensure adequate protection for the applicant.

The proposal also aimed to strengthen the right to an effective remedy by setting out the **principle of automatic suspensive effect of appeal**, subject to limited exceptions. Whilst this principle remains in the Council's position, **there are more exceptions**.

Regarding **implicit withdrawal**, relevant safeguards have been included before the appeal stage; in particular, the person has the possibility to request the re-opening of his case and there is always a possibility of examining the claim as a subsequent application. Moreover, where an appeal has no automatic suspensive effect, there is the option of requesting suspensive effect and **the person must be allowed to remain on the territory while that request is processed.** There is therefore no risk of return without judicial remedy.

Lastly, in line with the case-law of the European Court of Human Rights, the Commission proposed that an appeal against a negative decision taken in a border procedure has an automatic suspensive effect. The Council's position provides instead for the same guarantees for unaccompanied minors in appeals. In manifestly unfounded cases, these guarantees can mitigate the negative consequences of non-automatic suspensive effect. In particular, they clarify that **no removal can take place pending the outcome of the request for suspensive effect,** which ensures compliance with fundamental rights obligations as informed by the case law of the European courts.

**Fight against abuse**: in order to ensure a balance between the objectives of protecting genuine asylum seekers and fighting abusive repeated applications, the Commission proposed to allow Member States to remove an applicant after a second subsequent application (i.e. third application), provided that the non-refoulement principle is respected. The Council's position upheld the objectives of the proposal but added an additional case where the applicant's right to remain on the territory can be removed: after an inadmissible first subsequent application made merely in order to frustrate an imminent return. **The Council argued this is required to tackle abusive last-minute subsequent applications.** The Council's position clearly specifies that the exceptions from the right to remain must be applied in line with the principle of non-refoulement.

Lastly, the Council's position also amends the Commission proposal as regards **the rules on implicit withdrawal or abandonment of the application**. The proposal's objective was to harmonise the rules regarding those situations and in particular prevent the risk of an application never been examined in substance before being rejected. This objective remains in the Council's position since the latter specifies that an application cannot be rejected without an adequate examination of its substance. The Commission regrets, however, the inclusion of the provision that an applicant's case may be reopened only once if the applicant reports back following a discontinuation of the application.