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Proposal for a

COUNCIL DECISION

**on the position to be adopted, on behalf of the European Union, in the Executive
Committee of the Programme of the United Nations High Commissioner for Refugees**

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees ('Executive Committee') in connection with the envisaged adoption of a conclusion on machine-readable travel documents for refugees and stateless persons.

2. CONTEXT OF THE PROPOSAL

2.1. The Resolution of the United Nations Economic and Social Council of 30 April 1958 on the Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees

The Executive Committee was established by the United Nations Economic and Social Council by Resolution of 30 April 1958 on the Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (E/RES/672 (XXV)). Pursuant to that Resolution, the Executive Committee acts as an advisory body as regards norms and policy with respect to international refugee protection.

2.2. The Executive Committee of the Programme of the United Nations High Commissioner for Refugees

The Executive Committee comprises both members and observers. Membership is limited to States. Observer status is granted both to States and other entities. Currently, the Executive Committee counts 101 Member States, including 27 EU Member States, 16 observer states, including one EU Member State, and 39 non-state observers, including the European Union.

Observers, unlike members, do not have the right to vote, but are entitled to speak at the public meetings of the Executive Committee. As regards intergovernmental organisations that hold observer status in the Executive Committee, Rule 38, second paragraph, of the Rules of Procedure of the Executive Committee, as last amended in October 2016, provides: *'The Committee, upon a recommendation from the Standing Committee, may decide on an annual basis to invite intergovernmental organizations that hold observer status in the Committee to participate in its private meetings on asylum and refugee matters within their competence.'* On the basis of that provision, the Executive Committee invited the European Union on 5 May 2017 to participate in its private meetings on asylum and refugee matters within the European Union's competence.

The Executive Committee regularly adopts thematic conclusions on refugee protection. The thematic conclusions on refugee protection are adopted by consensus of the members of the Executive Committee. They are being prepared in a series of private meetings by members of the Executive Committee and intergovernmental organisations, who, in their capacity as observers, have been invited to participate in those private meetings, in cooperation with UNHCR experts.

2.3. The envisaged act of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees

On 2-6 October 2017, during its 68th session, the Executive Committee is to adopt a conclusion on machine-readable travel documents for refugees and stateless persons ('the envisaged conclusion').

Based on the invitation by the Executive Committee on the basis of Rule 38, second paragraph, of its Rules of Procedure, the European Union has participated in the preparation of the envisaged conclusion. The EU Member States, who are also members of the Executive Committee, participate in the adoption of the envisaged conclusion.

The purpose of the draft envisaged conclusion, as it resulted from the private meetings on 30 May, 8 June, 12 June, 16 June, and 11 and 12 September, is essentially to call on all States parties to the 1951 Convention Relating to the Status of Refugees ('1951 Convention') and the 1954 Convention Relating to the Status of Stateless Persons ('1954 Convention') to introduce machine-readable Convention Travel Documents in accordance with International Civil Aviation Organization ('ICAO') standard 3.12 and Document 9303, if they have not already done so, and to call on all States not parties to these Conventions already issuing machine-readable travel documents to refugees and stateless persons to share good practices with other interested States not parties to these Conventions with a view to encouraging them to introduce such travel documents, if they have not already done so. The envisaged conclusion also provides for a commitment of the Executive Committee to facilitate the transition to and continued issuance of machine-readable travel documents to refugees and stateless persons, through the mobilisation of financial resources and the provision of capacity-building and technical support, as appropriate, in collaboration with ICAO and the UNHCR.

The envisaged conclusion notes that international standards and specifications for travel documents have undergone significant developments since the 1951 and 1954 Conventions were drafted, and that the effective realisation of the rights of refugees and stateless persons lawfully staying within the territory of a state party to be issued with a travel document, enabling them to travel outside that territory, set out in Articles 28 of these Conventions and the Schedules and Annexes to these Conventions, can best be achieved, if refugees and stateless persons have access to travel documents in line with ICAO standards, in particular as regards machine-readability.

The envisaged conclusion also refers to ongoing multilateral discussions on refugees, such as on the Global Compact on Refugees.

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

The Union should support the adoption of Executive Committee conclusion on machine-readable travel documents for refugees and stateless persons.

It is desirable that travel documents issued by states to refugees and stateless persons lawfully staying within their territory comply with security features in line with international standards, namely ICAO standard 3.12 and Document 9303 on machine readable travel documents. This renders these travel documents more secure by contributing to protecting them against forgery and fraudulent use.

