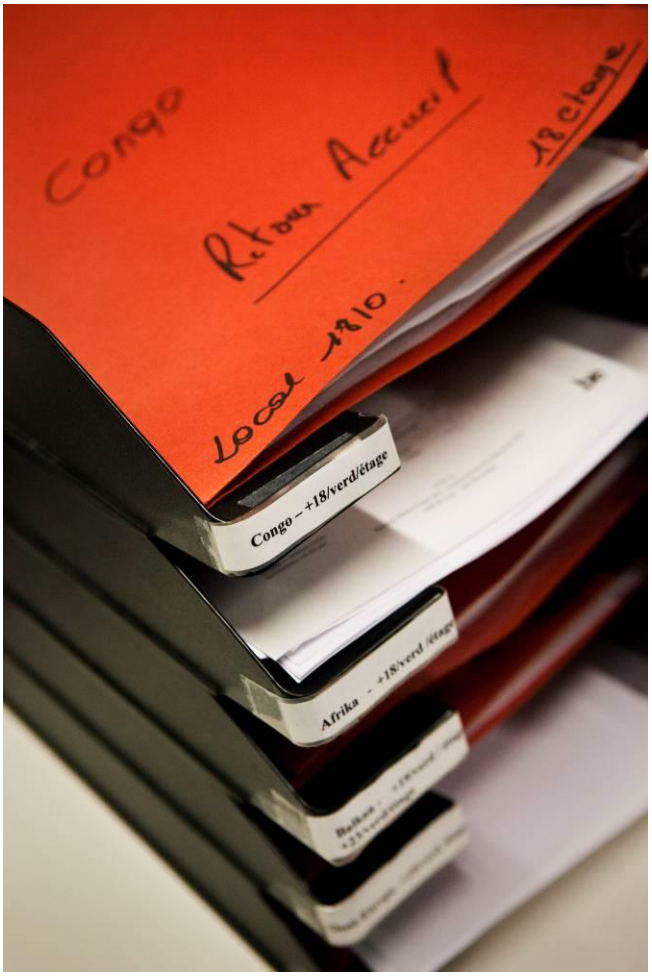
UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final



INTRODUCTION

On 1 June 2011, the European Commission adopted an Amended Proposal ("**Amended Proposal**" or "**Amended Recast Proposal"**) for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, (COM(2009) 554).[1]

The Amended Proposal modifies the previously issued Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) published in October 2009 ("**2009 Recast**").[2] Through the Amended Proposal, the European Commission sought to address the concerns and reconcile the positions of the EU Council of Ministers and the European Parliament.

In line with its supervisory function,[3] the Office of the United Nations High Commissioner for Refugees ("**UNHCR**") has monitored the application of the Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing refugee status ("**the Directive**" or "**APD**").[4]
In addition, UNHCR has undertaken extensive research on the application of key provisions of the Directive in selected Member States.[5] The findings of the research revealed significant divergences in asylum practice across the EU, as well as gaps in law and practice in the implementation of the APD. The numerous exceptions, discretionary and optional provisions in the Directive have allowed the emergence of widely diverging and, in some cases, problematic procedures. The research provides solid evidence of the need to develop and adopt a second generation legislative act.

Therefore, UNHCR welcomes the Commission's Amended Proposal which would significantly improve the quality and efficiency of the asylum systems in the EU and further harmonize protection standards in line with the objective of establishing a Common European Asylum System ("**CEAS**") by 2012, as confirmed by the European Council in the Stockholm Program[6] and reiterated by the Justice and Home Affairs ("JAH") Council in June 2011.[7]

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[1] European Union: European Commission, *Amended Proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final, at: http://www.unhcr.org/refworld /docid/4e3941c22.html

[2] European Union: European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, 21 October 2009, COM(2009) 554 final; 2009/0165 (COD), at: http://www.unhcr.org/refworld/docid/4ae960022.html .

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

[4] European Union: Council of the European Union, *Council Directive 2005/85/EC of of 1 December 2005 on Minimum Standards on procedures in Member States for granting and withdrawing refugee status*, 1 December 2005, 2005/853/EC, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF

[5] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: http://www.unhcr.org/refworld/docid/4bab55752.html

[6] European Union: Council of the European Union, *The Stockholm Programme - An Open And Secure Europe Serving And Protecting Citizens***,** December 2009, OJ 2010/C 115/01, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF

[7] European Union: Council of the European Union, *Council Conclusions on Borders, Migration and Asylum Stocktaking and the way forward,* 3096th JUSTICE and HOME AFFAIRS Council meeting Luxembourg, 9 and 10 June 2011, at: http://www.consilium.europa.eu/uedocs/cms_data/docs /pressdata/en/jha/122508.pdf

While retaining some elements of the 2009 recast, the Amended Proposal has introduced significant changes to accommodate concerns expressed by the EU Council of Ministers and individual Member States. It strikes a balance between Member States' practical requirements and those stemming from international law and the case law of the Court of Justice of the European Union ("**CJEU**") and of the European Court of Human Rights ("**ECtHR**"). To reconcile the demands of the Council, the Commission has adjusted the proposal through compromise wording which defines safeguards needed to maintain consistency with international and European refugee and human rights law and high quality standards of asylum decision-making.

In response to the demands put forward by Member States, the Amended Proposal also introduces more procedural devices to: (a) combat misuse or abuses of the asylum system and, (b) reduce costs.

To **prevent misuse of asylum procedures** the Amended Proposal introduces simplified procedures[8] (the simpler the procedure, the easier in principle it should be to identify non-genuine claims); training for the determining authority[9] (so that it is equipped with the knowledge and skills necessary to identify those whose claims have no link to the criteria for protection); and strengthened obligations for applicants for international protection to cooperate with the competent authority.[10] In addition, it extends the possibilities for channelling fraudulent applications into accelerated procedures and for declaring them manifestly unfounded.[11]

To **avoid increased costs**, the Commission has introduced provisions aimed at ensuring swift, accurate and high quality first instance decisions (frontloading), reducing the need for appeals.[12] With fewer appeals, the related costs (notably of reception conditions pending final decisions and of the procedure itself) will be reduced. Swifter identification of unfounded claims will also contribute to limiting costs.

