



UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270

These comments complement UNHCR's overarching proposals for Europe as set out in: "Better Protecting Refugees in the EU and Globally", UNHCR's proposals to rebuild trust through better management, partnership and solidarity, of 05 December 2016.¹ The proposals focus on four elements: Engagement beyond European Union (EU) borders, Preparedness, a well-managed asylum system and greater emphasis on integration.

The events of 2015 highlighted the need for a revitalized asylum system in the EU. In its overarching proposals, UNHCR recommends that, in addition to ensuring access to territory is guaranteed and new arrivals are registered and received properly, the system would also allocate responsibility for asylum seekers fairly among EU Member States, and ensure that EU Member States are equipped to meet the task. Building on elements of the existing Common European Asylum System (CEAS) and some of the reforms proposed by the European Commission (Commission), UNHCR proposes a simplified system that would facilitate the efficient management of population movements. A key element of this system is the prioritisation of family reunion directly after the registration phase in order to overcome some of the current obstacles to family reunion under the existing Dublin Regulation. In addition, rather than foreseeing mandatory admissibility procedures, the system would incorporate streamlined asylum determination procedures to manage mixed arrivals of refugees and migrants. Under this scheme, asylum-seekers with manifestly well-founded or unfounded claims and those from safe countries of origin would be channelled into accelerated procedures to provide quick access to international protection for those who need it, and facilitate return for those who do not. This would link to a fair and workable distribution mechanism to manage disproportionate arrivals in an EU Member State through responsibility sharing. Rather than adopting a punitive approach, UNHCR's proposals focuses on incentives for compliance. In addition to family links, other connections with a Member State would be taken into account in order to reduce onward movement and improve asylum-seekers' prospects for integration.

To complement and elaborate on these overarching proposals, UNHCR is setting out its position on the European Commission's proposals to reform the CEAS in a series of detailed commentaries. This paper sets out UNHCR comments on the specific aspects of the EC's proposal for a recast of the "Dublin" Regulation.

¹ UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>

Executive Summary

UNHCR has closely observed the Dublin system over many years, most recently publishing a study on the implementation of the Dublin III Regulation.² The shortcomings in the present and past Dublin iterations include bureaucratic complexities in the process and its implementation, the lack of proactive solidarity in the interaction between Member States as well as the cooperation with and of applicants. It should be recalled that a basic assumption underlying the CEAS and thereby the Dublin system remains unfulfilled – namely, the premise that asylum-seekers are able to enjoy adequate and generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States.

UNHCR urges the EU and Member States to effectively use and further strengthen the tools and instruments they have developed over time in the CEAS and is ready to continue assisting with these efforts in the interests of Member States, the EU, and those in need of international protection. UNHCR also considers that the efficiency of the system can be improved without sacrificing procedural and substantive rights of asylum-seekers.

The Dublin recast proposal

The main aims of the Commission's proposed recast are to make the system more efficient and effective as well as to contribute to a fairer sharing of responsibilities between Member States.

The proposed recast includes welcome aspects such as, for example, shortened time frames that may contribute to ensuring swifter access to asylum procedures as well as shorter time limits for detention, the proposed expansion of the definition of family members, as well as mandatory suspensive effect in relation to appeal or review. UNHCR further welcomes that family unity and the best interests of the child are retained as key principles in the allocation of responsibility under the Regulation.

Strengthening of the irregular entry criterion and applicants' obligations

The recast proposal, however, maintains and further strengthens the irregular entry criterion whilst placing further duties and responsibilities on the Member States where applications are first lodged. Additionally, the recast proposal does not provide incentives to ensure applicants' compliance with the system. Rather, it places new obligations on applicants as well as introduces more coercive measures for applicants who do not comply. Punitive measures alone are unlikely to reduce onward movements. Such punitive measures may, in reality, only serve to discourage applicants to register in the Member State of arrival, especially where the applicant does not have (family or other) reasons to be transferred to another Member State. As a consequence, onward movement will likely continue.

On the other hand, the lack of consequences for Member States' failure to comply with the time limits in take back and transfer procedures may lead to negative consequences such as "*asylum-seekers in orbit*" for prolonged periods of time. UNHCR also maintains concerns in relation to the longer-term cessation of responsibility between Member States, in particular for applicants who re-emerge with a risk of persecution or other serious harm in new circumstances, and so may have reason to seek asylum once again.

Admissibility procedures

The introduction of an admissibility procedure, which precedes the determination of responsibility under the Dublin Regulation, may also prove to be problematic. For example, admissibility considerations take precedence over family reunion possibilities, including on the basis of dependency. This also means that responsibility remains with the Member State of application for all claims found inadmissible or subject to

² See UNHCR's forthcoming study on the Dublin III Regulation.

accelerated procedures for security reasons or on the basis of the safe country concepts.

Safe country concepts should only be used where precise, impartial, and up-to-date information is available on the safety of a particular country. An applicant must have an effective opportunity to rebut the presumption of safety in light of their individual circumstances, and the safe country concepts should not apply to vulnerable applicants.

Time limits

The condensing of the procedural time limits has benefits, but also inherent risks in terms of efficiency unless flexibility can be built into the system where required (e.g. when additional time is required to complete family tracing and the Best Interests Assessment (BIA)).

Provision of information and personal interview

UNHCR is also concerned by proposed changes in relation to the provision of information and the personal interview, and is of the opinion that improvements could be made in order to enhance applicants' understanding and, consequently, cooperation. For example, under the proposed recast, where the personal interview is omitted, the applicant's right to present relevant information is no longer guaranteed. Concerns are raised also by the proposed restrictions to the timing and modalities of the submission of relevant documentation to the authorities.

Under certain circumstances, obligations may also be imposed upon applicants without them having been informed of such obligations and of the consequences of non-compliance. The recast proposal additionally substantially shifts responsibility for the gathering of information from the authorities to that which is proactively submitted by the applicant rather than striking a balance that fosters cooperation through shared duties. This may have adverse consequences on the amount of information applicants are able to provide in order to correctly determine responsibility at an early stage in the procedure. Consequently, efficiency would be undermined and recourse to appeals would likely be higher.

Family unity and dependency

Whilst it is welcomed that the recast proposal foresees a limited expansion of the Dublin criteria in respect of the definition of family members, additional categories of family, such as dependent minor married children, adult children and parents of adult children, remain excluded. The obligation to prioritize safe country concepts and security considerations over the application of the responsibility criteria further undercuts the modest enlargement of the definition of "family members". The recast proposal also misses the occasion to clarify the elements to be taken into account to assess the existence of a dependency link.

Discretionary clauses

Whereas UNHCR has consistently been calling for a proactive and flexible use of the discretionary clauses, the recast proposal significantly curtails their application, in that both the "humanitarian" and the "sovereignty" clauses would become inapplicable after the determination of responsibility. Additionally, the "sovereignty" clause would become applicable only to keep together wider family relations. The material scope of the provision, in the proposed recast, on *non-refoulement* pertains only to systemic deficiencies, so appears to fall short of the more rights-focused approach set out by the European Court of Human Rights (ECtHR).

Children and applicants with specific needs

UNHCR strongly supports the aim of enhancing child protection. However, it is not confident that the proposed measures, namely the transfer of unaccompanied children who do not have family members or relatives in a Member State to the Member State of first application in order to dissuade irregular onward movements, would effectively serve such aim. This is also at variance with UNHCR's position that children should not unnecessarily be transferred to another Member State, unless this is in their best interests, in

order not to delay their access to the asylum procedure.

Whilst enhanced provisions within the proposed recast on the best interests assessment (BIA) are welcomed, BIA procedures should be further operationalized by indicating which actors should be involved in the BIA and how it is to be conducted. Additionally, the possibility that a child be appointed a representative only in the Member State where s/he is obliged to be present exposes an evident protection gap, as children would not receive assistance during take back procedures and transfers.

Concerns are also raised by the insufficient safeguards to identify applicants with specific needs as well as any reasons that may render a transfer unsuitable due to the individual circumstances of an applicant.

Appeals

The proposed recast of the rules on remedies includes the mandatory suspensive effect until a decision is taken on the appeal or review, which is to be welcomed. The shorter time limits envisaged, however, are of concern, as is the significant limitation on the scope of appeals. Conversely, the introduction of a new remedy against the omission of a transfer is positive, but requires further clarification to be of value in practical terms.

Detention

The recast proposal also positively shortens the time limits for detention, although it does not further clarify the definition of what amounts to a “*significant risk of absconding*”.

Corrective allocation mechanism

The corrective allocation mechanism laudably aims to contribute to a fairer sharing of responsibilities between Member States. As currently designed in the recast proposal, however, it raises a number of concerns. For example, it is likely to entail multiple transfers for those applicants who have family in a Member State other than in the Member State benefitting from the allocation mechanism or of initial allocation. As a consequence of such multiple transfers, swift access to an asylum procedure may be prevented. Additionally, practical and financial issues may challenge the operation of the system. Member States benefitting from the corrective allocation mechanism will, under the present proposal, still have to handle admissibility procedures and conduct security checks as well as handle return procedures, after any appeals, for those found inadmissible. Finally, when security verification is in issue, delays may occur and/or this may leave scope for fundamentally undermining the corrective allocation mechanism in practice.

The Eurodac recast proposal

The proposed recast of the Eurodac Regulation, which aids the application of the Dublin Regulation and forms part of the Dublin system, expands both the purpose and the scope of the Eurodac database, and aims to transform it into a broader migration database. In addition to assisting in the determination of the Member State responsible for examining an application for international protection and facilitating the application of the Dublin Regulation, it is proposed that Eurodac supports control of illegal immigration (sic) and onward movement within the EU as well as the identification of irregularly staying third country nationals, including for the purpose of removal and repatriation. In terms of the extended scope, the proposed Regulation sets forth the collection and storage of additional biometric (facial image) and other personal data; data collected from applicants for international protection; persons arriving in an irregular manner or irregularly staying on the territory of a Member State; lowers the age threshold for collecting biometric and other personal data from children from 14 to 6 years old; and allows to share the identity of a person who entered the territory of a Member State in an irregular manner with third countries where a travel document for the purpose of return needs to be arranged. It also lays down conditions for access to data for law enforcement purposes for the prevention, detection or investigation of terrorist offences or of other serious criminal offences. Thereby, the original purpose of the database is substantially changed with the proposed recast of the Eurodac Regulation.

UNHCR acknowledges the legal and technical complexity of the recast proposal for the Dublin system, as well as the sensitive political environment in which it has been issued. The reform should be guided by the necessity to develop a system that is able to adapt to changes in inflows and that ensures the equitable sharing of responsibilities within the EU in the interest of asylum-seekers and Member States alike.

1. Introduction

The Dublin Regulation constitutes the only regional instrument that governs the allocation of responsibility for asylum-seekers, and is an important tool for asylum-seekers to be reunited with their family within the EU. The Dublin Regulation has largely failed both asylum-seekers and Member States³ with low numbers of transfers, in particular for family reunion, being effected and inconsistent implementation being generally widespread. UNHCR is of the opinion that a radical re-think of the Dublin Regulation is required. The reform should be guided by the necessity to develop a system that is able to adapt to changes in inflows and that ensures the equitable sharing of responsibilities within the EU in the interest of asylum-seekers and Member States alike. UNHCR also considers that the efficiency of the system can be improved without sacrificing procedural and substantive rights of applicants.

UNHCR provides these comments as an initial response to the Commission's proposal⁴ tabled on 4 May 2016 to recast the Dublin, Eurodac (Dublin system) and EASO Regulations. As negotiations progress, UNHCR may set out updated comments and/or supplement these with specific thematic briefings.

In view of the relevance of the proposed EU Asylum Agency (EUAA) and Eurodac to the implementation of the Dublin Regulation, this document also addresses some aspects of the proposed EUAA Regulation⁵ and the proposed recast of the Eurodac Regulation.⁶ It should not, however, be regarded as an exhaustive commentary on those proposals, which will be issued separately.

While the vast majority of the world's over 21 million refugees are hosted in the developing world,⁷ it should also be recalled that the intended reforms of the

³ Member States refers to the twenty-eight EU Member States, as well as associated countries taking part in the Dublin system, i.e. Iceland, Liechtenstein, Norway and Switzerland (hereinafter "Member States").

⁴ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 4 May 2016, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270(01)&from=EN)

⁵ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-271-EN-F1-1.PDF>

⁶ Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), 4 May 2016, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-272-EN-F1-1.PDF>

⁷ Developing regions hosted 86 per cent of the world's refugees under UNHCR's mandate in 2015: please see UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, available at: www.refworld.org/docid/57678f3d4.html

CEAS take place at a time when global displacement, including movements to and within the EU, is continuing and likely to escalate.