Council Regulation No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States¹, which lays down the minimum level of security that Member States' passport and travel documents are required to provide, already requires Member States to comply with ICAO Document 9303, in particular as regards the issuing procedures and the machine-readable biographical data page. The Regulation applies to all travel documents issued by Member States, including those issued to stateless persons as well as those issued to beneficiaries of refugees status and beneficiaries of subsidiary protection status in accordance with Article 25 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011² ('the Qualification Directive'), provided they have a validity of more than 12 months. Regulation (EC) 2252/2004 constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom and Ireland do not take part.

The proposed new Regulation of the European Parliament and of the Council of 13 July 2016 that is to replace the Qualification Directive ('the proposed Qualification Regulation')³ foresees that Member States comply with the minimum security features and biometrics outlined in Regulation (EC) No 2252/2004 or equivalent to those, when they issue travel documents to beneficiaries of refugee status and beneficiaries of subsidiary protection status, valid for at least one year, in accordance with the proposed Qualification Regulation. Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, applies to participation of the United Kingdom and Ireland in the adoption and application of the proposed Regulation.

In the spirit of Article 3(5) TEU the Union promotes these standards also in its relations with the wider world. As regards States parties to the 1951 and 1954 Conventions, this contributes to the effective realisation of the rights of refugees and stateless persons lawfully staying within the territory of a state party to be issued with a travel document, enabling them to travel outside that territory, set out in Articles 28 of these Conventions and the Schedules and Annexes to these Conventions.

It is in any event appropriate to establish the position to be adopted on behalf of the Union in the Executive Committee, as the envisaged conclusion on machine-readable travel documents for refugees and stateless persons may affect common rules contained in Council Regulation No 2252/2004, Directive 2011/95/EC of the European Parliament and of the Council, and the proposed Regulation of the European Parliament and of the Council that is to replace Directive 2011/95/EC.

¹ OJ L 385, 29.12.2004, p. 1-6, last amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 28 May 2009, OJ L 142, 6.6.2009, p. 1-4.

² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9-26.

³ Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final, in relation to which the Council agreed on a partial general approach on 19 July 2017.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement at issue.⁴

The notion of *‘acts having legal effects’* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *‘capable of decisively influencing the content of the legislation adopted by the EU legislature’*.⁵

4.1.2. Application to the present case

The Executive Committee is a body set up by an agreement, namely the Resolution of the United Nations Economic and Social Council of 30 April 1958 on the Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees.

The conclusion which the Executive Committee is called upon to adopt constitutes an act having legal effects. Although Executive Committee conclusions are not legally binding, they contribute to the interpretation and further development of international standards on refugee protection. They play an important role in determining the manner in which the 1951 Convention and the Protocol of 31 January 1967 relating to the status of refugees (‘1967 Protocol’) are interpreted and applied. The Office of the High Commissioner for Refugees (UNHCR) uses Executive Committee conclusions in exercising its duty of supervising the application of the provisions of the 1951 Convention and the 1967 Protocol, which States parties are to facilitate in accordance with Article 35 of the 1951 Convention. Executive Committee conclusions play a role in further developing the international refugee protection regime in a way that complements and strengthens the 1951 Convention and its 1967 Protocol, which the States parties have committed to⁶ and which the UN General Assembly has welcomed⁷. They provide evidence of an already established rule of customary international law, or lead to law creation. They are sometimes given considerable weight by national and international courts, including by the European Court of Human Rights.⁸

These considerations are likely to apply, in particular, to the envisaged conclusion. The envisaged conclusion reflects contemporary state practice in a key area, namely the issuance

⁴ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraph 64.

⁵ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

⁶ Point 7 of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees of 13 December 2001.

⁷ Resolution A/RES/57/187, para. 4, of 18 December 2001.

⁸ ECtHR (Grand Chamber), 29 January 2008, Saadi v United Kingdom (Application No. 13229/03).

of travel documents. They develop the international refugee protection regime further by acknowledging that the provisions relating to the issuance and standardisation of travel documents in the 1951 Convention and the Schedule and Annex to that Convention must be interpreted and applied in accordance with current international standards, confirming that such travel documents must be ICAO compliant.