In addition, a number of important proposed amendments have been introduced to bring the Directive more closely in line with European and international human rights and refugee legal standards, including as expressed in recent case law from the CJEU and the ECtHR (referred to in detail below). Other amendments have been made to reflect the requirements introduced by the Treaty on the Functioning of the European ("**TFEU**").[13]

The Amended Proposal represents a major positive step forward towards establishing common procedures for the granting or withdrawing of international protection as required by Article 78 (2) (d) of the TFEU. However, its provisions may not yet be sufficient to establish "***common procedures***" for the granting or withdrawing of a "***uniform status*** […] ***valid throughout the Union***".[14] In fact, the Amended Proposal still

[8] Article 24 APD on "Specific procedures" has been deleted.
[9] Article 4 (3) Amended Proposal. See footnote 1.
[10] Article 13 (1) Amended Proposal. See footnote 1.
[11] Article 31 (6) (e) Amended Proposal. See footnote 1.
[12] According to Eurostat, in 2010 an average of 26.76% of first instance decisions in France, Germany and UK were overturned at the appeal or review stage.
[13] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 30 March 2010, OJ 2010/C 83/01, at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083: SOM:EN: HTML
[14] Article 78 (2) (a) TFEU, *ibid*, emphasis added.

contains discretionary and optional provisions and the proposed legislative act – a Directive – may not be adequate to fulfill this purpose.[15]

Under the current Directive, an effective illustration of the divergences in asylum practice allowed by the optional provisions of the APD (some of which are maintained in the Amended Proposal) is the application of the safe country of origin concept. The generic formulation of Article 30 (5) APD (and of Article 37 (3) of the Amended Proposal) permits wide divergences in the information sources used by Member States to determine safe countries of origin. This fact, combined with major differences in the designation criteria applied, will inevitably result in inconsistency in the designation of safe countries of origin. The absence of harmonisation is evident from UNHCR's 2010 research on the application of the APD, which made a comparison among the three states which currently have in place a public national list of safe country of origin. At the time of UNHCR's research, France had designated 15 countries as safe, Germany 29 and the UK 24. Given that the purpose of the Directive is to establish harmonized minimum standards[16] between Member States' asylum systems, one would expect substantial correlation between the lists. However, only one country (Ghana) appeared on the list of all three States – although in the UK, Ghana was considered a safe country of origin for male applicants only.[17]

In addition, UNHCR regrets that the proposal does not address some problematic provisions such as, for instance, the European safe third country concept.

In the observations below, UNHCR comments only on amendments which differ from those of the 2009 recast proposal. Therefore, these comments should be read in conjunction with UNHCR's comments to the 2009 recast[18] which remain valid. In a few instances, the observations below complete UNHCR' comments to the 2009 recast and, in some cases, suggest that different wording may be more effective to achieve the aims of the Amended Proposal and of the Common European Asylum System.

Some of UNHCR's recommendations would require the substantive amendment of parts of the APD which remained unchanged in the Commission's proposal. In these cases, aware of the recast rules and considering the importance of the amendments proposed, UNHCR suggests that consideration be given to use of Article 8 of the Interinstitutional Agreement on the more structured use of the recasting techniques for legal acts.[19]

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[15] See paragraph on: Purpose of the Directive.
[16] Article 1 APD. See footnote 4.
[17] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, page 336, at: http://www.unhcr.org/refworld/docid/4c63e52d2.html
[18] UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, at: http://www.unhcr.org/refworld/docid/4c63ebd32.html
[19] Article 8: "*Where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission's proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis*". European Union*, Interinstitutional Agreement on a more structured use of the recasting technique for legal acts*, 2007/C 77/01, 21 November 2001, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:077:0001:0003:EN:PDF.

1. Purpose of the Directive

The Amended Proposal states that its purpose is to "*establish common procedures*"[20] for granting and withdrawing international protection. The wording mirrors Article 78 (2) (b) TFEU.[21] However, the provisions it contains may be insufficient because of the derogations that are still possible. Moreover, the nature of the proposed legislative act - a Directive – may raise questions about whether this instrument can achieve the declared purpose.

A Directive is a legal act[22] leaving Member States a wide margin of discretion when transposing it. In certain cases, as for the optional provisions, the discretion is absolute. The use of an instrument like a Directive was congruous for the achievement of "*minimum standards*", the declared purpose of the first phase asylum instrument.[23] The establishment of "*common procedures*" and of a "*uniform status of asylum valid throughout the Union*", as required by EU primary and secondary[24] law, cannot be achieved with a Directive. This would arguably require a legislative instrument with direct effect, namely a Regulation.

Because the initial 2009 Recast proposal was issued prior to the entry into force of the TFEU, when the Treaty Establishing the European Community still required minimum standards, it necessarily had to take the form of a Directive which would amend the existing APD. However, since December 2009, the TFEU requires common procedures. The notion of "*common procedures*" in comparison to "*minimum standards*" implies a higher degree of regulatory power of the Union.[25] This can be achieved more effectively through a regulation.[26]

It would appear that the adoption of a regulation would be in accordance with the principle of subsidiarity as set out in Article 5 (3) of the Treaty on European Union ("**TEU**")[27], as well as with the principle of proportionality, as set out in Article 5 (4) TEU. [28] This is because the objective of the Amended Proposal, (the establishment of common procedures in Member States for granting and withdrawing international protection) cannot be sufficiently achieved by the Member States and, given its scale and effects, it would be better achieved at the EU level,

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[20] Article 1 Amended Proposal. See footnote 1.
[21] See footnote 13.
[22] See CHAPTER 2, SECTION 1 and specifically Articles 288 and 289 TFEU. See footnote 13.
[23] Article 1 APD, see footnote 4.
[24] European Union: *DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, L337/9, Article 1, available at: http://www.unhcr.org/refworld/docid/4f197df02.html
[25] See: European Union: European Parliament, *Setting up a Common European Asylum System Study: Report on the application of existing instruments and proposals for the new system*, 2010, p.291, at: http://www.unhcr.org/refworld/docid/4e3bd6362.html
[26] *Ibid*. p.59
[27] European Union, *Consolidated version of the Treaty on European Union*, 30 March 2010, OJ 2010/C 83/01, at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML
[28] *Ibid.*

Recommendation: UNHCR suggests consideration be given to the use of a Regulation as a more effective legislative act to reach a Common European Asylum System, in line with the TFEU's obligations, potentially in a future next legislative phase.

2. Definitions

UNHCR supports the modified definition introduced by Article 2 (d) of the Amended Proposal of "***Applicant in need of special procedural guarantees***". This provision introduces a clear definition[29] of this category as jointly requested by France, Germany and the UK.[30]
Article 2 (d) specifies that there are differences between procedural needs, on the one hand, due to the situation of certain applicants; and their material and reception requirements on the other. It recognises that certain applicants (e.g. survivors of sexual violence) may require more time and psychological support to overcome trauma and explain their experience during an interview.