**UNHCR
Mandate**

UNHCR provides these comments as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions for refugees.⁸ According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [...]”⁹

This supervisory responsibility is reiterated in the preamble of the 1951 Convention Relating to the Status of Refugees (1951 Convention),¹⁰ whereas Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees¹¹ (1967 Protocol) oblige State Parties to cooperate with UNHCR in the exercise of its functions, in particular its supervisory responsibility.

UNHCR’s supervisory responsibility has also been reflected in EU law, including: by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU);¹² in Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (EU Charter);¹³ as well as Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.¹⁴

**Background
and general
objectives of
the
Commission’s
proposals**

According to the Commission, the long term aims of the proposed reforms are to end irregular and dangerous movements and the business model of smugglers, and to replace these with safe and legal ways to enter the EU for those in need of protection. In relation to the Dublin Regulation, the key elements of the Commission’s proposed recast are:

- “Enhance the system’s capacity to determine efficiently and effectively a single Member State responsible for examining the application for international protection. In particular, it would remove the cessation of responsibility clauses and significantly shorten the time limits for sending requests, receiving replies

⁸ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: www.refworld.org/docid/3ae6b3628.html.

⁹ *Ibid.*, para. 8(a).

¹⁰ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137: www.refworld.org/docid/3be01b964.html

¹¹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267: www.refworld.org/docid/3ae6b3ae4.html

¹² European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at: www.unhcr.org/refworld/docid/4b17a07e2.html

¹³ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: www.refworld.org/docid/3ae6b3b70.html

¹⁴ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: www.refworld.org/docid/51c009ec4.html

and carrying out transfers between Member States;

- Ensure fair sharing of responsibilities between Member States by complementing the current system with a corrective allocation mechanism. This mechanism would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers;
- Discourage abuses and prevent secondary movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and remain in the Member State determined as responsible [with] proportionate procedural and material consequences in case of noncompliance [...].”

2. General observations on the Dublin system

UNHCR has closely observed the Dublin system over many years, most recently in the context of its forthcoming study on the implementation of the Dublin III Regulation. UNHCR has also issued comments on the 2009 and 2012 Commission proposals for a recast of the Eurodac Regulation.¹⁵ UNHCR acknowledges the legal and technical complexity of the recast proposal for the Dublin Regulation, as well as the sensitive political environment in which it has been issued. It should be recalled that a basic assumption underlying the Dublin system remains unfulfilled – namely, the premise that asylum-seekers are able to enjoy adequate and generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States. There are not only large differences in the implementation of the asylum *acquis*¹⁶ but also fundamental, and sometimes systemic, deficiencies in some of the national asylum systems or in parts thereof. These divergences are important drivers of onward movement and undermine the Dublin system’s assumption that all applicants will be equally treated wherever they lodge an application for

¹⁵ UN High Commissioner for Refugees (UNHCR), *An efficient and protective Eurodac - UNHCR comments on the Commission's amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No [...] (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person) and to request comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Recast version)*, November 2012, available at: <http://www.refworld.org/docid/50ad01b72.html> and *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ("Dublin II")* (COM(2008) 820, 3 December 2008) and *the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation]* (COM(2008) 825, 3 December 2008), 18 March 2009, available at: <http://www.refworld.org/docid/49c0ca922.html>

¹⁶ See for instance UNHCR, *The CEAS at a crossroads: Consolidation and implementation at a time of new challenges. UNHCR's recommendations to Latvia for the EU Presidency January - June 2015*, January 2015, available at: www.refworld.org/docid/54afbee34.html.

international protection in the EU. This does not only pertain to redressing the disparate reception, procedural and qualification deficiencies persisting across the CEAS but also additional measures are needed to support local integration and so further dissuade unsupported onward movement in that respect as well. Deficiencies also remain¹⁷ in the capture and timely sharing of detailed and disaggregated data across the CEAS, which does not allow a rigorous and constant monitoring of the implementation of the Dublin Regulation and overall functioning of the system.

Finally, some Member States continue to face significant challenges, including of a technical nature, to systematically and efficiently collect, store and transmit fingerprints in the Eurodac database in full respect of relevant fundamental rights obligations. As a result, significant gaps in data persist. Registration is, however, crucial for orderly processing, improved access to protection and enhanced security. Therefore, UNHCR supports solutions to ensure the registration of all irregular arrivals, including children, in a common system. Such solutions should, however, be coupled with sufficient procedural safeguards to ensure compliance with fundamental rights and international protection obligations, including respect of the principle of *non-refoulement*. The best interests of the child, including for the purpose of family tracing and unity, assistance in locating those who disappear and may be at risk, including victims of trafficking, should serve as the guiding principle for the collection and processing of biometric and other personal data of children.

The new system should enable improved data sharing, interoperability in line with applicable safeguards and standards, and thorough security checks. In UNHCR's view, it should also enable the registration of both the making of an application for international protection by border guard and police authorities, in line with the proposed Asylum Procedures Regulation,¹⁸ and the subsequent lodging of the application by the competent asylum authorities.

Recommendations:

The EU and Member States should develop mechanisms capable of ensuring that adequate and harmonized standards and practices are in place across all Member States, building on existing structures and frameworks. This could reduce factors contributing to the onward movement of asylum-seekers and refugees and the exclusion of Member States from transfer arrangements under the Dublin Regulation due to non-compliance with standards. Additional measures to support local integration would also contribute to dissuading onward movement.

The reform process should have due regard to the requirements of Article 78 of

¹⁷ European Council on Refugees and Exiles, *Asylum Statistics in the European Union: A Need for Numbers*, August 2015, AIDA Legal Briefing No. 2, available at: www.refworld.org/docid/55e400aa4.html

¹⁸ 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, 13 July 2016, Article 5, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>

the TFEU, under which the CEAS needs to be fully consistent with the 1951 Convention and its 1967 Protocol and to fundamental rights, in particular under the Charter of Fundamental Rights of the European Union.

UNHCR encourages the Council, the Commission and the European Parliament to take part constructively in the negotiations with the objective of improving efficiencies in the Dublin system without compromising procedural and substantive rights of applicants. A fair and efficient system is in the interest of Member States and applicants alike.

The impact of the proposed recast of the Dublin Regulation can only fully be assessed in conjunction with the proposed recast of the other instruments of the CEAS. Consequently, further discussions and progress in developing the CEAS should be conducted in a holistic manner, as the component parts are intrinsically interrelated.

The capture and timely sharing of detailed and disaggregated data across the CEAS should be improved in order to increase transparency and accountability. Member States should ensure the systematic and efficient registration of all irregular arrivals, including children, in a common registration system in full respect of fundamental rights obligations. Both the making and the lodging of applications for international protection should also be recorded in this system. Further efforts should be invested to address challenges relating to the accuracy of biometric data and the risks associated with potential errors.

3. Improving the efficiency of the system

The main aim of the proposed recast, according to the text, is to make the Dublin system more efficient and effective. This is proposed to be achieved by providing for shorter time limits for carrying out the Dublin procedure and by introducing consequences for applicants where they move on irregularly. Additionally, the proposal introduces mandatory admissibility procedures before the determination of responsibility for the examination of an application for international protection under the Regulation, so as to reduce the number of transfers. The recast proposal maintains and further strengthens the irregular entry criterion whilst creating further duties and responsibilities on the Member States where applications are first lodged.

Under the proposed system, admissibility procedures (first country of asylum and safe third country) will be conducted as a first step for all applicants along with a security check and the application of the safe country of origin concept (that operates through an accelerated procedure). Where admissibility of an applicant has been positively decided upon, security checks cleared by the Member State

where the applicant is present, and it has been assessed that the applicant does not originate from a safe country of origin designated on the proposed EU list,¹⁹ the Member State where the applicant is present or, if the corrective allocation mechanism is triggered, the Member State of allocation, will subsequently assess responsibility under the Regulation. The criteria for establishing responsibility in the Dublin III Regulation are substantially maintained in the proposed recast and run, in hierarchical order, from family considerations (which have been expanded to include siblings and families formed in transit countries), to possession of a (valid or recent) visa or residence permit of a Member State, to whether the applicant has entered a Member State irregularly, or regularly.

Once responsibility has been determined, no shift of responsibility will be allowed under any circumstances. The criteria for establishing responsibility for examining an application for international protection will only then be applied once, with consequences should an applicant move on after responsibility of a Member State has been determined.

Stateless persons

While stateless persons are covered by the definitions of a third country national in the proposed recasts of the Dublin and Eurodac Regulations, UNHCR welcomes the continued reference to stateless persons throughout the recast proposals. This removes the risk that stateless persons may not fall within the scope of either Regulation. However, UNHCR notes that explicit reference to stateless persons is not consistently made throughout the proposed recast of the Eurodac Regulation and that neither proposal includes a definition of a stateless person as per article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons.²⁰ It is further noted that according to the proposed Eurodac Regulation data collection includes the nationality of the persons covered by the Regulation. In this context, UNHCR considers that both the claimed and presumed nationality should be recorded, and that the database should also ensure a harmonized recording of the lack of nationality of stateless persons.

In addition, UNHCR has concerns about the use of the Dublin system to transfer stateless persons who are not in need of international protection. In the absence of a formal statelessness determination procedure²¹ and protection framework to ensure stateless persons enjoy their basic human rights in most EU Member States, many stateless persons see no other option but to lodge an application for international protection, even when they are not in need of international protection. As they are unlikely to be able to return to any country due to their statelessness, submitting an application for international protection is often their only means to be allowed to stay on the territory of a Member State, at least temporarily. Member

¹⁹ European Commission, *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*, COM(2016) 467 final, 13 July 2016, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>

²⁰ Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons reads: 'A stateless person is a person who is not considered as a national by any State under the operation of its law.' The International Law Commission has concluded that the definition is part of customary international law.

²¹ UNHCR, *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, 11 July 2016, available at: www.refworld.org/docid/57836cff4.html

States must uphold their 1954 Convention obligations towards stateless persons on their territory at all times. This means that a stateless person who has been issued a final negative decision on his or her asylum application in another Member State should be protected in the country where he or she is present and not be returned to that Member State under the Dublin Regulation.

Recommendations:

UNHCR recommends that stateless persons are explicitly included in the definition of “third country nationals“ in both the proposed Dublin and the Eurodac Regulations as per article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons.

For consistency purposes, UNHCR considers that stateless persons should be explicitly mentioned in **Article 2(3)-(4), Chapter V and Article 38(1) of the proposed recast of the Eurodac Regulation.**

Both the claimed and presumed nationality of a person as well as the lack of nationality of stateless persons should be recorded in the Eurodac database.

4. Obligations of applicants including consequences for non-compliance

The proposed system in its normal operation mostly mirrors the current Dublin system but modifies it, inter alia, by placing new obligations on applicants and introducing measures for applicants who do not comply, including the withdrawal of material reception conditions, as well as introducing an accelerated procedure when applicants come from a safe country of origin, when national security or public order considerations have arisen or when applicants not comply with new obligations placed on them.

Obligations to be complied with by an applicant are introduced by **proposed recast Article 4**, which primarily foresees that an applicant must apply in the Member State either of first irregular entry or, in case of legal stay, in that Member State (**proposed recast article 4(1)**). In case of non-compliance (irregular onward movement) the application will be examined in an accelerated procedure (**proposed recast Article 5(1)**). Where an applicant moves on after having lodged an application for international protection in a Member State, the applicant will be returned through a take back procedure to the Member State of first application. Where an application was decided in the negative in another Member State it will no longer be subject to an appeal (**proposed recast Article 20(5)**). In all cases where an applicant moves on, s/he will be entitled to receive material reception

conditions only in the Member State where s/he is required to be present (the one of first application or the one determined as responsible respectively). Only emergency health care - according to the recast proposal - is guaranteed in other Member States (**proposed recast Article 5(3)**).

The procedural consequence for non-compliance with the obligations set forth in **proposed recast Article 4(1)**, namely the examination of the application for international protection in an accelerated procedure, raises concerns. The prioritization and/or acceleration of the examination of applications for international protection may not affect procedural and other human rights safeguards, in particular the opportunity of a personal interview, the provision of legal assistance, and access to an effective remedy as well as principles of family unity and the best interests of the child. UNHCR maintains significant concerns about proposals to reduce appeal rights, through amendments providing that where an application is decided in the negative in another Member State it will no longer be subject to an appeal (**proposed recast Article 20(5)**).

