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From: General Secretariat of the Council

To: Asylum Working Party

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Subject: List of questions by the German delegation for the Council Legal Service

Following the informal Videoconference of the Asylum Working Party on 17 June 21, delegates will find attached a list of questions by the German delegation for the Council Legal Service relating to the following proposals:

Amended 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

Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817

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Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]



List of questions for the Council Legal Service

Reference is made to the Council Proposal for an Asylum Procedures Regulation of 15 April 2021 (ST 7890/2021 INIT), the Council Proposal for a Screening Regulation of 12 May 2021 (ST 8548/2021 INIT) and the Commission Proposal for a Regulation on Asylum and Migration Management (AMR) of 23 September 2020 (ST 11213/2020 INIT).

1. Does Article 47 of the EU Charter of Fundamental Rights require that it must be possible for an asylum seeker to seek judicial review of his or her asylum procedure being conducted as a border procedure in accordance with Article 41 et seqq. of the Asylum Procedures Regulation and not as a standard domestic procedure?

2. Must it, then, be possible to seek judicial review in particular of the assessments listed in a) to d) below, given they are the preconditions for an asylum procedure being conducted as a border procedure? If the answer to one or all of these questions is “yes”, must judicial review against this individual assessment take place before or during the border procedure, or can it be provided incidentally as part of the judicial review of another decision, for example the decision on the asylum application? In the case of an incidental review: At what point in time would the judicial review be possible and based on which legal provisions? Would an incidental remedy be deemed “effective” within the meaning of case law?

a) The assessment by the screening and/or asylum authority that an asylum seeker poses a security risk within the meaning of Article 41c (1) in conjunction with Article 40 (1) point (f) of the Asylum Procedures Regulation.

b) The assessment by the screening and/or asylum authority that none of the grounds set out in Article 41e of the Asylum Procedures Regulation is applicable to the asylum applicant which would mean that the asylum procedure would have to be continued as a standard domestic procedure.

c) The assessment by the screening and/or asylum authority that the asylum seeker meets the conditions under Article 41c (1) in conjunction with Article 40 (1) point (c)/(ca) of the Asylum Procedures Regulation.

d) The assessment by the screening and/or asylum authority that the asylum seeker meets the conditions under Article 41c (1) in conjunction with Article 40 (1) point (i) of the Asylum

Procedures Regulation. Is judicial review possible, for instance, if it is stated that the conditions under Article 40 (1) point (i) second last and last half-sentence are met and the asylum procedure is to be continued as a standard domestic procedure?

3. In the event that the Council Legal Service takes the view that judicial review must take place in the course of the asylum border procedure, does Article 53 of the Asylum Procedures Regulation then guarantee an effective remedy?

4. Does an effective remedy in accordance with Article 47 of the EU Charter of Fundamental Rights not require that the period for lodging an application for the ordering of the right to remain under Article 54 (4) of the Asylum Procedures Regulation and the outcome of the court proceedings concerning such an application to remain be awaited, in case of abusive subsequent applications within the meaning of Article 43 point (-a) in conjunction with Article 54 (6) of the Asylum Procedures Regulation, so that the administrative decision cannot be enforced beforehand?

5. Does Article 47 of the EU Charter of Fundamental Rights require that it must be possible for an asylum applicant within the meaning of the AMR to seek judicial review of the assumption that he or she could pose a danger to national security or public order if the consequence of this assumption is that no procedure for determining the Member State responsible is conducted together with a review of the criteria for determining the Member State responsible pursuant to Article 14 et seqq. of the AMR, but that the Member State in which the application for international protection was registered is responsible, in accordance with Article 8 (4) of the AMR, for examining the asylum application or if the applicant thus simultaneously poses a security risk within the meaning of Article 41c (1) in conjunction with Article 40 (1) point (f) of the Asylum Procedures Regulation, meaning that a border procedure would have to be conducted? If so, must an appeal be lodged against an individual assumption or can a sufficiently effective remedy also be provided incidentally as part of a judicial review of another decision, for instance together with a decision on the asylum application?

6. Does Article 47 of the EU Charter of Fundamental Rights require that it must be possible for an asylum applicant within the meaning of the AMR to seek judicial review of the assumption that he or she could pose a danger to national security or public order if the consequence thereof is that he or she will no longer be eligible for any possible transfer procedures as part of actions of solidarity pursuant to Article 57 (2) or Article 57 (7) subparagraph (2) of the AMR?

7. Must not an effective remedy in accordance with Article 47 of the EU Charter of Fundamental Rights require that Article 33 of the AMR allow judicial review of the transfer decision and the transfer in regard to potential infringements of fundamental rights (subjective right), which would mean that, for example, compliance with time limits which can impact the cessation of responsibilities must also be subject to judicial review? This is contrary to the limited right to pursue legal action set forth in the text of the Commission proposal.

We would ask that the case-law of the European Court of Justice in particular be taken into consideration and incorporated when responding to the above questions.