The modified definition, along with the new formulation of Amended Article 24, does not create a "*new status category*". A person should not be considered in need of procedural guarantees only because s/he belongs to one of the exemplified categories listed in Article 2 (d). A case by case assessment is necessary to establish whether, due to his/herpersonal condition or experiences, a person is in need of more time and/or relevant support to present the elements of his/her application.

For instance, an older person is not automatically in need of *special procedural guarantees* because of his/her age. However, it is possible that because of conditions associated with the age of a particular applicant, s/he may require more time to articulate the elements of his/her claim.

UNHCR further welcomes the inclusion of "*sexual orientation, gender identity, serious physical illness and mental illness disorder*" as grounds for inclusion of applicants in the category of applicants in need of special procedural guarantees; a provision requested by the European Parliament.[31]

UNHCR supports the introduction of Article 2 (q), providing a definition of "***subsequent application***". It serves to clarify its meaning in the framework of the European Commission's efforts to make the subsequent application concept more easily understandable throughout the Amended Proposal.

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[29] *"applicant in need of special procedural guarantees" means an applicant who due to age, gender, sexual orientation, gender identity, disability, serious physical illness, mental illness, post traumatic disorders or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.*

[30] European Union, Council of the European Union, German, French and United Kingdom delegations, *Joint contribution of the German, French and United Kingdom delegations regarding the proposals for a directive laying down standards for the reception of asylum seekers and for asylum procedures*, 27 June 2011, 12168/11, para 5, at: http://register.consilium.europa.eu/pdf/en/11/st12/st12168. en11.pdf

[31] European Union, European Parliament, *Texts Adopted at the sitting of Wednesday 6 Aril 2011*, P7_TA-Prov(2011)0136, Amendment 13, at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0136+0+DOC+XML+V0//EN&language=EN

According to the Amended Proposal, "*subsequent application means a further application made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his/her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1)".*
UNHCR notes that the word "*including*" may generate confusion as it seems to imply that implicitly and explicitly withdrawn claims are a subcategory of negative decisions taken in final instance. UNHCR would suggest replacing the wording "*including*" with "*or after*".
Article 2 (q) cross refers to Article 28 Amended Proposal on "Procedures in the case of implicit withdrawal or abandonment of the application". In order to bring consistency within the text, UNHCR suggests adding "or abandonment of the application" also to Article 2 (q).

In addition, UNHCR notes that confusion may also result from inclusion in the definition of "subsequent application", of "*cases where the applicant has explicitly withdrawn his/her application*" without further specifying the requirements for such an explicit withdrawal. This may create a risk of violation of the *non-refoulement* principle.

According to the Amended Proposal, the consequences of an explicit withdrawal of an application may be three:

1. the claim is rejected,
2. the claim is discontinued; or
3. the claim is discontinued without a decision.

The Amended Proposal indicates that, in accordance with Article 46 (1) (b) on effective remedies, if a claim is discontinued or is discontinued without a decision, it should be possible for the case to be reopened, where applicable.[32] Consequently, in UNHCR's view, it should not be considered as a subsequent application.

With regard to explicitly withdrawn claims, the definition of Article 2 (q) of the Amended Proposal should only include claims that, following explicit withdrawal, have been rejected. In principle, however, no claim should be rejected without an analysis of the merits. In this framework, UNHCR would support the inclusion of claims rejected after explicit withdrawal within the definition of subsequent application only if Article 27 of the Amended Proposal is modified to include a clause that requires an adequate examination of its substance before the rejection. This requirement would mirror Article 28 (1) of the Amended Proposal requiring an examination of the merits. Another means to address this problem to some degree would be to ensure that the proposed obligation for Member States to inform applicants about the consequences of explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) is maintained.[33]

UNHCR notes that the Amended Proposal intends, *inter alia*, to "*enable Member States to deal appropriately with a* ***large number of simultaneous asylum claims***". To this

[32] Art. 46 (1) (b): *"Member States shall ensure that applicants for international protection have the right to an effective remedy before a court or tribunal, against the following: […](b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 27 and 28."*
[33] On the possibility to consider an explicitly withdrawn claim as a subsequent application, provided that the applicant is duly informed about the consequences of the withdrawal, see *Setting up a Common European Asylum System Study,* page 334. See footnote 25.

end, rules have been revised regarding access to procedures (Article 6 (4) Amended Proposal), conducting personal interviews (Article 14 (1)), and standard maximum duration of asylum procedures (Article 31 (3) (b)).[34]

Taking into account the potentially significant impact and different approaches to the interpretation of these provisions, UNHCR would recommend consideration of a new provision defining the meaning of "large number" and of "simultaneous" applications".

Recommendations:

- ✓ UNHCR would suggest replacing the word "*including*" with "*or after*" in Article 2 (q)
- ✓ With regards to explicitly withdrawn claims, UNHCR recommends specifying in article 2 (q) that only applications rejected following explicit withdrawal be considered as subsequent applications.
- ✓ UNHCR would support the inclusion of claims rejected after explicit withdrawal within the definition of subsequent application only if Article 27 Amended Proposal is modified to include a clause requiring an adequate examination of its substance before rejection. The proposed obligation for Member States to inform applicants about the consequences of the explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) would also assist in addressing the problem that could otherwise result from this provision.
- ✓ UNHCR recommends consideration of a new provision defining the meaning of "large number" and of "simultaneous" applications.

3. Responsible authorities

Article 4 (2) (b) of the Amended Proposal reintroduces the possibility for Member States to provide that, in the framework of border procedures[35], an authority other than the determining authority is responsible for granting or refusing permission to enter. Considering that the provision of Article 4 (2)(d) of the current APD[36] has not been maintained or reintroduced, UNHCR understands that Article 4 (2) does not grant to the authority other than the determining authority the prerogative to examine the claim or to interview the applicant at the border. UNHCR would oppose any different interpretation.