A correspondent obligation upon applicants for international protection, including children from the age of 6 years old, to provide biometric data – fingerprints and a facial image – is introduced in the proposed recast of the Eurodac Regulation. In case of non-compliance, the recast allows the Member States to introduce administrative sanctions, in accordance with their national law. While it is stipulated that these sanctions shall be effective, proportionate and dissuasive, a considerable margin of discretion is left upon the Member States to decide on the exact measures to be applied. In UNHCR's view, the proposed recast of the Eurodac Regulation is too vague on administrative sanctions in case of non-compliance and falls short of setting the necessary fundamental rights safeguards.

Recommendations:

UNHCR urges that the use of accelerated procedures does not affect human rights safeguards as well as procedural guarantees, including access to an effective remedy.

UNHCR urges that the proposed preclusion of an effective remedy against the rejection of an application, where an applicant is returned to the Member State that issued such decision, be deleted from **proposed recast Article 20(5)**.

UNHCR calls for **Article 2(3)** of the proposed recast of the Eurodac Regulation to be amended to provide an exhaustive list of permissible administrative sanctions, which would be lawful, proportionate and compliant with relevant fundamental rights provisions, including Articles 1, 3, 4, 6 and 7 of the Charter of Fundamental Rights of the EU (EU Charter).

UNHCR recommends that **Article 2(3) of the proposed recast of the Eurodac Regulation** explicitly state that detention should not be used as a sanction for

non-compliance to provide biometric data, in particular where other means to establish a person's identity are available.

UNHCR recommends that **Article 2(3) of the proposed recast of the Eurodac Regulation** explicitly state that use of mental and physical coercion be avoided, and that compliance with the requirement to provide biometric data be obtained following effective counselling and information provision, with full respect of the fundamental rights of the persons concerned. Any use of force should be explicitly prohibited.

UNHCR calls for Article 2(4) of the proposed recast of the Eurodac Regulation to introduce a blanket prohibition on the use of administrative sanctions, including mental and physical coercion, against children and vulnerable persons. This would cover not only instances where they cannot provide biometric data due to the condition of their fingertips or face, but also where their compliance with the requirement to provide biometric data cannot be obtained following effective counselling and information provision.

Rather than offering incentives to foster compliance, the proposed recast (**proposed recast Article 5(3)**) opts for the automatic withdrawal of material reception conditions when a person who is subject to a procedure under the Regulation is not present in the Member State where s/he is required to be present. However, this does not appear to be in-line with the Court of Justice of the European Union (CJEU) ruling in the Cimade and Gisti²² case and consequently with the right to dignity in the EU Charter. Based on the CJEU's judgment in Cimade and Gisti, Member States' obligations to provide reception conditions to the applicant only cease "*when the applicant has actually been transferred by the requesting Member State*".

In Saciri,²³ the CJEU subsequently stated that fundamental rights (in particular the requirements of Article 1 of the EU Charter, under which human dignity must be respected and protected) preclude the asylum-seeker from being deprived – even for a temporary period of time after the making of the application for international protection and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by the recast Reception Conditions Directive (RCD).²⁴ This judgment also held that where this takes the form of financial allowances, they must be "*sufficient to meet the basic needs of asylum seekers, including a dignified standard of living, and must be adequate for*

²² *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, European Union: Court of Justice of the European Union, 27 September 2012, available at: www.refworld.org/docid/506425c32.html

²³ *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others*, C-79/13, European Union: Court of Justice of the European Union, 27 February 2014, available at: www.refworld.org/docid/5315f0a74.html

²⁴ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: www.refworld.org/docid/51d29db54.html

their health.”

Additionally, the punitive measures foreseen for non-compliance may discourage applicants to register in the Member State of arrival where this is not the Member State of choice, especially where the applicant does not have (family or other) reasons to be transferred to another Member State. As a consequence, onward movements will likely continue, defeating one of the main aims of the proposed recast.

Recommendations:

Proposed recast Article 5(3) should be amended to be in line with **proposed recast Recital (22)** and should explicitly oblige Member States to ensure that the immediate material needs of any applicant in relation to shelter, nutrition and clothing in all circumstances be sufficient to meet their basic needs, including a dignified standard of living, and be adequate for their health.

UNHCR considers that punitive measures alone will not reduce onward movement. Incentives for compliance should be considered rather than only contemplating negative procedural consequences and the withdrawal of material reception conditions.

Should any punitive measures be retained, these should not negatively impact on effective access to protection and should be compliant with European standards and principles. Additionally, it is UNHCR’s view that children and those with specific needs should be exempted from any punitive measures.

5. Admissibility

The proposed recast introduces admissibility screening, which precedes the Dublin procedure. Such screening is envisaged to be undertaken by the Member State of application, which must scrutinize any applicable safe country notions as well as conduct security checks. Responsibility remains with the Member State of application for all claims found inadmissible or subject to accelerated procedures. This also means that substantive duties in this respect will remain with the first Member State of application.

According to the recast proposal, before the determination of responsibility, the Member State of application will assess whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. Additionally, the Member State of application will be responsible for

examining, in an accelerated procedure, the application lodged by applicants who are considered, for serious reasons, a danger to national security or public order of the Member State, or who come from a safe country of origin designated on the proposed EU list (**proposed recast Articles 3(3) and 3(4)**).

UNHCR is, however, concerned that the intention to make safe country considerations mandatory in this context may raise protection-related concerns, especially in view of the fact that these will precede any assessment of the criteria under the Dublin Regulation (e.g. regarding the presence of family links in a Member State).²⁵

The recast proposal also does not make it clear, once the admissibility check has been cleared in the Member State of application, whether or not another Member State could subsequently declare an application inadmissible on safe third country or first country of asylum grounds.²⁶

In the CJEU judgments of C-63/15 Ghezelbash²⁷ and C-155/15 Karim,²⁸ it was stated that the criteria Chapter III of the Dublin III Regulation establish subjective rights for asylum-seekers. These judgments introduce the principle that asylum-seekers have rights in relation to the application i.a. of the family criteria in the Dublin Regulation. In UNHCR's view, this may, for example, preclude return to a safe third country.

The proposed recast seeks to establish that if a case is inadmissible on safe third country or first country of asylum grounds, then the Member State in question, i.e. where the application was lodged, is responsible, regardless of the applicability of the family provisions in a particular case. In view of **proposed recast Recital (20)**, which establishes that in order to ensure full respect for the principle of family unity and for the best interests of the child the dependency clause shall become a binding responsibility criterion, the considerations above apply also to **proposed recast Article 18** (Dependent persons).

Consequently, in consideration of the principle of family unity in Article 7 of the EU Charter and Article 8 of the European Convention on Human Rights²⁹ (ECHR) as well as the best interests of the child,³⁰ it is UNHCR's view that the assessment of the existence of family links in a Member State and thus family reunion possibilities, including on the basis of dependency, should take precedence over admissibility considerations.

²⁵ UNHCR, *Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum-Seekers and Migrants*, 10 March 2016, available at: www.refworld.org/docid/56ebf31b4.html

²⁶ A second admissibility check could be made pursuant the proposed Asylum Procedures Regulation. European Commission, *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*, 13 July 2016, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>

²⁷ *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-63/15, European Union: Court of Justice of the European Union, 7 June 2016, available at: www.refworld.org/docid/575ae1ec4.html

²⁸ *George Karim v Migrationsverket*, C-155/15, European Union: Court of Justice of the European Union, 7 June 2016, available at: www.refworld.org/docid/575ae26b4.html

²⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: www.refworld.org/docid/3ae6b3b04.html

³⁰ Recital 15 of the proposed recast.

Recommendation:

The assessment of responsibility on the basis of family links under **proposed recast Articles 10 to 13 and 18** should be conducted before the application of safe country notions to ensure respect for the right to family unity and the best interests of the child, as enshrined in international law and also the EU Charter. If an applicant can be reunited with family members or, in the case of children, relatives who are present in a Member State, then s/he should not be subject to the application of safe country concepts and instead be transferred to the Member State responsible under the family criteria.

When considering safe country notions it is important to recall that national law should provide a clear methodology and instructions for the application of each distinct safe country concept. This should concern, for example, the collation of precise, impartial and up-to-date information from a range of reliable and credible sources. This would ensure quality assessments of the situation in countries to underpin the safe country concepts, which should also be subject to regular and timely reviews with clear benchmarks and criteria. Applicants should be supplied with all the information relied upon by the Member State and this should be applied on a case-by-case basis. Applicants should then be allowed, on an individual basis, to have an effective opportunity to rebut the application of the safe country concept to his/her particular circumstances. This includes the opportunity of a personal interview on the application of the safe country notion, receiving legal assistance in an effective manner and access to an effective remedy before a court or tribunal with a right to remain pending the outcome of any appeal. In addition, family unity needs to be maintained, and any family links mitigating against transfer need to be respected. In the same vein, the best interests of the child must be a primary consideration in any transfer process, particularly when it comes to the circumstances of unaccompanied or separated children.³¹

A claim can thus not be rejected on the basis of safe country designation alone. Moreover, an assessment to identify individuals at risk must also be part of the due process and applicants identified in need of special procedural guarantees should not be channelled into such accelerated procedures. If all of these safeguards are not in place and adequately applied, persons may not have access to protection in line with their entitlements under international and EU law.³² In the

³¹ Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990, Article 3; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: www.unhcr.org/refworld/docid/48480c342.html. See also, e.g., UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

³² For further more detailed information, please see - UNHCR, *Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum-Seekers and Migrants*, 10 March 2016, available at: www.refworld.org/docid/56ebf31b4.html

present state of non-harmonization of safe country concepts, and as long as national lists co-exist with an EU list (at least during any transitional phase), this is likely to create onward movement to certain countries (e.g. if a country is considered as a safe country of origin on the national list of one Member State and not of its neighbour). As such, it may be an additional factor that will likely discourage applicants from registering in the Member State of arrival, enhancing risks for individuals and contrary to the expressed aims of the proposed recast.

The impact of this proposal may also be affected by the adoption of the proposal for an Asylum Procedures Regulation,³³ insofar as it brings in a common approach to safe countries, notably through the incorporation of the proposal for an EU list of safe countries of origin.

Significantly, admissibility screening as presently envisaged in the recast proposal also means that substantive responsibilities in this respect remain with the first Member State in which the application for international protection was lodged. This raises concerns in terms of the feasibility of practical implementation of this procedure, as admissibility procedures are likely to create an additional burden for Member States of first application. In particular, Member States of first application would be required to accommodate all new arrivals, in line with their reception obligations in EU law, until the admissibility procedure is conducted, including any associated appeals.³⁴

Recommendations:

Admissibility procedures on the basis of safe country concepts should not be applied for individuals who have specific needs, including children.

Admissibility procedures and safe country concepts should only be used where precise, impartial, and up-to-date information is available on the safety of a particular country. An application may not be rejected solely on the basis that the applicant is believed to come from a safe third country. An applicant must have an effective opportunity to rebut the presumption of safety in light of their individual circumstances, and the safe country concepts should not apply to vulnerable applicants.

6. Time limits and responsibility

³³ European Commission, *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*, 13 July 2016, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>

³⁴ According to the EUAA proposal, is e.g. under proposed Article (2) 1. (g) able to “provide effective operational and technical assistance to Member States, in particular when they are subject to disproportionate pressure on their asylum and reception systems”.

Time limits to submit or reply to take charge requests and to carry out transfers are proposed to be shortened, in order to condense the procedure. If these time limits are breached, the allocation of responsibility remains with the requested Member State, except where the request is not submitted within the time limits, in which case the Member State where the person is present becomes responsible. The irregular entry criterion is envisaged to be strengthened by repealing the rule that makes it inapplicable twelve months after the border crossing. Responsibility would, consequently, no longer shift from one Member State to another as a consequence of missing deadlines for submitting or responding to a request or for effecting transfers. Take back procedures are streamlined from a regime of requests and acceptances, to mere notifications and confirmations, with no personal interview and no formal right to object on the part of the notified Member State. Under the proposal the responsibility of a Member State for an applicant also remains for a significant period even where the applicant has left the Dublin zone.

The recast proposal envisages shorter time limits for the different steps of the Dublin procedure³⁵ in order to speed up determination of responsibility. Take charge requests have to be submitted within one month (except where requests are submitted on the basis of a Eurodac or Visa Information System (VIS) hit, in which case a request should be submitted in two weeks) (**proposed recast Article 24(1)**) and a decision has to be taken by the requested Member State within one month of receipt of the request (except where the request is based on a Eurodac or VIS hit, in which case the reply should be given in two weeks) (**proposed recast Article 25(2)**). No reply will be tantamount to accepting the request. As a result of shortening the time limits, the urgent procedure under the Dublin III Regulation is no longer considered necessary because decisions will be taken more swiftly and has been removed from the recast proposal.

