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From: Presidency
On: 23 October 2018
To: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)
Subject: Border procedures

Asylum Procedure Regulation

On 13 July 2016, the Commission submitted along with other proposals of the CEAS package a proposal for a Regulation establishing a Common Procedure for International Protection in the EU.

After intense discussions in the Council, the majority of the provisions of the Asylum Procedure Regulation only need some further fine-tuning. The biggest outstanding issue for most Member States is Article 41 regarding the border procedure for which an agreement seems difficult to obtain.

In this sense, Article 41 proved challenging with respect to various aspects, such as the deadline for keeping persons at the border, and the possibility to use such a procedure also in proximity to the external border or in transit zones or, in case of disproportionate numbers of arrivals, in other locations. However, the most difficult and divisive question is whether the application of the border procedure should be optional or mandatory.

During the JHA Council on 12 October 2018, some Member States stated that they are opposed to a mandatory asylum border procedure, while other Member States expressed support for a mandatory border procedure in Art. 41 APR.

The Presidency has explored options for making the border procedure mandatory in certain specific cases. The latest version of the text provides therefore that the application of the border procedure is mandatory only in the following three cases, namely when

- *there are reasonable grounds to consider the applicant as a danger to the national security or public order of the Member States, or the applicant had been forcibly expelled for serious reasons of national security or public order under national law;*
- *the applicant, in lodging his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with the Qualification Regulation;*
- *the applicant has made clearly insufficient, inconsistent or contradictory, clearly false or obviously improbable representations which contradict relevant and available country of origin information, thus making his or her claim clearly unconvincing as to whether he or she qualifies as a beneficiary of international protection by virtue of the Qualification Regulation;*

For other cases where the accelerated procedure applies and for inadmissibility checks applying the border procedure is optional.

The current proposal of the Presidency was discussed during a JHA Counsellors meeting on the 16 October 2018. The discussions once again showed that there is no agreement on whether in some cases the border procedure should be mandatory or not.

Past discussions have also shown that the question of the border procedure is not an isolated issue of Article 41 of the **Asylum Procedure Regulation** but also directly or indirectly linked with other legislative files.

According to the latest Presidency compromise proposal for Art. 41(3) of the Asylum Procedure Regulation “*where a decision by a court or tribunal of first instance on an appeal is not taken within twelve weeks from when the application is lodged, the applicant shall no longer be kept at the border or in the transit zones and shall be granted entry to the territory of the Member State for his or her application to be processed in accordance with the other provisions of this Regulation.*”

The wording implies that when applying border procedures the applicant

- **has not legally entered the territory,**
- **can be kept at the border or in the transit zone,** and therefore
- **may be detained.**

Reception Conditions Directive

The relevant legal basis for detention can be found in Art. 8(3)(d) of the **Reception Conditions Directive** which clarifies, that “*an applicant may be detained in order to decide, in the context of a border procedure in accordance with Article 41 of the Asylum Procedures Regulation on the applicant’s right to enter the territory.*”

Therefore, detention may be used when applying the border procedure in Art. 41 of the Asylum Procedures Regulation.

Schengen Borders Code

Furthermore, the application of the border procedure should be seen in connection with Article 14 of the **Schengen Borders Code** stating *that a refusal of entry is notified to third country nationals that do not fulfil the entry conditions listed in article 6, “without prejudice to the application of special provisions concerning the right of asylum and to international protection”*.

Return Directive

On 12 September 2018 the Commission tabled a proposal for a revised Return Directive (recast). The proposed changes to the EU Return Directive also include an accelerated border procedure in Article 22. The border procedure of the Return Directive applies only to third-country nationals subject to a negative decision resulting from an asylum border procedure carried out in accordance with Article 41 of the Asylum Procedure Regulation. Therefore, the return and the asylum border procedures are directly linked to each other.

As demonstrated again by the informal SCIFA discussion on 20-21 September 2018 in Vienna, one of the crucial elements of the proposal is the obligation to make use of the border procedure in a limited number of cases. This procedure will enable the rapid return of applicants for international protection, whose application was rejected *following an asylum border procedure* provided for in Article 41 of the *Asylum Procedure Regulation*, in order to prevent gaps between the procedures and ensure complementarity. The Commission proposes for this procedure that:

- *no voluntary departure would be foreseen, except if the TCN holds a valid travel document (which shall be confiscated until departure) and cooperates with the national authorities;*
- *shorter time-limit would be set for lodging an appeal;*
- *automatic suspensive effect in case of the first appeal against a return decision would only apply in case where there is a risk of breach of the principle of non-refoulement because new significant circumstances arose or because the rejection of the asylum application was not subject to an effective judicial review. The second and further appeal would have no suspensive effect, unless the court decides so;*
- *a TCN who was already detained in the context of an asylum border procedure may be held in detention for a maximum period of 4 months under the border procedure for return. Where it is not possible to enforce the return within this period, a further period of detention of the TCN may be ordered in accordance with the main general provision on detention of this directive.*

During the JHA Council on 12 October 2018 ministers were asked by the Presidency whether they would support the Commission proposal of Article 22 of the recast of the Return Directive.

Furthermore, ministers were also asked **under which** conditions a mandatory application of the border procedure under the Asylum Procedures Regulation could be supported.

The discussions have shown that there is overall support for the concept of border procedure in the Return Directive despite the opposition of some Member States regarding the mandatory use of the border procedure in the Asylum Procedure Regulation. Therefore, there seems to be some discrepancy between the support for the border procedure in the Return Directive and refusing a mandatory border procedure in the APR, which, from a legal perspective, go “hand in hand”.

Therefore delegations are invited to express their views to the following questions:

- 1. With regard to Article 41 of Asylum Procedure Regulation, could you support an obligation for Member States to provide a border procedure in national law, while keeping the discretion as to the cases for which and the places where to use such a procedure in relation to inadmissibility checks or cases subject to the accelerated procedure?**
- 2. Is there sufficient consistency in the proposed legal framework for the functioning of the asylum and return border procedures, together with the rules on refusals of entry, considering the interaction between the legislative files mentioned above? If not, which adjustments would be needed?**
- 3. How should the necessary framework for the practical implementation of an efficient border procedure be designed? In particular, how could EASO and FRONTEX facilitate the process in practice?**