To mitigate the danger of *refoulement*, decisions refusing permission to enter cannot be taken without the opinion of the determining authority on the applicant's potential need for protection. The Amended Proposal does not qualify the opinion of the determining authority as binding. However, this mandatory opinion, coupled with the requirement that the authority responsible for refusing permission to enter must have appropriate knowledge or receive the necessary training, should ensure – in principle – that all the elements of a claim are properly taken into account. It addition, and in order to ensure that the authority refusing permission to enter has the necessary knowledge, UNHCR

[34] Amended Proposal, Explanatory Memorandum, para 3.1.1. See footnote 1.
[35] Article 43 Amended procedure. See footnote 1.
[36] Article 4 (2) APD: "*However, Member States may provide that another authority is responsible for the purposes of : "[…] (d) processing cases in the framework of the procedures provided for in Article 35 (1)*"[border procedures]. See footnote 4.

supports the recommendation of the European Parliament[37] that such authority's personnel should always receive the necessary training to fulfill its obligations. To this end, the wording of Article 4 (4) Amended Proposal should be modified.[38] The disjunctive "***or***" in the provision should be replaced by "***and***".

The list of subjects to be included in the mandatory training for the determining authority (Article 4 (3) Amended Proposal) has been linked to the list of subjects in Article 6 (4) of the Regulation establishing the European Asylum Support Office ("**EASO**").[39] Unlike the 2009 recast, the list does not include evidence assessment, an essential topic for determining international protection needs. However, evidence assessment is one of the modules of the European Asylum Curriculum ("**EAC**"),[40] which is part of the training established and managed by EASO. In addition to including evidence assessment and other essential topics for the determining authority, the EAC has the potential to contribute very significantly to harmonizing different asylum procedures, which is also a central purpose of the Amended Proposal.

The Amended Proposal only requires Member States to "*take into account*" the EAC and the training established by EASO. In UNHCR's view, the harmonization goal would better be served if the formulation were modified to ensure that the EAC is actually used by Member States to train the determining authority. To that extent, UNHCR recommends amendment of Article 4 (3) as follows: "*Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010* ***and*** *the training established and developed by the European Asylum Support Office*".

Recommendations:

- ✓ UNHCR recommends that Article 4 (3) be modified as follows: "*Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010~~. Member states shall also take into account~~* ***and*** *the training established and developed by the European Asylum Support Office*".
- ✓ UNHCR recommends that in Article 4 (4) of the Amended Proposal, "***or***" be replaced by "***and***", to ensure adequate training and knowledge for authorities empowered to deny permission to enter the territory of a Member State.

[37] Amendment 18. See footnote 31.
[38] Article 4 (4) Amended Proposal: "*Where an authority is designated in accordance with paragraph 2, Member States shall ensure that the personnel of that authority have the appropriate knowledge* ***or*** *receive the necessary training to fulfil their obligations when implementing this Directive*". Emphasis added. See footnote 1.
[39] European Union, *Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office*, 19 May 2010, No 439/2010, Article 6 (4), at: http://www.unhcr.org/refworld/docid/4c075a202.html
[40] For more information on the EAC, please see: http://www.asylum-curriculum.eu

4. Access to procedures

UNHCR appreciates the proposed change made in the Amended Proposal aimed at simplifying and clarifying the text of the recast, including with regard to the link between "*make a request*" and "*lodge an application*" for international protection (Amended Proposal, Article 12 (1)).. The proposal makes clear that a person who 'makes a request' must be registered as an applicant, and must have an effective opportunity thereafter to 'lodge an application' under national law which triggers further specific obligations.

UNHCR also understands the logic underlying proposals for simplified wording regarding the obligation to facilitate access to procedures.[41] The Amended Proposal requires that "*the personnel of authorities that are likely to receive*" the declaration of a person who wishes to make an application for international protection "*has relevant instructions and receives the necessary training*". However, to avoid any misunderstanding, it would be preferable – as provided in the initial 2009 recast proposal – to specify or at least to provide a non-exhaustive list of authorities likely to receive such declarations, which should accordingly receive relevant instructions and training. As an alternative, non-binding approach, such guidance could be developed in the context of practical cooperation among the Member States, potentially under the auspices of the EASO.

Recommendation: UNHCR suggests specifying authorities which are likely to receive declarations from persons who wish to make an application for international protection. Such authorities should accordingly receive relevant instructions or training. As an alternative, non-binding approach, such guidance could be developed in the context of practical cooperation among the Member States, potentially under the auspices of the EASO.

5. Information and counseling at border crossing points and in detention facilities.

The provision on information and counseling at border crossing points and in detention facilities has been simplified to give more flexibility to Member States in the implementation of these rules.[42]

UNHCR notes that information is essential to ensure effective access to the asylum procedure.[43] However, differently from the 2009 recast, the Amended Proposal requires Member States only to provide information on the possibility of requesting international protection, and not on the procedures to be followed.

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[41] Article 6 (3) amended proposal. See footnote 1.

[42] European Union, European Commission, *Detailed Explanation of the Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status*, COM (2011)319 final ANNEX, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2011:0319%2801%29:FIN:EN:PDF

[43] See UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para e (ii), at: http://www.unhcr.org/refworld/docid/3ae68c6e4.html; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, Conclusions, letter g), 31 May 2001, EC/GC/01/12, at: http://www.unhcr.org/refworld/pdfid/3b36f2fca.pdf.

UNHCR understands that, in accordance with Article 12 (1) (a) of the Amended Proposal, as soon as a person declares his/her wish to **make** an application for international protection, s/he should be informed of the procedures to be followed in order to **lodge** an application, including at border crossing points and in detention facilities.

In fact, Article 12 (1) (a) of the Amended Proposal requires Member States to ensure that all **applicants** for international protection are informed of "*the procedures to be followed* […] *during the procedures*". According to Article 2 (c), a person becomes an applicant for international protection as soon as s/he "*has made*" a request for international protection i.e. s/he declares the intention to seek protection in a Member State.

In light of the above, UNHCR understands that the Amended Proposal maintains the obligation for Member States to provide information on the procedures to be followed in order to lodge an application for international protection, including at crossing points, and detention facilities. Nevertheless, the concept would be clearer if the wording of the 2009 recast[44] would be retained.
UNHCR notes that the Amended Proposal has modified the provision related to interpretation. The 2009 recast required Member States to provide for "*interpretation arrangements in order to **ensure** communication between persons who want to make an application for international protection*" and relevant authorities.[45] By contrast, the Amended Proposal requires Member States to provide *"interpretation arrangement to the extent necessary to **facilitate** access to procedure*". Effective communication with the asylum-seeker is essential[46] to ensure access to procedures and avoid breaches of the *non-refoulement* principle. In UNHCR's view, the wording used in the Amended Proposal ("facilitate") may not adequately guarantee a sufficient degree of effective communication. Therefore, UNHCR would suggest replacing the verb "to facilitate" with "to ensure". Communication technology allows remote interpretation, and so the modified provision should not increase the cost of asylum procedures.