The envisaged conclusion is in any event capable of decisively influencing the content of EU legislation, which must be adopted, interpreted and applied in accordance with the 1951 Convention and the 1967 Protocol⁹. More specifically, the following EU legislation must be interpreted in a manner consistent with Article 28 of the 1951 Convention and the Schedule and Annex to that Convention, the interpretation of which is, in turn, guided by the envisaged conclusion:

- Council Regulation No 2252/2004. This is because Article 1(1) first sub-paragraph in conjunction with sections 2 and 5 of the Annex to that Regulation lays down the minimum security level of Member States' passports and travel documents in accordance with ICAO Document 9303, in particular as regards the issuing techniques and the machine-readable biographical data page;

- the Qualification Directive. This is because Article 25 of the Qualification Directive provides that:

'1. Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the [1951 Convention], for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.'

- the proposed Qualification Regulation. This is because Article 27 of the proposed Qualification Regulation reads as follows:

'1. Competent authorities shall issue travel documents to beneficiaries of refugee status, in the form set out in the Schedule to the [1951 Convention] and with the minimum security features and biometrics outlined in Council Regulation (EC) No2252/2004 45. Those travel documents shall be valid for at least one year.

2. Competent authorities shall issue travel documents with the minimum security features and biometrics outlined in Regulation (EC) No 2252/2004 to beneficiaries of subsidiary protection status who are unable to obtain a national passport. Those documents shall be valid for at least one year.

⁹ Article 78(1) TFEU, Article 18 of the Charter of Fundamental Rights of the European Union. Case C-57/09 B and D, EU:C:2010:661, paragraph 78. See also Case C-31/09 Nawras Bolbol, EU:C:2010:351, paragraph 36 to 38.

3. The documents referred to in paragraphs 1 and 2 shall not be issued where compelling reasons of national security or public order so require.'

The envisaged conclusion also guides UNHCR when exercising its tasks as a non-voting member of the Management Board of the European Asylum Support Office (EASO) and the Union when it is designing its cooperation with UNHCR in accordance with Article 220(1) first sub-paragraph TFEU, including as an observer in the Executive Committee.

The envisaged act does not supplement or amend the institutional framework of the agreement.

The procedural legal basis for the proposed decision, therefore, is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the proposed decision relate to the Union's common policy on asylum.

The substantive legal basis of the proposed decision, therefore, is Article 78(2) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 78(2) TFEU in conjunction with Article 218(9) TFEU.

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Resolution on the Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees was adopted by the United Nations Economic and Social Council by Resolution of 30 April 1958.
- (2) Pursuant to the Resolution, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees acts as an advisory body as regards norms and policy with respect to international refugee protection.
- (3) The Executive Committee of the Programme of the United Nations High Commission for Refugees, during its 68th session on 2-6 October 2017, is to adopt a conclusion on machine-readable travel documents for refugees and stateless persons.
- (4) It is appropriate to establish the position to be adopted on behalf of the Union in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, as the envisaged conclusion is likely to have legal effects and are, in any event, capable of decisively influencing the content of Union law, namely of Council Regulation No 2252/2004 of 13 December 2004¹⁰, Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011¹¹, and the proposed

¹⁰ Council Regulation No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ L 385, 29.12.2004, p. 1-6, last amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 28 May 2009, OJ L 142, 6.6.2009, p. 1-4.

¹¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9-26.

Regulation of the European Parliament and of the Council of 13 July 2016 that is to replace Directive 2011/95/EC¹².

- (5) The Union should support the adoption of the envisaged conclusion on machine-readable travel documents for refugees and stateless persons.
- (6) It is desirable that travel documents issued by states to refugees and stateless persons lawfully staying within their territory comply with security features in line with international standards, namely ICAO standard 3.12 and Document 9303 on machine readable travel documents. This renders the travel documents more secure by contributes to protecting them against forgery and fraudulent use.
- (7) The position of the Union is to be expressed by the Member States of the Union that are members of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, acting jointly.
- (8) [In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Decision.]

OR

[In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application.]

OR

[In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified (, by letter of ...) its wish to take part in the adoption and application of this Decision.]

¹² Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final.

OR

[In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom has notified (, by letter of ...) its wish to take part in the adoption and application of this Decision.

In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.]

- (9) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted, on behalf of the Union, in the 68th session of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees with regard to the adoption of the conclusion on machine-readable travel documents for refugees and stateless persons is set out in the Annex.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, acting jointly.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*