While shorter time limits can in principle be welcomed, certain assessments and procedures, such as the tracing of family members and BIAs, may at times require more time. This necessitates some flexibility in the application of the time limits. Among other concerns, the limited time to submit a request and reach decisions may also result in the need for multiple requests for re-examination, similar to what happens currently when requests are submitted without all the required information due to the elapsing of time limits, as shown by UNHCR's findings from its forthcoming study on the implementation of the Dublin III Regulation. In turn, this leads to prolonged procedures, an inefficient use of Member State resources, as well as delayed access to the asylum procedure for applicants.

There are thus several potentially negative consequences of overly short time

³⁵ One month from the lodging of the application for submitting a take charge request (**proposed recast Article 24(1)**) and two weeks from the Eurodac or VIS hit for the take back notification (**proposed recast Article 26(1)**); one month to reply to a take charge request (**proposed recast Article 25(1)**), only immediate notification of receipt for take back notifications (**proposed recast Article 26(3)**); four weeks to carry out a transfer from the final transfer decision, which shall be taken within one week from the acceptance or notification (**proposed recast Article 30(1)**).

limits, without sufficient provision for flexibility. Correct assessment of the responsibility criteria on the basis of the existence of family links may in some cases only take place on appeal where the requesting Member State does not submit a request within the deadline. This issue is partially addressed by the introduction of an appeal remedy (**proposed recast Article 28(5)**) where the Member State does not submit a take charge request despite the presence of family links in another Member State (see **section 12 (Procedural safeguards)** below for further information in this regard). However, the potential need for applicants to resort frequently to this remedy may have a negative impact upon the efficiency of the Dublin system.

In this context, UNHCR particularly welcomes the proposed recast's call for the new EUAA to coordinate a network of Dublin Units. This follows from the existing work of EASO and will help provide a forum to share good practices for enhanced coordination and consistency and quickly raise and address any humanitarian concerns connected to the operation of the Dublin system.

Recommendations:

It is UNHCR's view that shorter time limits are welcomed as this aims to improve the efficiency of the procedures and outcomes and so will usually be in the interests of both Member States and applicants. However, flexibility in time limits should additionally be factored into the proposed recast as in some cases this in reality will be required. For example, flexibility in time limits when a take charge request based on family links is being considered and additional time is required to complete family tracing or the BIA, should be permissible. The current Implementing Regulation³⁶ of the Dublin III Regulation, at Article 12(6), which relates to unaccompanied children, for example, allows for a limited extension of time “[w]here compelling evidence indicates that further investigations would lead to more relevant information”. Proposed recast Articles 24 and 25 should be amended accordingly to allow flexibility in lengthening time limits where necessary and the details around flexibilities in time limits should be carried through into the new Implementing Regulation in due course.

Given the shortening of time limits, access to early legal assistance, including before an application is lodged, is essential. Under the Dublin III Regulation as well as the proposed recast, free legal assistance is only mandatory at the appeals stage. Information on “*persons or entities that may provide legal assistance to the*

³⁶ European Commission, *Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 2 September 2003, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R1560&from=EN>, as amended by *Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 30 January 2014, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:039:0001:0043:EN:PDF>

*person concerned*³⁷ (**proposed recast Article 27(4)**) is also only obligatorily communicated to the person concerned together with the transfer decision.

Recommendation:

Access to early legal assistance is paramount; UNHCR recommends that this be mandatorily made available as early as possible to the applicant, including before an application is lodged.

The recast proposal introduces a principle of permanent responsibility under which the expiry of procedural deadlines will no longer result in a shift of responsibility between Member States (with the exception of the deadline for replying to take charge requests). Accordingly, the proposed recast provides that the irregular entry criterion be enlarged by deleting the rule that responsibility shall cease twelve months after the date on which the border crossing took place (**proposed recast Article 15**) and the criteria for determining the Member State responsible shall be applied only once (**proposed recast Articles 3(5) and 9(1)**). This means that, as of any second application, the readmission rules (take back) will apply without exceptions.

In relation to this, UNHCR is concerned by the deletion in the proposed recast of Article 19 (Cessation of responsibilities) of the Dublin III Regulation. Consequently, the responsibility of a Member State would be established without time limits (**proposed recast Article 3(5)**)³⁷ unless another Member State issues a residence document (**proposed recast Article 20(6)**). For example, in situations in which an individual whose application for protection is rejected and/or who leaves the EU may, years later, be in need of international protection in new circumstances. It would be inappropriate in such cases for a previous determination of responsibility – based on past, potentially no-longer-relevant facts - to limit the applicant's right to an examination of his or her need for international protection in a particular Member State with which s/he may have no continuing connection.

Recommendations:

UNHCR recommends that the provisions allowing for the longer-term cessation of responsibility in Article 19 of the Dublin III Regulation be maintained in the recast Dublin Regulation. Applicants may re-emerge with a risk of persecution or other serious harm in new circumstances and so have reason to seek asylum once again.

³⁷ It should be noted in this regard that in accordance with **proposed recast Article 17 of the Eurodac Regulation** data relating to an applicant for international protection shall be stored in the Eurodac database for ten years from the date on which the fingerprints were taken. Therefore, responsibility in these circumstances would theoretically cease after ten years, since after such time period it would no longer be possible to check an applicant's fingerprints in the system against previously recorded data.

Another concern is that no consequences are attached to a Member State's failure to comply with the time limits in take back and transfer procedures. This may lead in practice to the return to a Dublin Convention-like situation where non-binding time limits in practice created "*asylum-seekers in orbit*" for long periods of time³⁸, which the Dublin II Regulation aimed at redressing through the introduction of binding time-limits. The lack of consequences in this regard may reduce Member States' incentives to make the Dublin system work, thus unnecessarily prolonging procedures. This could further undermine trust in the system on the part of applicants.

Recommendations:

The lack of consequences for Member States' failure to comply with the time limits in take back and transfer procedures should be re-considered as it may lead to negative consequences such as "*asylum-seekers in orbit*" for prolonged periods of time.

7. Provision of information to applicants and personal interview

The proposed recast envisages that, where the personal interview is omitted, the applicant's right to present relevant information is no longer guaranteed. The recast proposal additionally shortens the time limits for the provision to the authorities of information relevant for the determination of responsibility, which should be provided at the latest at the stage of the personal interview. At the same time, the proposed recast of the Eurodac Regulation strengthens some aspects of the existing obligation upon the Member States to provide information to applicants for international protection. In particular, these concern the language in which the information is provided, the sharing of the contact details of the data protection officer, information on the right to lodge a complaint to the supervisory authority, storage of data, completion of incomplete data, and restrictions on data processing.

The provision of information by the competent authorities (**proposed recast Article 6**) would be modified to incorporate the obligations and consequences of non-compliance among the information that is to be provided to the applicant as soon as an application is lodged.

Timely and accurate provision of information by competent staff is paramount in enabling applicants to submit all the information relevant for the correct

³⁸ UNHCR, *Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper*, 19 January 2001, available at: www.refworld.org/docid/3ae6b34c0.html

determination of responsibility. This is particularly important in light of the shortening of the time frames for submitting such information, especially in those Member States where the personal interview takes place together with the registration and/or admissibility interview (i.e. when an applicant comes in contact with the authorities for the first time). The proposed principle of permanent responsibility renders a correct determination of responsibility in the first instance all the more important.

The findings of UNHCR's forthcoming study on the implementation of the Dublin III Regulation show that limited understanding of the reasons why certain information (e.g. on the presence of family in a Member State) is required and lack of understanding of the functioning of the Dublin Regulation itself, exacerbated also by the lack of quality interpretation in many Member States, impacts negatively on the willingness and possibility to provide such information in practice. Relevant information to enable the applicant to provide any necessary information for a correct determination of responsibility should therefore be provided as soon as possible, including, when possible, at the border, and in any case before the personal interview is carried out. Enabling the applicant to submit all relevant information in a timely manner would contribute to efficient procedures in the interest of both Member States and applicants.

Individual follow-up should also be available for applicants to receive information on the individual progress of their case. This, in turn, would reduce onward movements, which are due in many cases to the uncertainties surrounding the Dublin procedure and its duration.

Recommendations:

In order to ensure that applicants are informed in a timely manner and are thus enabled to submit all the information relevant for the correct determination of responsibility, information on the application of the Dublin Regulation should be made available as early as possible to the applicant, including before an application is lodged and, when possible, even before an application is made, for example at the border where information should also be available.

Clear and concise information should always be provided on the steps and duration of the Dublin procedure, individual follow-up should be available for applicants to receive information on the individual progress of their case.

According to the recast proposal, elements and information relevant for determining the Member State responsible can only be submitted up until or during the personal interview³⁹ (**proposed recast Article 4(2)**). However,

³⁹ Whereas under the Dublin III Regulation, in accordance with Article 7(3), evidence regarding the presence in a Member State of family for the purpose of the application of Articles 8, 10 and 16, can be submitted until the requested Member State accepts a take charge or take back request.

information relevant for the correct assessment of the criteria under Chapter III of the Regulation may not immediately be at the disposal of the applicant. To address this, **proposed recast Article 4(2)** states that the “*applicant shall submit as soon as possible and at the latest during the interview pursuant to Article 7, all the elements and information relevant for determining the Member State responsible and cooperate with the competent authorities of the Member States.*” It should, however, be made explicitly clear within this that “*all the elements and information relevant*” does not necessarily include documentation, which if temporarily unavailable, may be submitted at a later date.

The **proposed recast Article 9** (Hierarchy of criteria), as currently formulated, does not provide for the situation whereby an applicant does not submit all the elements and information, including documentation, before or during the personal interview, for reasons not attributable to him/her. **Proposed recast Article 9** should maintain the possibility, as per Article 7(3) of the Dublin III Regulation, to enable applicants to submit all the elements and information, including documentation, on the presence of family members (including relatives for the purposes of the application of **proposed recast Article 10** in the case of children) or any elements and information, including documentation, relating to the application of the dependency clause up until a take back notification is made or a take charge request is accepted by another Member State.

Additionally, a personal interview may be carried out at a very early stage of the procedure, thus limiting the possibility for the applicant to process and understand the information received and then comply with the obligation to provide all relevant information before and/or during the personal interview.

UNHCR welcomes those provisions of the proposed recast of the Eurodac Regulation concerning the provision of information, which are strengthened. However, the introduction of a provision in **proposed Article 30(1)(c)** which allows to inform persons seeking international protection only on the categories of recipients of the data as opposed to clearly identifying the specific recipients, is concerning. Similar considerations are applicable to the lack of an obligation on the Member States to provide information on the aims of the Dublin Regulation, the possible use of personal biometric data for the purpose of prevention, detection and investigation of terrorist offences and serious crimes, the administrative sanctions foreseen in case of non-compliance, as well as the advance data erasure and marking applicable. UNHCR also notes that, while **proposed Article 30(2)** stipulates that information to children shall be provided in an age-appropriate manner, it does not mandate that this be done by appropriately trained staff and in a child-friendly environment. A similar provision concerning survivors of torture is also lacking. Additionally, there is no requirement that a responsible adult, guardian or representative be present at the time children receive information or their biometric data is collected.

Recommendations:

Proposed recast Article 4(2) should be amended to explicitly clarify that “*all the elements and information relevant*” does not necessarily include documentation, which if temporarily unavailable, may be submitted at a later date.

Applicants should be given the opportunity to submit further evidence until responsibility of a Member State has been determined. Restrictions to the possibilities to submit information and evidence as necessary for a correct determination of responsibility would likely result in several procedural stages and an increased recourse to appeals, which is not in the interest of Member States or applicants. The possibility for applicants to provide any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, before responsibility for an application for international protection is accepted by the requested Member State, should be retained, and should not be deleted from **proposed recast Article 9**.

UNHCR recommends that **Article 30 of the proposed recast of the Eurodac Regulation** be amended to ensure that applicants for international protection are provided information on the recipients of their biometric and other personal data, on the aims of the Dublin Regulation, that personal biometric data may be used for the purpose of prevention, detection and investigation of terrorist offences and serious crimes, the administrative sanctions foreseen in case of non-compliance, as well as the advance data erasure and marking applicable.

UNHCR also recommends that **Articles 2(2) and 30(2) of the proposed recast of the Eurodac Regulation** be amended to ensure that information to children is provided only by appropriately trained staff in a child-friendly environment. In UNHCR’s view, **proposed Article 2(2)** should be amended to include the requirement that children be accompanied by a responsible adult, guardian or representative at the time they receive information or when their biometric data is collected. The provisions of **proposed Article 2(2)** on the standards for collecting biometric data from children should also be incorporated under **Article 30**.