Article 8 (2) of the Amended Proposal on access for organizations providing advice and counseling to applicants for international protection at border crossing points has been modified. Unlike the initial 2009 recast, it does not explicitly include detention facilities amongst the list of places accessible to the abovementioned organizations. However, UNHCR understands that access for organizations providing advice and counseling to detention facilities is still foreseen under Amended Article 23 (2),[47] and would strongly support this interpretation.

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[44] I.e. the text of Article 7 of the 2009 proposal. See footnote 2.
[45] Article 7 (2) of the 2009 recast. *Ibid*.
[46] UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, page 13, 10 February 2005, at: http://www.unhcr.org/refworld/docid/42492b302.html
[47] Article 23 (2) of the Amended Proposal: "*Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant , in accordance with Article 10(4) and Article 18(2)(b) and (c) of Directive […/…/EU] [the Reception Conditions Directive]*"

Recommendation: UNHCR recommends modifying the last part of Article 8 (1) as follows: "*Member States shall provide interpretation arrangements to the extent necessary ~~to facilitate~~ **to ensure** access to procedures in these areas*"

6. Requirements for the examination of applications

The provision granting the applicant and his/her legal adviser access to the country of origin information ("**COI**") used by the determining authority in taking a decision[48] has been moved to Article 12 (2) (d) of the Amended Proposal. This proposed modification has the potential to ensure more consistency in the text.

UNHCR welcomes the introduction of an additional element in Article 10 (3) (d), enabling personnel taking decisions to seek advice on religious matters where an applicant claims international protection on religious grounds.

7. Requirement for a decision by the determining authority

UNHCR notes that, in line with Article 4 (2) (b) of the Amended Proposal, certain decisions may be taken by an authority other than the determining authority. However, the title of Article 11, which refers to the determining authority, might be seen as implying that some of the requirements of this provision, such as the obligation to provide decisions in writing, may not apply to decisions granting or refusing permission to enter in a border procedure. UNHCR thus suggests deletion of the reference to the determining authority from the title of Article 11 of the Amended Proposal.

UNHCR strongly supports the proposed amendment preventing Member States from taking a single decision covering all dependants when the disclosure of details regarding sexual orientation and gender identity would jeopardize the interest of an applicant.[49]

Recommendation: UNHCR suggests deletion of the words "by the determining authority" from the title of Article 11 of the Amended Proposal

8. Guarantees for applicants for international protection

UNHCR appreciates that paragraphs 12 (1) (a) and (f) have been amended to indicate that applicants should be informed in a language that the applicant understands or is reasonably supposed to understand. In the context of an asylum procedure, where so much depends on the testimony of an individual, effective communication with the

[48] Article 9 (2) (b) of the 2009 Recast. See footnote 2.

[49] For a compilation of documents on sexual orientation and gender identity, please see: UN High Commissioner for Refugees, *Selected Documents Relating to Sexual Orientation and Gender Identity Relevant to International Refugee Protection*, October 2009, at: http://www.unhcr.org/refworld/docid/4ae99c582.html

asylum-seeker is essential. UNHCR considers it necessary to provide information to every applicant for international protection in a language which he or she actually understands.[50] Assumptions that an applicant speaks or understands the official language of his or her country of origin may be incorrect.[51]

The Amended Proposal introduces an important additional guarantee: Member States should ensure that applicants for international protection are informed about the possible consequences of an implicit or explicit withdrawal of their application. UNHCR has advocated for the introduction of such a guarantee. [52] This is important to ensure that provisions on the rejection of explicitly withdrawn claims[53] or on the time limit for the re-opening of implicitly abandoned claims are not applied to applicants who have no intention of withdrawing or abandoning their applications.

UNHCR reiterates its previous comments on the fact that, due to the impact of the certification of a claim as inadmissible, only the determining authority should carry out the admissibility interview. [54] In this framework, UNHCR appreciates that the obligation to provide applicants for international protection with the services of an interpreter for submitting their case has been extended to the admissibility interview. [55]

As noted above,[56] the provision granting the applicant access to COI used by the determining authority in taking a decision[57] has been moved to Article 12 (2) (d) of the Amended Proposal. UNHCR supports this modification as it has the potential to ensure more consistency in the text. However, in addition to moving the provision, its language has been modified. Unlike the 2009 recast requiring that COI used by the determining authority is "*made available*" to the applicant,[58] the Amended Proposal foresees that such information "*shall not be denied*".

UNHCR would support a positive rather than negative phrasing of the obligation. A positive obligation for Member States to provide COI used for the purposes of taking a decision is preferable as it would acknowledge the importance of such information in line with the principle of equality of arms.

In addition, UNHCR reiterates its recommendation in comments to the 2009 recast, namely that the obligation to make COI available to the applicant is expanded to include all other expert evidence which may be taken into consideration in the determination of

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[50] See, *inter alia*, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,* page 13. See footnote 46

[51] See: European Union, European Agency for Fundamental Rights, *The duty to inform applicants about asylum procedures: The asylum-seeker's perspective*, September 2010, chapter 5, at: http://fra.europa.eu/fraWebsite/attachments/asylum-access-info-report-092010_en.pdf

[52] *Improving Asylum Procedures: Detailed Research on Key Asylum Procedures Directive Provisions,* page 181, see footnote 17.

[53] Article 27 (1) Amended Proposal.

[54] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, para 25, see footnote 18.

[55] Article 12 (1) (b) Amended Proposal. See footnote 1.

[56] See paragraph on: Requirements for the examination of applications.

[57] Article 9 (2) (b) of the 2009 Recast. See footnote 2.

[58] *Ibid.*

the application (including medical reports, psychological evaluation, witness statements, etc.).[59]

Recommendations:

- ✓ UNHCR recommends providing information to every applicant for international protection in a language which he or she actually understands.
- ✓ UNHCR suggests a positive rather than negative phrasing of the obligation for Member States to provide the applicant with COI used for the purposes of taking a decision.
- ✓ UNHCR reiterates its recommendation in comments to the 2009 recast, namely that the obligation to make COI available to the applicant is expanded to include all other
- ✓ expert evidence which may be taken into consideration in the determination of the application (including medical reports, psychological evaluation, witness statements, etc.).

9. Personal interview

A new provision related to a large influx of third country nationals has been added (Article 14 (1) second indent). In these cases Member States may provide that the personnel of an authority other than the determining authority be temporarily involved in the interview. In such cases, the personnel should receive in advance the necessary training, including on the elements listed in Article 6 (4) (a) to (e) of the EASO Regulation. UNHCR does not oppose this amendment provided that the **necessary training** specified in the provision is delivered along with other training developed and managed by EASO, and that an appropriate definition of "*large influx of third country nationals*" is established.[60]

UNHCR notes that the provision related to the interview of dependants in cases when a person has made an application on their behalf (Article 14 (1) last indent) has been simplified. UNHCR supports this simplification as long as the proposed requirements for a personal interview in the Amended Proposal are maintained, including with regard to confidentiality.

UNHCR notes with satisfaction that its recommendation[61] related to the change of the term "*competent authority*" in Article 13(2) (b), as it appeared in the initial 2009 recast, has been adopted. In accordance with the objective of designating a single determining authority, Article 14 (2) (b) of the Amended recast proposal reads "*determining authority*".

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[59] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, para 9, see footnote 18

[60] See paragraph on: Definitions.

[61] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection,* page 22. See footnote 18.

Recommendations:
Article 14 (1) second indent is acceptable provided that the **necessary training** it foresees is delivered along with other training developed and managed by EASO, and that an appropriate definition of "*large influx of third country nationals*" is provided.

10. Content of a personal interview

UNHCR reiterates its support to recast Article 16[62] specifying the basic content requirements of the personal interview and the opportunity given to the applicant to provide explanations regarding elements which may be missing and/or inconsistencies/contradictions in his/her statements. Applicants should, in addition, also be afforded the opportunity, during the personal interview, to provide explanations in relation to contradictions/inconsistencies between evidence put forward by him/her and other sources of relevant information.

11. Requirement for a personal interview

In article 13 (3) (a), the alternative conjunction "or" has been replaced by "and". It requires that the person conducting "*the interview is competent to take account of the personal **and** general circumstances of the application*". UNHCR strongly supports this provision as well as the inclusion of sexual orientation and gender identity among the general circumstances surrounding the application that the interviewer must be competent to take into account.[63] Bias and invasive questioning by interviewers as well as misplaced reliance by interviewers on stereotypical images of how lesbian, gay, bisexual and transsexual persons, as well as persons with intersex conditions ("**LGBTI**" persons) act, and with regard to regional and cultural differences, have been reported.[64] The proposed modification would ensure appropriate interviews, and consequently, higher quality of first instance decisions.
UNHCR notes and welcomes the fact that the wording of Amended Article 15 (3) (c) on the selection of a competent interpreter has been simplified without changing its meaning.

UNHCR understands that the request of the applicant to have a same sex interviewer and interpreter may – at times - be based on discriminatory reasons. In this regard, UNHCR would like to recall Article 2 of the 1951 Convention requiring refugees to conform to laws and regulations of "*the country in which he finds himself*".[65]

UNHCR supports the new adjective used to qualify modalities of the interviews with minors which – according to Article 15 (3) (e) - must be conducted in a child

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[62] *Ibid.* page 25.
[63] These modifications are in line with amendment 43 of the European Parliament. *Texts Adopted.* See footnote 31.
[64] UN High Commissioner for Refugees, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, 22 September 2010, paras 30-31, at: http://www.unhcr.org/refworld/docid/4cff9a8f2.html
[65] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, at: http://www.unhcr.org/refworld/docid/3be01b964.html

"*appropriate*" manner. In UNHCR's view, "*appropriate*" is broader than "*friendly*" which was used in the 2009 recast.

12. Reports and recording of personal interviews

Unlike the 2009 recast, article 17 (1) of the Amended Proposal does not require a transcript of the interview, but rather a "*thorough report containing all substantial elements*". In addition, the Amended recast proposal provides Member States with the possibility to record the personal interview in audio or audio-visual form.
In its comments to the 2009 recast, UNHCR expressed its concerns about the possibility that the current formulation of the APD may be interpreted by some Member States as allowing the interviewer to determine which parts of the applicant's statement are worthy of recording in the written report. This may result in relevant oral evidence not being recorded, and/or the meaning and accuracy of statements being unwittingly altered.[66] While noting that the formulation of the Amended Proposal improves considerably the text of the current Directive, UNHCR considers it may be insufficient to guarantee the accuracy of the report. Therefore, UNHCR would support modification of the provision to ensure that a transcript of every personal interview is made[67] unless the interview is audio or audio-visually recorded, and the recording is admissible as evidence in appeal procedures. Considering that at least seven Member States already require interviewers to make a *verbatim* written transcript of the interview,[68] while others utilize various comprehensive formats for recording interview statements, the re-introduction of this requirement should not represent an excessive burden on Member States' asylum systems.

UNHCR notes with satisfaction that its recommendation related to the recording of the personal interview of each applicant has been followed.[69] In UNHCR's view, the most effective way of making an accurate record of a personal interview is by audio or audio-visual recording.[70] It does not employ the human resources of the interviewer during the interview; it helps to eliminate disputes regarding the accuracy of the written report; it may help in addressing allegations of inaccurate interpretation during the personal interview, and provide a useful evidentiary resource to both the decision-maker and, in the case of any eventual appeal, the adjudicator. Clearly, rules on data protection and confidentiality apply and must be taken into consideration.

UNHCR supports the new safeguard introduced by proposed Article 17 (3), first indent, requiring the assistance of an interpreter to ensure that the applicant is fully informed of the content of the interview report.

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[66] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, para 16. See footnote 18.
[67] See: *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, page 41. See footnote 5. See also: UN High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, para 4.3.8, at: http://www.unhcr.org/refworld/docid/42d66dd84.html
[68] *Improving Asylum Procedures - Detailed Research,* page 162. See footnote 17.
[69] UN High Commissioner for Refugees, *Improving Asylum Procedures- Key Findings and Recommendations,* page 42. See footnote 5.
[70] UN High Commissioner for Refugees, *Building in Quality – A Manual on Building in High Quality Asylum System, Further Developing Asylum Quality in the European Union (FDQ)*, September 2011, page 26, at: http://www.unhcr.org/refworld/docid/4e85b36d2.html

Recommendation: UNHCR recommends modifying Article 17 in the Amended Proposal to ensure that a transcript of every personal interview is made unless the interview is audio or audio-visually recorded, and the recording is admissible as evidence in appeal procedures.

13. Provision of legal and procedural information free of charge in procedure at first instance

The provisions related to legal assistance and representation have been modified and divided between five articles in an effort to simplify and make the Amended Proposal more easily understandable. UNHCR supports this step.