UNHCR further recommends that **proposed Article 30 of the proposed recast of the Eurodac Regulation** be amended to ensure that information to survivors of torture is provided by appropriately trained staff in a suitable environment.

UNHCR is also concerned that under certain circumstances obligations may be imposed upon applicants without prior information to them about such obligations and of the consequences of non-compliance. In particular, **proposed recast Article 5 (1) and (3)**, establishes negative consequences for not complying with the obligations set forth in **proposed recast Article 4(1)**. However, whilst **proposed recast Recital (22)** provides that an applicant be “*duly informed in a timely manner*” of his/her obligations, **proposed recast Article 6(1)** (Right to information) states that information must be provided immediately after the

application is lodged. This raises potential difficulties, as an applicant would be obliged to comply with the obligations in **proposed recast Article 4(1)** without having been informed of the existence of such obligations and related consequences of non-compliance.

Recommendations:

Given the risk that applicants may not be duly informed of their obligations under **proposed recast Article 4(1)** and related consequences of non-compliance, UNHCR recommends that the negative procedural consequences as well as the withdrawal of reception conditions foreseen for not complying with the obligations set forth in **proposed recast Article 4(1)** are deleted from the recast proposal.

The proposed provisions raise concerns also in terms of the onus of proof of evidence, especially where children and other applicants with specific needs are concerned, as the proposed amendments appear to substantially shift responsibility for the gathering of information from the authorities to that which is submitted by the applicant. The duty of enquiry incumbent upon a Member State's authorities in the context of Dublin procedures has, for example, been recognized by the United Kingdom Upper Tribunal in a judgment of 29 April 2016.⁴⁰

The personal interview provision (**proposed recast Article 7**) provides that the personal interview with the applicant can be omitted where the applicant has absconded or the information provided by the applicant pursuant to **proposed recast Article 4(2)** is sufficient for determining the Member State responsible. However, the obligation for the Member State omitting the interview to allow the applicant to present all further information, which is relevant to correctly determine the Member State responsible before a transfer decision is taken, has been deleted from **proposed recast Article 7**.

The right to be personally interviewed in the course of the Dublin procedure is in line with the right to be heard, as part of the right to good administration, which is reflected in Article 41 of the EU Charter.⁴¹ As a general principle of EU law, it also binds Member States when they are acting within the scope of EU law, and constitutes an important part of procedural fairness. A personal interview can also serve to verify whether the applicant has any specific needs and/or concerns in relation to being returned to the Member State designated as responsible. UNHCR is of the view that a personal interview should be conducted in all cases, including

⁴⁰ *MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) (IJR)*, JR/2471/2016, United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 29 April 2016, available at: <http://www.refworld.org/docid/582096654.html>

⁴¹ Article 41 EU Charter (Right to good administration):

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

where it is believed that an applicant has already provided the information relevant to determine the Member State responsible by other means, unless the applicant is unable or unfit to be interviewed.

If the possibility to omit a personal interview, where the applicant is considered to have provided sufficient information for determining the Member State responsible, is retained in **proposed recast Article 7**, then it should be clarified what amounts to sufficient information. Additionally, and in the absence of a personal interview, the applicant should be afforded the possibility to present any further information relevant for the correct determination of responsibility before a transfer decision is taken.

Recommendations:

The recast proposal should clearly also place responsibility on the authorities to seek information from the applicant. Information on the presence of family members and relatives in a Member State and on dependency issues should be proactively gathered during the personal interview; the onus should be on the Member State and the applicant concerned to co-operate in the gathering of all the necessary information to ensure a correct determination of responsibility in accordance with the Dublin Regulation.

UNHCR urges that a personal interview be conducted in all cases, including where it is believed that an applicant has already provided the information relevant to determine the Member State responsible by other means, unless the applicant is unable or unfit to be interviewed.

Should the possibility to omit a personal interview where the applicant is considered to have provided sufficient information for determining the Member State responsible be retained in **proposed recast Article 7**, UNHCR urges that applicants be afforded the possibility to present any further information relevant for the correct determination of responsibility before a transfer decision is taken.

8. Family links and dependency

The recast proposal contains a limited and targeted extension of the definition of family members (**proposed recast Article 2(g)**). The definition of family members is extended in two ways: by (1) including the sibling or siblings of an applicant and by (2) including family relations that were formed after leaving the country of origin but before arrival on the territory of the Member States.

The extension to cover families formed during transit reflects the circumstances of forced displacement whereby applicants may have stayed for a protracted period

of time outside the country of origin and in transit before reaching the EU, and as such is welcomed. However, other family relations, such as dependent minor married children, adult children or the parents of an adult, remain excluded and so may prevent family reunion in many cases as well as encourage onward movement. Additionally, UNHCR is of the view that a child travelling with a family member who has another family member or relative in a Member State should be allowed to reunite with that family member or relative, if it is in the child's best interests to do so. This could be provided through the addition of a specific provision for children who are accompanied by an adult family member under **proposed Article 10** allowing for family reunion with family members or relatives legally present in another Member State if it is in their best interests.⁴² Such specific provision for accompanied children would ensure that the right to family unity as well as children's best interests are respected in such instances. The recast proposal states that the enlargement of the definition to siblings is "of particular importance for improving the chances of integration of applicants and hence reduce secondary movements" (**proposed recast Recital (19)**). The same considerations can be applied to the additional categories of family identified above.

The obligation that the Member State of application prioritize safe country notions and security considerations over the application of the responsibility criteria (**proposed recast Article 3(3)**), however, further undercuts the modest positive effect of the enlargement of the definition of family members.

UNHCR further notes that the indication of the persons who could be reunited for dependency reasons under **proposed recast Article 18** appears incoherent with the revised definition of family members, which has been broadened to include also families who were formed in transit.

Additionally, UNHCR regrets that the recast proposal does not clarify further the elements for the determination of a dependency link, which has so far caused this provision to be applied only to a very limited extent, as verified in UNHCR's recent study on the Dublin III Regulation. UNHCR however welcomes that **proposed recast Article 18(3)** more clearly empowers the Commission to adopt delegated acts to provide clarity on the elements to be taken into account to assess the existence of a dependency link, in which UNHCR urges that the concept of dependency be interpreted flexibly, reflecting strong and continuous social, emotional or economic dependency between family members, not requiring complete dependence (for example, as in the case of spouses).⁴³

⁴² This provision would allow to reunite families under article 8 in those cases where they are separated and one part of the family –for example a parent and a child - is legally present in a Member State (including where they have received a complementary form of protection), whilst another child travels with an adult family member –for example the other parent. Currently, in those cases family reunion would only be possible under proposed Articles 11 and 12. However, these exclude family members with complementary forms of protection as well as relatives.

⁴³ UNHCR, *UNHCR Resettlement Handbook, 2011*, July 2011, available at: www.refworld.org/docid/4ecb973c2.html: - Chapter 5 (pages 178-179): "... the concept of dependency is central to the factual identification of family members. Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. For operational purposes, with regard to the active

UNHCR's forthcoming study on the implementation of the Dublin III Regulation also found that, due to the lack of detailed guidance or lists of evidence or proof required to prove family links, inconsistent practice as regards the proof taken into account to prove family links is reported in several Member States. This should be clarified further in the recast Implementing Regulation of the proposed recast of the Dublin Regulation.

Recommendations:

UNHCR supports the proposals to widen the definition of “family members” to include siblings as well as families formed in transit, but also urges that this be extended to include other family relations,⁴⁴ such as minor married children who are dependent, adult children or the parents of an adult, in order to avoid irregular onward movement of applicants with the aim of rejoining family members in another Member State. Additionally, **proposed recast Article 10** should be amended to incorporate the possibility of children who are travelling with a family member who have another family member or relative in a Member State to reunite with that family member or relative, if it is in the children's best interests to do so.

UNHCR urges that the limitation to families formed in the country of origin be deleted from **proposed recast Article 18**.

UNHCR encourages the Commission to adopt implementing acts, as soon as possible, to provide clarity on the non-exhaustive elements to be taken into account to assess the existence of a dependency link. This assessment should be as simple, broad and flexible as possible, and not wholly based on economic considerations or physical aspects, but also legal, emotional, social and security factors.

UNHCR urges the Commission to clarify the evidentiary requirements for establishing family links in the implementing act as soon as possible and this should be reasonable, especially in light of the circumstances of applicants for international protection. Beneficiaries of international protection may often be obliged to flee without their personal documents, or relevant civil status documents may not be issued in the country of origin. Hence, there may be situations in which relationships can be proved only through oral evidence.⁴⁵

involvement of UNHCR offices in individual cases, the concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration. The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependants, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit.”

⁴⁴ UNHCR, *Family Reunification*, 21 October 1981, No. 24 (XXXII) – 1981, available at: www.unhcr.org/3ae68c43a4.html

⁴⁵ UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: www.unhcr.org/refworld/docid/48620c2d2.html

9. Discretionary clauses

The discretionary clauses (**proposed recast Article 19**) are made significantly narrower. The time limits for their application are shortened (i.e. only until a request is submitted to another Member State as opposed to until when a decision on the substance is taken under the Dublin III Regulation), and both the “humanitarian” and “sovereignty” clauses (**proposed recast Articles 19(1)** and **19(2)**) would become inapplicable after the determination of responsibility. The scope of the “sovereignty clause” (**proposed recast Article 19(1)**) is also restricted to become applicable only to keep or bring together wider family relations. Additionally, **proposed recast Recital (21)** clearly states that:

“[a]ssuming responsibility by a Member State [...] when such examination is not its responsibility [...] should be exceptional. Therefore, a Member State should be able to derogate from the responsibility criteria, only on humanitarian grounds, in particular for family reasons, before a Member State responsible has been determined...”

Family separation has significant adverse effects on applicants’ and refugees’ well-being and ability to, *inter alia*, plan, work, and integrate in the host society; it is consequently of utmost importance that Member States ensure family unity to the extent possible, including where necessary through the exercise of their discretion under the Dublin Regulation.

UNHCR has repeatedly been calling for a proactive and flexible use of the discretionary clauses.⁴⁶ UNHCR further reiterates that, in light of their humanitarian purpose, the discretionary clauses should be applied in a flexible manner whenever circumstances relevant for their application so require.⁴⁷ Therefore, the use of the “sovereignty clause” should not be limited to family considerations, and the use of the discretionary clauses in the course of the Dublin procedure should not be subject to time limits, as circumstances may arise where the application of a discretionary clause is necessary at the transfer stage, for example where an applicant is for serious health reasons unable or unfit to travel.

Recital (45) in the proposed recast states that “[w]ith respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by

⁴⁶ For example, UNHCR, *Central Mediterranean Sea Initiative (CMSI): Action Plan*, March 2015, available at: www.refworld.org/docid/5506a6ae4.html; UNHCR, *UNHCR proposals to address current and future arrivals of asylum-seekers, refugees and migrants by sea to Europe*, March 2015, available at: www.refworld.org/docid/55016ba14.html; UNHCR, *UNHCR Statement on the European Commission's Migration Agenda Commission's Migration Agenda*, 13 May 2015, available at: www.refworld.org/docid/555eeac14.html; UNHCR, *The CEAS at a crossroads: Consolidation and implementation at a time of new challenges. UNHCR's recommendations to Latvia for the EU Presidency January - June 2015*, January 2015, available at: www.refworld.org/docid/54afbee34.html

⁴⁷ It should be noted that such circumstances can concern both the individual circumstances of the applicant as well as the situation in a Member State that does not amount to the threshold required for the application of Article 3(2).

*their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.” Article 3(2) in the proposed recast remains unaltered but the material scope of the provision in this regard on *non-refoulement* pertains only to systemic deficiencies, so appears to fall short of the more individual-focused approach set out by the European Court of Human Rights (ECtHR) in Tarakel.⁴⁸*

More positively, the reference to humanitarian grounds “*based in particular on family or cultural considerations*” has been deleted from **proposed recast Article 19(2)** but it remains to be seen whether this will stimulate a more flexible interpretation and use of this provision.

Recommendations:

UNHCR urges that the proposed narrowing of the discretionary clauses (**proposed Article 19**), both in terms of scope as well as time frames for their applicability, is deleted from the proposed recast, and that these provisions be applied in a proactive, expeditious, pragmatic and flexible manner, including under the operation of the corrective allocation mechanism, and with a particular focus on the transfer of unaccompanied and separated children.

The lack of amendment of **proposed Article 3(2)** should be re-considered; the provision should not only be limited to situations where there are systemic deficiencies but also include a more rights-focused approach in accordance with the ECtHR case law.