Article 19 (1) of the Amended Proposal does not depart significantly from the initial 2009 recast proposal. It reaffirms the obligation for Member States to provide applicants for international protection – upon request – with legal and procedural information including, at least, "*information on the procedure in the light of the applicant's particular circumstances and explanations of reasons in fact and in law in the event of a negative decision"*.

The UK Solihull project,[71] which piloted early access to legal advice in first instance procedures, demonstrated, *inter alia*, that a more interactive role for legal representatives before, during and after the substantive asylum interview, and prior to the decision, may have the potential for large savings on support and appeal costs. This is because the resulting improved quality in the first instance negative decisions rendered them more sustainable, with a consequent reduction in allowed appeals. According to the European Commission, 14 Member States already provide a right to legal aid or legal advice in first instance procedures.[72] This was recently confirmed by research conducted by ECRE/ELENA.[73] In light of the above, UNHCR reiterates its recommendation in comments to the 2009 recast, namely that free legal assistance should be provided in first instance, ideally encompassing the preparation of procedural documents,[74] and legal representation (with participation of the representative) in the personal interview.

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[71] See J. Aspden, *Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission*, October 2008, at: http://www.asylumaid.org.uk/data/files/publications/137/ Solihull Pilot.pdf

[72] European Union, European Commission, *Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/Ec of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 8 September 2010, COM(2010) 465 final, para 5.1.5, at: http://eur-lex.europa.eu /LexUriServ/LexUriServ.do?uri=COM:2010:0465:FIN:EN:PDF

[73] European Council on Refugees and Exiles, *ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe*, October 2010, at: http://www.unhcr.org/refworld/docid/4d243cb42.html

[74] Also the European Parliament considers that assistance in the "*[p]reparation of the necessary procedural documents*" should be provided to the applicant in first instance procedures. *Texts Adopted at the sitting of Wednesday 6 Aril 2011,* Amendment 48. See footnote 31.

Recommendation: UNHCR recommends that consideration be given to modifying recast Article 19 (1) to remove the possibility of limits on free assistance at first instance to the provision of information on the procedure and to the explanation of reasons in fact and in law in the case of a negative decision. Free legal assistance in first instance should ideally also encompass the preparation of procedural documents and legal representation, including participation in the personal interview.

14. Free legal assistance and representation in appeal procedures

Article 20 of the Amended Proposal does not depart substantially from the 2009 recast, but for the reintroduction of a "merits test". Article 20(3) provides that "*Member States may provide that free legal assistance and representation not be granted if the applicant's appeal is considered by a court or tribunal to have no tangible prospect of success*." UNHCR's 2010 research highlighted that in some Member States, merits tests were applied in ways that could lead to arbitrary restriction of access to legal assistance on appeal, contrary to the APD.[75] In UNHCR's view, exceptions to the provision of free legal aid should be made only where the applicant has adequate financial means.[76]

Recommendation: UNHCR recommends deleting Article 20 (3) Amended Proposal allowing Member States to subject the provision of free legal assistance and representation to "merits tests"..

15. Conditions for provision and scope of legal and procedural information free of charge and free legal assistance and representation.

To accommodate existing national asylum systems, Article 21 (1) introduces the possibility for Member States to allow - in addition to non-governmental organizations - government officials or specialized services of the State to provide legal and procedural information and legal assistance. UNHCR understands that specialised services of the State may include also lawyers directly paid by the State.

Given the growing complexity of asylum procedures and the issues involved, incorrect advice could have catastrophic consequences for the applicant, and increase the likelihood of an incorrect decision by the authorities. Qualified and high-quality providers of information and legal assistance are therefore essential. Moreover, providers of information and legal assistance should always act in the interest of the applicant.

In addition, Article 23 1 (a) of the Amended Proposal addresses access to information in the applicant's file in cases where security issues may arise. The Amended Proposal

[75] *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations,* page 87. See footnote 5. See also Devon law Centre*, Asylum Appellate Project – Final Report*, March 2010.
[76] *UNHCR: Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, page 18. See footnote 46.

alters the wording of the 2009 recast, limiting such access where "*disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised.*" In these cases, Member States should grant access to information to the legal adviser or counselor who has undergone a security check "*or, at least, to specialized services of the state that are allowed under national law to represent the applicant for this specific purpose*". In UNHCR's view, these specialized services should be competent qualified and act in the interest of the applicant.

The need for acting in the interest of the applicant is equally pressing in cases where security issues may arise, and can be addressed through appropriate screening and authorization of legal advisers and representatives, or training and obligations for specialized services of the State. In this context, UNHCR would support explicit reference to qualifications, competence and the requirement to act in the interest of the applicant in this provision.

Recommendation: UNHCR recommends modifying Article 21 (1) to require that providers of legal and procedural information and of legal assistance are qualified, competent and that they act in the best interest of the applicant. A similar adjustment should be made to Article 23 (1) dealing with legal assistance, including potentially by specialized services of the state, in cases raising security issues.

16. Applicants in need of special procedural guarantees

The title of Article 24 in the Amended Proposal has been changed to make it clearer, along with the Amended Proposal's definition,[77] that special procedural needs and special reception needs (to be addressed in the Reception Conditions Directive) may be different.

No new status category is being created, contrary to the concerns of some observers. The Amended Proposal does not impose any form of *prima facie* recognition procedure. It suggests that the assessment of whether an applicant is in need of specific procedural guarantees should be done on a case-by-case basis.

UNHCR welcomes the inclusion of wording underlining the need to identify applicants in need of specific procedural guarantees a timely fashion.[78] In this connection, and with due regard to the theme of horizontal issues – as requested by the European

[77] Article 2 (d) Amended Proposal.
[78] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, page 8. See footnote 18.

Parliament[79] - the Amended Proposal suggests a reference to the distinct mechanism provided for in the Amended Reception Condition Directive.[80]

UNHCR further welcomes the fact that Article 24 also applies if, at a later stage in the procedure, it becomes evident that an applicant is in need of special procedural guarantees.[81] This provision has the potential to address, *inter alia*, the needs of LGBTI persons who can at first be reluctant to talk about intimate matters, including sexual or gender-based violence, particularly when their sexual orientation or gender identity is negatively perceived in their country of origin.[82]

In UNHCR's view, Article 24, read in conjunction with Article 2 (2) defining vulnerable persons, fairly and pragmatically takes into account the need for procedural guarantees that certain applicants may possess such as more time to present the elements of their application. In addition, the early identification mechanism required by the provision would limit scope for abuse.
According to Article 24 (3) of the Amended Proposal, applicants in need of special procedural guarantees cannot be channelled into accelerated procedures. It reaffirms that which is already stated in Article 24 (2), namely that applicants in need of special procedural guarantees should be granted *inter alia* sufficient time and relevant support to present the elements of their application,

17. Guarantees for unaccompanied minors

The provisions in the Amended Proposal related to unaccompanied minors have been modified in several areas.