10. Take back procedures

Take back requests are proposed to be transformed into simple take back notifications (**proposed recast Article 26**), given that there will no longer be any scope for shifting responsibility. Such notifications do not require a reply, but instead an immediate confirmation of receipt from the Member State determined as responsible.

There are also consequences for being transferred back to the responsible Member State. In particular: an accelerated procedure if the application is still under examination in the responsible Member State (**proposed recast Article 20(3)**); if the original application had been withdrawn, any new application lodged with the responsible Member State is treated as a subsequent application and so must entail new elements (**proposed recast Article 20(4)**); and deprivation of

⁴⁸ *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: www.refworld.org/docid/5458abfd4.html

access to an effective remedy if the transferee's application had been rejected in the responsible Member State (**proposed recast 20(5)**).⁴⁹

The **proposed recast Article 7(2)** excludes the possibility to conduct interviews in the case of a take back notification. This raises serious concerns, as a personal interview can also be the occasion to verify whether the applicant has any specific needs and/or concerns in relation to being returned to the country determined as responsible. Whilst it is understood that the operation of the new proposed Eurodac database will simplify the verification of Eurodac "hits" and the consequent determination of responsibility, it should be taken into account that the personal circumstances of an applicant may change over time and a transfer may not be in an applicant's best interests. Provisions have been introduced in the proposed recast of the Eurodac Regulation (**proposed recast Articles 15(4) and 16(5)**) to ensure that, where a "hit" suggests that an application for international protection has been filed in a Member State, that evidence and consequently the Dublin procedure, shall take precedence over any other hit received. This includes "hits" which would have otherwise triggered the initiation of a return procedure.

UNHCR is also concerned by the potential issues related to the quality and correctness of the data recorded in the Eurodac database. Deficiencies in this regard have been observed, in particular where the system is under stress. This leads to incorrect "hits" and exposes individuals to a risk of violation of their rights. The proposed expansion of the database, which would entail the collection, storage and transmission of more data, increases the risk of errors. UNHCR therefore considers that information obtained through Eurodac, in particular where it leads to "hits" which could lead to a transfer, should be considered together with and weighted against any other available evidence.

UNHCR is also concerned by the limitations in **Article 31 of the proposed recast of the Eurodac Regulation** to the right of access to, rectification and erasure of personal data of an individual. Additional concerns are raised by the deletion of the provisions concerning the right of any person to bring an action or a complaint concerning access to, rectification and erasure of their personal data before competent authorities or courts.

For example, victims of human trafficking may have been suffered exploitation or other harm before entering the EU, and/or within the EU. Some may be at risk of (re-)trafficking in another Member State. Victims of human trafficking in the asylum system or otherwise in need of international protection are a highly vulnerable group and require effective cooperation from different actors to ensure their early

⁴⁹ The deprivation of access to an effective remedy is examined in more detail above under section 4 (**Obligations of the applicant including consequences for non-compliance**).

identification and referral to the most appropriate services. Member States' *non-refoulement* obligations⁵⁰ are engaged and should be carefully considered in relation to transfers of victims of human trafficking under the Dublin Regulation.⁵¹

UNHCR notes that the proposed recast, as with the Dublin III Regulation, does not explicitly require the notification to be motivated, which was the case in the Dublin II Regulation. This lack of motivation of a decision may hamper the effectiveness of a remedy; in absence of a reason for the decision to transfer or for not examining the case, it becomes more difficult for the applicant to argue why a transfer should not take place. Article 41(2)(c) of the EU Charter obliges the administration to give reasons for its decision. Thus, although both the Dublin III Regulation as well as the proposed recast no longer contain explicit reference to motivation, the obligation itself to motivate decisions continues to apply.

Recommendations:

UNHCR urges that, prior to any take back request being made, a personal interview is conducted by appropriately trained staff to verify whether the applicant has any specific needs and/or concerns in relation to being returned to the country designated as responsible. Any such individuals identified should not be subject to a take back transfer.

UNHCR calls for increased awareness of the possibility of errors in data recorded in the Eurodac database. Additionally, steps should be taken to ensure that the information obtained through Eurodac, in particular where it leads to "hits", is considered together with and weighted against any other available evidence. Efforts should be made to address challenges relating to the quality and correctness of biometric data and the risks associated with potential errors.

UNHCR calls for **Article 31 of the proposed recast of the Eurodac Regulation** to retain provisions on the right of any person to request their personal data, that factually inaccurate data be corrected or that data recorded unlawfully be erased. Additionally, provisions should be retained concerning the obligation of the national supervisory authority to render assistance to persons in exercising their rights in this area, as well as on the right of any person to bring an action or a complaint concerning access to, rectification and erasure of their personal data before competent authorities or courts. UNHCR emphasizes that all persons covered by the Regulation whose biometric and other personal data is collected and stored in the Eurodac database, must be granted the right to rebut false assumptions and to request the rectification or erasure of their data, and to bring action or a complaint before the competent authorities or courts.

⁵⁰ Recital 10 of the *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims* provides that "[t]his Directive is without prejudice to the principle of non-refoulement in accordance with the 1951 Convention relating to the Status of Refugees (Geneva Convention), and is in accordance with Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union."

⁵¹ Please also see Articles 11-16 of *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

11. Unaccompanied children

According to the recast proposal, the Member State responsible for the examination of an application for international protection lodged by an unaccompanied child who does not have any family relations in a Member State should be that of first application, unless this is not in the best interests of the child concerned (**proposed recast Article 10(5)**).

The proposed recast envisages that a BIA be carried out in all cases preceding a transfer and that a BIA be conducted by staff with the required qualifications and expertise. The presumption that it is in the best interests of a child⁵² to be returned to the country of first application where the child does not have family in a Member State, unless proven contrary, is concerning and appears contrary to the CJEU's ruling in MA and Others⁵³. It is UNHCR's view that children should not be transferred to another Member State, unless this is for family reunion purposes and/or a transfer is in the best interests of the child, in order not to unnecessarily prolong procedures and thus delay children's access to an asylum procedure.

In this context, UNHCR also notes the very limited time frames for carrying out a take back procedure under the proposed recast. Whilst a BIA should be carried out before the issuance of a transfer decision (**proposed recast Article 8(4)**), the Member State where the child is present, under **proposed recast Article 30(1)**, has only two weeks for carrying out a BIA (one week from the Eurodac hit to notify the responsible Member State and one week from that notification to issue a transfer decision). Two weeks may not be sufficient to carry out a BIA. Consequently, should this be retained, flexibility in the time limits as illustrated above under **section 6 (Time limits and responsibility)** should be allowed to conduct a BIA that takes into account, as a minimum, the elements listed under **proposed recast Article 8(3)**.

UNHCR welcomes that the proposed recast of the Eurodac Regulation stipulates that the taking of fingerprints and facial images from children shall be done in a child-friendly and child-sensitive manner by appropriately trained personnel and the obligation to provide children with information in a child-appropriate manner. While UNHCR supports the registration of children in a common EU registration system, the principle of the best interests of the child, including for the purpose of

⁵² See also *Protecting the best interests of the child in Dublin Procedures: UNHCR's comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*, February 2015, available at: www.refworld.org/pdfid/54e1c2924.pdf

⁵³ *Judgment of the Court of Justice of the European Union (fourth Chamber) of 6 June 2013, Regulation (EC) No. 343/2003 in Case C-648/11, MA, BT, DA v Secretary of the Home Department*, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de26e1e178dc544e418a73ea935c222f5f.e34Kaxilc3eQc40LaxqMbN4Ob3mRe0?text=&docid=138088&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=215640>

family tracing and unity and/or assistance in locating those who may disappear and/or otherwise be at risk, including victims of trafficking, should as the guiding principle for the collection and processing of the biometric and other personal data of children. Additionally, it is UNHCR's view that no administrative sanctions should be applied in the case of non-compliance (**Article 2(4) of the proposed Eurodac Regulation**).

Recommendations:

The presumption that it is in the best interests of the child to be transferred back to the country of first application where the child does not have family in a Member State, unless proven contrary, is contrary to EU case law. UNHCR urges that this be deleted from the recast proposal.

Should the possibility to subject unaccompanied children to a take back procedure be retained where they do not have family in a Member State, flexibility in the time limits should be allowed to conduct a BIA that takes into account, as a minimum, the elements listed under **proposed recast Article 8(3)**.

Collection of the biometric data of children, as referred to in **Articles 2(2), 10(1), 13(1) and 14(1)** of the proposed recast of the Eurodac Regulation, should be carried out having due regard to the best interests of the child, including for the purpose of family tracing and unity and/or assistance in locating those who may disappear and/or otherwise be at risk, including victims of trafficking. No administrative sanctions should be applied in the case of non-compliance under **Article 2(4) of the proposed Eurodac Regulation**.

The provision on guarantees for children is strengthened in the proposal. In particular, according to **proposed recast Article 8(4)**, a BIA shall always be carried out swiftly by qualified staff before a transfer is carried out, and the assessment shall be based on all the factors enumerated under **proposed recast Article 8(3)**, which mirror those already listed in Article 6(3) of the Dublin III Regulation.

Whilst the enhanced provisions on the BIA are welcomed, UNHCR regrets that BIA procedures are not further operationalized by indicating which actors should be involved in the BIA. UNHCR refers in this regard to *General Comment Number 14 of the Committee on the Rights of the Child*⁶⁴ which provides further guidance on who should carry out the assessment of best interests. The Committee recommends that this be done, where possible, by a multidisciplinary team. It also

⁶⁴ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1)*, 29 May 2013, CRC/C/GC/14, notably in paragraphs, 46 and 52-79, available at: www.refworld.org/docid/51a84b5e4.html; further guidance on this subject may be found in the joint UNHCR UNICEF publication "*Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*", October 2014, available at: www.refworld.org/docid/5423da264.html

provides guidance on how such best interest assessments may be conducted.

Where children are transferred, the proposed recast provides that the transferring Member State should also make sure that the receiving Member State will take all appropriate measures to ensure that the receiving Member State takes the reception and procedural measures referred to in Articles 14 and 24 of the RCD (concerning, *inter alia*, education, representation and accommodation) and Article 25 (guarantees for unaccompanied minors) of the APD. This provision introduces important safeguards; UNHCR urges that these considerations be mentioned explicitly as factors to be taken into account in the BIA.

The proposed formulation of the provision on representation for children, however, indicates that a representative shall be appointed in the Member State “*where the unaccompanied minor is obliged to be present*” (**proposed recast Article 8(2)**). The possibility that a representative would be appointed for a child only in the Member State where s/he is obliged to be present raises serious concerns, as in instances of onward movement and consequent take back procedures, a representative would not be appointed for a child in the sending Member State, which exposes an evident protection gap.⁵⁵

Further to the above, it is noted that the proposed recast of the Dublin Regulation continues to use the term “representative” as opposed to “guardian”, which is the term introduced in the proposed Asylum Procedures Regulation and Reception Conditions Directive.⁵⁶ Given that the definitions of “representative” in the proposed recast Dublin Regulation and of “guardian” in the proposed Asylum Procedures Regulation substantially overlap, consistency in terminology would be beneficial for the purpose of clarity. Moreover, if one person could act as guardian for Dublin and asylum procedures as well as for reception, this would ensure continuity in the assistance provided to unaccompanied children. Furthermore, the use of the term “guardian” could avoid confusion concerning the role of a representative, which goes beyond ensuring representation of a child during a particular proceeding, vis-à-vis the role of the guardian as also noted in the Handbook of the EU Agency on Fundamental Rights (FRA).⁵⁷

Recommendations:

UNHCR recommends the use of the term “guardian” instead of “representative” in accordance with the proposed Asylum Procedures Regulation and recast Reception Conditions Directive to ensure consistency in terminology and thus clarity.

⁵⁵ CRC, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: www.refworld.org/docid/42dd174b4.html

⁵⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, 13 July 2016, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-465-EN-F1-1.PDF>

⁵⁷ FRA, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, para. 2.6, available at: http://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-guardianship-children_en.pdf

A child should always have access to a qualified guardian, including expert legal assistance, whom should be independent from the authorities responsible for implementing the Dublin Regulation. **Proposed recast Article 8(2)** should be amended accordingly.

Proposed recast Articles 8(2) and 8(3) should further clarify the time frames for the appointment of the guardian as well as their role in the Dublin procedure and, in particular, the procedures for assessing the best interests of the child.

As UNHCR's recent study on the Dublin III Regulation shows, appropriate guidance and common standards across the Member States on BIA are required for the effective application of the Dublin Regulation in a manner that respects the best interests of all children, whether accompanied or unaccompanied. Appropriate guidance could for instance be provided in the Implementing Regulation or the new EU Asylum Agency (EUAA) could have a role in providing guidance to be applied by all Member States.

12. Effective remedy

The proposed recast of the rules on remedies includes the introduction of the mandatory suspensive effect until a decision is taken on the appeal or review. Whilst the scope of appeals is reduced, a new remedy against the omission of a transfer is introduced.

In relation to the notification of a transfer decision, it is of particular relevance to flag that **proposed recast Articles 27(1)** (take charge) **and 27(2)** (take back) both state that the Member State where the person concerned is present shall notify the person concerned in writing "without undue delay". UNHCR is however concerned about the lack of a definitive set time frame that this implies.

According to the Commission's proposal, the rules on remedies have been adapted in order to speed up and harmonize the appeal process. Shorter time limits (seven days for lodging the appeal; fifteen days for the court to decide on the appeal) and automatic suspensive effect of the appeal are introduced (**proposed recast Article 28**). The introduction of the mandatory suspensive effect until a decision is taken on the appeal or review is a positive proposal.

The scope, however, of the appeal is limited to the existence of a risk of inhuman or degrading treatment, and to whether **proposed recast Articles 10 to 13 and 18** are infringed upon. A new remedy is introduced for cases where no transfer decision is taken, and the applicant claims that a family member or, in the case of unaccompanied children, also a relative, is legally present in another Member State. However, the scope of the effective remedy excludes the possibility to lodge an appeal against a transfer decision in a take back procedure, unless **proposed**

recast Article 3(2) in relation to the existence of a risk of inhuman or degrading treatment is infringed upon.

In this context, the recent CJEU judgments in C-63/15 Ghezelbash⁵⁸ and C-155/15 Karim⁵⁹ are relevant. The former held that it is apparent from Recital 9 that the Dublin III Regulation is not solely meant to improve the effectiveness of the Dublin system, but also to improve the protection afforded to applicants under that system. The latter case, clarified that the right to an effective remedy can pertain to an examination of the infringement of the rules set out in the existing Dublin Regulation, even where there are no systemic deficiencies in the asylum procedure or reception conditions of the responsible Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter.

Recommendations:

The right to an effective remedy should not be limited to cases of systemic deficiencies in the asylum procedure or reception conditions that provide grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter in accordance with EU case law. By contrast, the scope of effective remedies should be broadened in line with Article 13 of the ECHR (Right to an effective remedy⁶⁰) and Article 47 of the EU Charter and, in particular, to include also the possibility to lodge an appeal against a transfer in a take back procedure.

Proposed recast Article 28(5) introduces a remedy against the failure to transfer, where the applicant claims that a family member or, in the case of unaccompanied children, a relative is legally present in a Member State other than the one which is examining his or her application for international protection, and considers therefore that other Member State as the Member State responsible for examining the application. This remedy does not seem to be time-bound but it is currently unclear at what juncture within the process the applicant in this type of scenario can seek redress via this remedy. It is also apparent that applicants will need to be made aware that this remedy exists as, in the absence of actual knowledge and understanding of this option, including legal assistance on it, this remedy may be of little value.

Accordingly, the existence and operation of the remedy contained in **proposed recast Article 28(5)**, should be stipulated to individuals on lodging their application by explicitly being mentioned in **proposed recast Article 6** (Right to

⁵⁸ *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, Case C-63/15, European Union: Court of Justice of the European Union, 7 June 2016, available at: www.refworld.org/docid/575ae1ec4.html

⁵⁹ *George Karim v Migrationsverket*, C-155/15, European Union: Court of Justice of the European Union, 7 June 2016, available at: www.refworld.org/docid/575ae26b4.html

⁶⁰ Article 13 of the ECHR (Right to an effective remedy): *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

information) and also form part of the verbal explanation given during the personal interview as per **proposed recast Article (7)**, which UNHCR is of the opinion should always occur.

To operationalize this remedy, a notice indicating the time frame after which an applicant will be able to activate this remedy in the absence of justified delays, for example due to the need for additional time to complete family tracing or a BIA, should be provided to the applicant upon the lodging of the application for international protection.

In addition, as mentioned above, **proposed recast Article 27(1)** (take charge) should be amended to provide a clear time limit for notification of the transfer decision to the applicant concerned. For the sake of clarity and of administrative as well as procedural fairness, the applicant should be notified where no transfer decision is taken, or where there is a need for an extension of the time limits as detailed above. The notification should be in a language that the applicant understands, regardless of whether s/he is represented by a legal advisor or other counsellor and should indicate the reasons as to why the transfer will not proceed or an extension of the time limits is required - and for how long. This would allow the applicant to then consider whether or not to avail themselves of the remedy contained within **proposed recast Article 28(5)** or from what point in time it will be possible for the applicant to seek redress through this proposed remedy in case a transfer decision will not be taken within the extended time limits.

Recommendations:

The remedy contained in **proposed recast Article 28(5)** is welcomed but should also be explicitly mentioned in **proposed recast Articles 6 and 7**, which respectively relate to the information provided to applicants both in writing and orally during the personal interview. Clarity on the remedy in **proposed recast Article 28(5)** should also be provided by amending **proposed recast Articles 27(1)** (take charge) to provide a clear time limit for notifying the applicant of a transfer decision to allow for an automatic time limit after which an applicant will be able to resort to this remedy in case a transfer decision is not taken. This time limit should run from the lodging of the asylum application and the applicant should be notified in writing in a language that they understand, whether or not they are represented by a legal advisor or other counsellor, where no transfer decision is taken or where there are justified delays that require an extension of the procedural time limits. Such notification will have to indicate a clear point in time from which the applicant will be able to resort to this remedy in case of an extension of the time limits.

For consistency purposes, **proposed recast Article 27(2)** (take back) should be amended to provide for a clear time limit for notifying the applicant of a transfer decision in line with **proposed recast Article 27(1)**.

Additionally, the short time limits introduced for appeal raise concerns, especially where an applicant does not have access to legal assistance prior to the issuance of a transfer decision. The short period of seven days for lodging the appeal may not be sufficient for the applicant to be able to effectively resort to legal assistance and substantiate the appeal, especially where the applicant has not received sufficient information and/or a personal interview has not been carried out, so preventing the applicant from seeking any necessary clarifications.

The CJEU's C-69/10 Diouf judgment⁶¹ indicates that a fifteen-day period may be adequate unless particular circumstances (to be evaluated on a case-by-case basis) apply. In the judgment, it was considered that in an accelerated procedure, the time limit for lodging an appeal against a negative asylum decision has to be “sufficient in practical terms to enable the applicant to prepare and bring an effective action”. The Court held that: “[w]ith regard to abbreviated procedures, a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved.” However, the Court also found that national courts should take into account the individual circumstances of a case, and could decide to examine the case under the ordinary procedure instead of the accelerated procedure, should those individual circumstances so dictate.

Recommendation:

Although the automatic suspensive effect of the appeal is welcomed and should be retained in the recast proposal (**proposed recast Article 28(3)**), the time limit to lodge an appeal should be extended to at least fifteen days for lodging the appeal or longer if particular circumstances (to be evaluated on a case-by-case basis) apply.

13. Detention for the purpose of transfer

The time limits for detention and for carrying out the procedure when a person is detained have been shortened⁶² in the proposal (**proposed recast Article 29**). This is welcomed by UNHCR, given that detention should last for as short a period

⁶¹ *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: Court of Justice of the European Union, 28 July 2011, available at: www.refworld.org/docid/4e37bd2b2.html

⁶² The time limits to submit a request when an applicant is in detention have been shortened from one month to two weeks, while the time limits to reply to the request have been shortened from two weeks to one week. A transfer shall be carried out within four weeks as opposed to six under the Dublin III Regulation.

as possible and should only be used as a measure of last resort, and in case no alternatives to detention are available.⁶³

It remains to be seen, however, what impact the proposals to recast the RCD will have in relation to the safeguards and guarantees for detained applicants, including that applicants shall not be detained for the sole reason of seeking international protection.

It is regretted that the **proposed recast at Articles 2(n) and 29(2)** does not take the opportunity to further clarify the definition of “*significant risk of absconding*”. In particular, UNHCR is concerned that the possibility remains that Member States take a wide view of what constitutes such a risk.⁶⁴ However, it should not be possible under such a formulation to determine that the mere fact of being subject to the Dublin Regulation creates a risk of absconding that justifies detaining the applicant.

Proposed recast Article 29(2) also provides no further clarification vis-à-vis the decision to detain an applicant on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively. In these regards, concerns remain in particular in relation to persons with specific needs and their identification, including prior to the decision to detain.

UNHCR reiterates the importance that the detainee is entitled to request judicial review of his/her detention whenever new circumstances arise or information becomes available that may affect the lawfulness of his/her detention, in accordance with Article 5(4)⁶⁵ of the ECHR⁶⁶.

Recommendations:

The term “*significant risk of absconding*” should be further clarified and it should not be possible under such a formulation to determine that the mere fact of being subject to the Dublin Regulation creates a risk of absconding that justifies detaining the applicant.

Persons with specific needs, including victims of trauma or torture, victims or potential victims of trafficking and children should in principle not be detained and alternatives to detention should be actively explored where detention would otherwise be necessary, in order to secure transfer procedures.

⁶³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: www.refworld.org/docid/503489533b8.html; UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, 2014, available at: www.refworld.org/docid/536b564d4.html

⁶⁴ UNHCR's Study on the Dublin III Regulation shows that for those Member States that have incorporated a definition of the risk of absconding in their national legislation, an array of grounds appear to be used in practice to define the existence of a significant risk of absconding. These include, but not limited to: failure to comply with an implementation of an immigration decision related to removal in the past; entry into the Member States in an irregular manner; failure to cooperate in the establishment of the applicant's identity; security risks and indications that the applicant does not wish to comply with a transfer decision.

⁶⁵ Article 5(4) ECHR states: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

⁶⁶ See also - European Council on Refugees and Exiles, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, June 2015, AIDA Legal Briefing No. 1, available at: www.refworld.org/docid/5612210a4.html

14. Corrective allocation mechanism

The Commission's stated purpose in complementing the Dublin Regulation with the addition of a corrective allocation mechanism is to contribute to a fairer sharing of responsibilities between Member States. Such corrective mechanism would operate when a Member State's asylum system is faced with "disproportionate pressure." An automated system (**proposed recast Articles 34 to 36**) is proposed to allow for the registration of all applications and the monitoring of each Member State's share in all applications. As soon as an application is lodged, the Member State will register that application in the automated system, which will record each application under a unique application number. As soon as a Member State has been determined to be responsible, this will also be included in the system. The system will also indicate and take into account the numbers of persons effectively resettled by each Member State.

The number of applications for which a given Member State is responsible and the number of persons effectively resettled by a Member State are the basis for the calculation of the respective shares. This includes applications for which a Member State would be responsible under the admissibility procedure (safe country of first asylum and safe third country), safe country of origin (that operates through an accelerated procedure) and security grounds.

The system is intended to continuously calculate the percentage of applications for which each Member State has been designated as responsible for and compares this with the reference percentage based on the key. This reference key is based on two criteria with equal fifty per cent weighting, namely the population size and the total gross domestic product of a Member State. The corrective mechanism is triggered automatically where the number of applications for international protection for which a Member State is responsible exceeds one-hundred and fifty per cent of the figure identified in the reference key⁶⁷ (**proposed recast Article 35**).

The allocation continues as long as the Member State experiencing the disproportionate pressure continues to be above one-hundred and fifty per cent of its reference share (**proposed recast Article 43**). The automated system allocates applicants to Member States that are below their reference number. Family members to which the procedure for allocation applies shall be allocated to the same Member State (**proposed recast Article 41(2)**).

The Member State that benefits from the corrective mechanism transfers the applicant to the Member State of allocation, transmitting also that applicant's

⁶⁷ The figures underlying the reference key shall be adapted annually by the European Union Agency for Asylum (**new Recital 9**).

fingerprints in order to allow security verification in the allocated receiving Member State (**proposed recast Article 40**). Where the designated Member State of allocation, following a security verification, has information that reveals that an applicant is for serious reasons considered to be a danger to their national security or public order, information on the nature of the alert is to be shared with the law enforcement authorities in the benefitting Member State. Where the designated Member State of allocation considers that the applicant may for serious reasons be a danger to the national security or public order, the benefitting Member State of application is the Member State responsible and shall examine the application in an accelerated procedure.

As per **proposed recast Article 38**, the benefitting Member State takes a decision to transfer the applicant within one week from the indication of the allocated responsible Member State provided by the automated system; the applicant is notified without delay and the transfer takes place within four weeks from the final transfer decision, unless the benefitting Member State can accept responsibility for examining the application under **proposed Articles 10 to 13 and 18**. This will avoid that an applicant is transferred to a Member State under the allocation mechanism and then transferred back to the benefitting Member State. However, UNHCR is concerned that under the current proposal, this provision would be of limited practical value. In fact, an applicant should be given an effective possibility to provide relevant information to the benefitting Member State, whilst no personal interviews are specifically foreseen prior to a transfer under the corrective allocation mechanism.

All applicants, except those whose application has been declared inadmissible or is to be examined in the Member State of first application, shall be transferred under the corrective mechanism. Following the transfer, the Member State of allocation will verify whether the responsibility criteria, such as family in another Member State and/or possession of a (valid or recent) visa or residence permit of another Member State, apply in the case of the applicant. Where this is the case, the applicant will be transferred onwards to the Member State responsible (**proposed recast Article 39**).

The provision under the operation of the corrective allocation mechanism that family links are to be verified by the Member State of allocation, and not the Member State of first application, raises concerns, especially with regard to children and individuals with specific needs. In this context, UNHCR reiterates its concerns, in particular relating to the transfer of unaccompanied children the child concerned and with a view not to unnecessarily prolong procedures and thus delay children's access to an asylum procedure.

The mechanism, as currently designed, is likely to entail multiple transfers for those applicants who have family in a third Member State (i.e. from the Member State of first application, to the Member State of allocation and then onwards if there is a Member State where family members are present and/or are in

possession of a (valid or recent) visa or residence permit of another Member State). As a consequence of such multiple transfers, swift access to asylum procedures may be prevented.

UNHCR further notes that the proposal does not clarify whether an applicant who is transferred to another Member State under the corrective allocation mechanism would be required to lodge a new application for international protection in the Member State of allocation. Similar considerations are applicable in case of transfers under take charge procedures. In the absence of an explicit provision, current practice under the Dublin III Regulation in case of take charge procedures is to allow the transferred applicant to lodge a new application for international protection in the responsible Member State. However, for the sake of clarity and of consistency in approaches in all Member States, the proposal should explicitly mention that an applicant who is transferred under the corrective allocation mechanism or a take charge procedure should be provided the possibility to lodge an application in the responsible Member State. Alternatively, the possibility for the responsible Member State to automatically take into account the application lodged in another Member State and recorded in the automated system pursuant to **proposed Article 22(1) and (2)**, should be considered. An application would thus be considered as “lodged in the EU”. Additionally, procedural steps would be reduced. As a consequence, procedures would be streamlined.

The “early warning and preparedness mechanism” provision under Article 33 of the Dublin III Regulation has been deleted from the recast proposal, whilst the proposal to establish a new EUAA foresees that it will assume a permanent monitoring, assessment and strengthened operational and technical support role. In view of this enhanced role, UNHCR welcomes the inclusion of the EUAA as an operational actor in the corrective mechanism. In line with its increased oversight role, the EUAA will be responsible for aggregating data on resettlement (**proposed recast Article 22(3)**) and for regularly publishing data indicating the relative distribution of applications for international protection among the Member States (**proposed recast Article 59(2)**). These measures can contribute to increasing the transparency of the CEAS and can enable the public and policy makers to better understand the actual situation of asylum when viewed from a European rather than a national level.

Recommendations:

In consideration of the primacy of family unity and of the best interests of the child, and of the need to ensure swift access to the asylum procedure, UNHCR recommends that the assessment of family links and any specific needs arising be carried out in the Member State of first application also under the operation of the corrective allocation mechanism. In UNHCR’s view, this would reduce the number of transfers thus preventing delays in the procedure and the costs associated with it. Furthermore, it would provide additional safeguards to children and those with specific needs as well as enhance an applicants’ understanding of the system

and, consequently, compliance, thus reducing onward movement.

Specific mechanisms for the prioritization of those with specific needs, including children – i.e. a sub-threshold for a particular category of those with specific needs that would trigger the corrective allocation mechanism- could be foreseen. For example, such mechanisms could be triggered when a significant set number of children or other persons with specific needs arrive in a Member State, independently of the activation of the proposed corrective allocation mechanism.

Whilst the corrective allocation mechanism is operational, any transfers back to the Member State benefitting from the mechanism that is experiencing disproportionate pressures should cease for operational efficiency and to allow for pressure on the benefitting Member State to be released as quickly as possible.

UNHCR recommends that the proposal explicitly mention that an applicant who is transferred under the corrective allocation mechanism or a take charge procedure should be provided the possibility to lodge an application in the responsible Member State without delay. In this context, UNHCR further recommends that the possibility for the responsible Member State to automatically take into account the application lodged in another Member State and recorded in the automated system pursuant to **proposed Article 22(1) and (2)** be considered with a view to streamlining procedures.

The corrective allocation mechanism proposed envisages an automated system, which does not presently incorporate any “preferences” or of applicants or substantive connections with a Member State to be taken into account in relation to the Member State of their allocation.

It is UNHCR’s position as well as that of its Executive Committee that there is no unfettered right to choose one’s country of asylum; however, asylum-seekers’ preferences should be taken into account to the extent possible,⁶⁸ while making it clear in the information provided to applicants subject to any allocation mechanism that all preferences may not be met. Where possible, this will promote better integration and so likely reduce onward movements. Factors should be based on objective information such as presence of extended family, any previous regular stay in a Member State, study, work or concrete employment possibilities in order to allow for the system to operate swiftly.⁶⁹

Recommendations:

UNHCR encourages that within Chapter VII on the corrective allocation

⁶⁸ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: www.refworld.org/docid/51af82794.html and ExCom, *Refugees Without an Asylum Country*, 16 October 1979, No. 15 (XXX) - 1979, available at: www.refworld.org/docid/3ae68c960.html

⁶⁹ For further information see: UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>

mechanism, preferences of applicants be taken into account to the extent possible, while making it clear in the information provided to applicants that all preferences may not be met. Factors should be based on objective information such as presence of extended family, any previous regular stay in a Member State, study, work or concrete employment possibilities. The new EUAA could possibly take a lead in these processes to facilitate expedited corrective allocation.

UNHCR is concerned that practical issues may challenge the operation of the system, and so will require adequately enhanced capacity and resources (including reception during admissibility and associated appeals). The EUAA could have a supporting role, in particular in those Member States receiving most first applications, who will, under the present proposal, still have to handle admissibility procedures and conduct security checks on them as well as, for those found inadmissible, after any appeals, return them. It may also be that very few individuals are eligible for allocation under the mechanism, as their cases would be found inadmissible.

The fact that the threshold for the cessation of the corrective allocation mechanism is the same as the threshold for its activation seems to raise some operational issues. If the intent is to relieve the Member State bearing a “*disproportionate pressure*”, then the cessation of the mechanism should operate once the situation in the benefitting Member State has normalised. Accordingly, the corrective mechanism could cease to operate once the number of applications is well below the threshold for its activation to have a real corrective effect. In its paper “Better Protecting Refugees in the EU and Globally” UNHCR proposes that the mechanism be activated as soon as a Member State reaches the reference share.

While the consideration of the number of persons effectively resettled acknowledges the importance of efforts to implement legal and safe pathways to Europe, which UNHCR continues to call for⁷⁰, this should not detract from Member States’ obligations to applicants who seek protection within their territory.

Recommendations:

If it is to have a real corrective effect, the threshold for cessation of the allocation mechanism should be lower than the threshold for its activation. Additionally, UNHCR proposes the activation of the corrective allocation mechanism as soon as a Member State reaches the reference share.

Article 80 of the TFEU requires that EU asylum, migration and border policies be “*governed by the principle of solidarity and fair sharing of responsibility, including its financial implications*”. Under the allocation mechanism, the costs of transferring an applicant to the Member State of allocation should be reimbursed

⁷⁰ UNHCR, *Central Mediterranean Sea Initiative Action Plan*, available at: www.unhcr.org/531990199.html and UNHCR, *Special Mediterranean Initiative, Plan for an enhanced operational response, June-December 2015*, available at: www.unhcr.org/557ad7e49.html

to the transferring Member State (benefitting from the corrective mechanism) from the EU budget (EUR 500 lump sum) (**recast Article 42**). However, there is no financial solidarity within the recast proposal pertaining to identifying and registering applicants, admissibility screening, handling inadmissible and security cases, as well as returns of those rejected (or for that matter, for carrying out transfers under normal circumstances i.e. in take charge and take back procedures outside of the operation of the corrective allocation mechanism).

In respect of **proposed recast Article (40)**, the detail around the operating procedures when security verification is in issue are not well developed. Unless they are clarified, UNHCR is concerned that delays may occur and/or this may leave scope for undermining the corrective allocation mechanism in practice. Although it is understood that security checks will likely remain a contentious topic, the recast proposal seems to be analogous with relocation experiences, on which the Commission has reported and identified security checks as one of the key bottlenecks to the faster roll-out of relocation.⁷¹

Recommendation:

Where the Member State of allocation has information that reveals that an applicant is for serious reasons considered to be a danger to national security or public order, efficient security check verification arrangements, determinations and methods for communicating the outcome of these should be set out in agreed Standard Operating Procedures to prevent delays, enhance cooperation and guard against the undermining of the corrective allocation mechanism in practice.

A Member State of allocation may decide to temporarily opt not to take part in the corrective mechanism for a twelve-month period (**proposed recast Article 37**). The Member State not willing to take part shall indicate (without having to give reasons) this in the automated system, which will then count the number of applications that would have been allocated to that Member State. At the end of the twelve months period the system will communicate to the Member State the number of applicants for whom it would have been the Member State of allocation. The Member State that temporarily does not take part in the corrective allocation must make a solidarity contribution of EUR 250,000 per applicant to the Member State that has instead been determined as responsible for examining those applications.⁷² The proposed EUAA will monitor and report to the Commission on a yearly basis on the application of the financial solidarity mechanism (**proposed recast Article 37(5)**). UNHCR welcomes this additional responsibility for the EUAA, as it will ensure that the EUAA has access to all the data indicating the relative distribution of asylum responsibilities and support across the Member

⁷¹ European Union: European Commission, *Seventh report on relocation and resettlement*, 9 November 2016, COM(2016) 720 final, available at: <http://www.refworld.org/docid/583555954.html>

⁷² According to the recast proposal, the Commission should adopt an implementing act, specifying the practical modalities for the implementation of the solidarity contribution mechanism.

States, including financial transfers. In this context, it is important that it is clearly stipulated that the EUAA has access to the data generated by the automated system that is necessary to monitor and report to the Commission on the application of the financial solidarity mechanism as foreseen in **proposed recast Article 37(5)**.

In respect to **proposed recast Articles 44 and 45**, which pertain to the details of establishing and accessing the “[a]utomated system for registration, monitoring and the allocation mechanism”, UNHCR is concerned that this part of the recast proposal does not foresee a role for the EUAA and, in particular, for it in the preparation, development and the operational management of the system. The central role in **proposed recast Article 35(4)** is assigned to the EUAA in the context of establishing the reference key and monitoring its implementation. In view of the scope and scale of the corrective mechanism, the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) should develop and operate the corrective mechanism in close co-operation with the EUAA.

Recommendations:

Proposed recast Article 44(3) should be amended so that eu-LISA shall, in cooperation with the EUAA, be responsible for the preparation, development and the operational management of the central system and the communication infrastructure between the central system and the national infrastructures.

Proposed recast Article 45(2) should be amended to provide that the EUAA shall have access to the automated system for entering and adapting the reference key pursuant to **proposed recast Article 35(4)**, for entering the information referred to in **proposed recast Article 22(3)** and monitoring the application of the financial solidarity mechanism vis-à-vis **proposed recast Article 37**.

15. Conclusion

The short-comings in the present and past Dublin Regulations include bureaucratic complexities in the configuration of the process and its implementation, the lack of proactive solidarity in the interaction between Member States as well as the cooperation with and of applicants. Although there are aspects that are to be welcomed, many issues remain and indeed arise in the tabled recast proposal.

However, UNHCR encourages EU institutions, Member States and civil society to take heed of these comments and recommendations throughout the passage of the proposed recast Dublin system negotiations. UNHCR urges the EU and

Member States to use and further strengthen the tools and instruments they have developed over time in the CEAS in order to ensure more effective responses for those in need of international protection and for others. UNHCR is ready to continue assisting with these efforts in the interests of Member States, the EU, and those who are in need of international protection.

UNHCR, December 2016