As recommended previously by UNHCR,[83] the exception to the obligation to appoint a representative of a separated/unaccompanied minor when s/he is married has been deleted.[84]

UNHCR supports the proposed requirement that the admissibility interview must be conducted by a person with the necessary knowledge of the special needs of the child. This is in line with UNHCR's guidelines.[85]

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[79] *Texts Adopted at the sitting of Wednesday 6 Aril 2011,* Amendment 54. See footnote 31.
[80] European Union, European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)*, COM(2011) 320 final, 1 June 2011, Article 22, at: http://ec.europa.eu/home-affairs/news/intro/docs/110601/320/1_EN_ACT_part1_v12.pdf
[81] Article 24 (1).
[82] See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *Policy paper: the recast of the EU asylum Procedure and Reception Directives*, July 2011, page 7, at: http://www.ilga-europe.org/home/publications/policy_papers/the_recast_of_the_eu_asylum_procedure_and_reception_directives_july_2011
[83] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, page 28. See footnote 18.
[84] Article 25 (2) Amended Proposal. See footnote 1.
[85] UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para 5.12, at: http://www.unhcr.org/refworld/docid/3ae6b3360.html

Unlike the 2009 recast, Article 25 (4) of the Amended Proposal does not foresee the provision of legal assistance free of charge to unaccompanied minors at first instance, but only of legal and procedural information. At the same time, it extends the provision of this information to representatives. UNHCR welcomes this. However, in light of the particular vulnerability of unaccompanied minors, UNHCR reiterates its recommendation above concerning legal assistance in general,[86] namely that consideration should be given to modifying Amended Article 25 (4) to remove the possibility of limiting free assistance at first instance to the provision of information on the procedure and to the explanation of reasons in fact and in law in the case of a negative decision. Free legal assistance in first instance provided to unaccompanied minors should preferably also encompass the preparation of procedural documents and legal representation, including participation in the personal interview.

UNHCR notes and supports Amended article 25 (5), requiring that in case a medical examination to determine age produces unclear results, the applicant should be considered as a minor. UNHCR also supports the deletion of the possibility to subject free legal assistance in second instance to "merit tests" as currently provided for by Article 25 (6).

Recommendation: UNHCR recommends that consideration should be given to modifying Amended Article 25 (4) to remove the possibility to limit free assistance at first instance, given its specific importance in the case of unaccompanied minors. Free assistance should preferably encompass the preparation of procedural documents and legal representation, including participation in the personal interview.

18. Procedures in case of implicit withdrawal or abandonment of the application

UNHCR considers that a negative decision on an application for international protection should be issued only where there has been an appropriate evaluation of all relevant facts, based on which the determining authority has established that the applicant is not a refugee or does not qualify for subsidiary protection. UNHCR has expressed its concern about existing Article 20 APD, allowing Member States to reject an application on the basis of non-compliance with procedural obligations, such as a failure to comply with reporting duties.[87] In UNHCR's view, an applicant for international protection may fail to comply with reporting or communications requirement for a variety of reasons which are not necessarily related to the absence of protection needs.[88] Consequently, UNHCR strongly supports Article 28 (1) in the Amended Proposal, providing that the determining authority can reject a claim which is considered implicitly withdrawn or abandoned **only after** an adequate examination of its merits.

Article 46 (1) (b), on the right to an effective remedy, corresponds to Article 39(1) (b) of the current APD. It provides for an effective remedy against the refusal to re-open an

[86] See paragraph on: Provision of legal and procedural information free of charge in procedure at first instance
[87] *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, page 29. See footnote 46.
[88] *Improving Asylum Procedures - Detailed Research,* page 196. See footnote 17.

application after it has been discontinued pursuant to its implicit or explicit withdrawal or abandonment. It implies that the legal consequence of a "*decision to discontinue*" a claim involves the possibility for the applicant to request its re-opening. The Amended Proposal maintains this possibility. This is UNHCR preferred option.

In addition, to ensure that negative decisions are issued only following appropriate evaluation of all relevant facts, Article 28 (2), first indent, in the Amended Proposal foresees that an applicant who reports again to the competent authority after a decision to discontinue his/her application is entitled to make a new application which shall not be subject to the "subsequent application" procedures. UNHCR supports this provision.

UNHCR notes that Article 28 (2), second indent, of the Amended Proposal establishes a one-year time limit after which the applicant's case can no longer be re-opened, or a new application may be treated as a subsequent application. Member States can then either reject it after an adequate examination of its substance, or channel it into "the subsequent application procedures" foreseen by Article 40 and 41. Provided that the guarantees contained in the Amended Proposal are observed, and that the proposed obligation is maintained to inform applicants about the consequences of the implicit or explicit withdrawal of their applications (Article 12 (1) (a) in the Amended Proposal), UNHCR does not oppose the introduction of this time limit.

Recommendation: Article 28 (2), second indent, establishing a one year time limit is acceptable provided the guarantees contained in the Amended Proposal are observed, and if the proposed obligation to inform applicants about the consequences of the implicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) is maintained.

19. Procedures in case of withdrawal of the application

According to the Amended Proposal, the consequences of an explicit withdrawal of an application may be three:

1. the claim is rejected,
2. the claim is discontinued; or
3. the claim is discontinued without a decision.

In case of withdrawal, UNHCR recommends that Member States take a decision to discontinue the examination, or discontinue the examination of the application without taking a decision, and enter a corresponding notice in the applicant's file. The overwhelming majority of the Member States surveyed in one of UNHCR's research[89] use one of these two options.

UNHCR notes that Article 27 of the Amended Proposal maintains the possibility for Member States to reject a claim that has been explicitly withdrawn. Such withdrawal may occur either before the applicant has substantiated the application in accordance with

[89] *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, page 45. See footnote 5.

Article 4 of the Qualification Directive ("**QD**"),[90] and/or before the determining authority has evaluated all the elements of the claim and completed the examination in accordance with Article 4 QD. A decision to reject the application should not be issued when there has been no examination of its merits.

UNHCR would support maintaining the possibility for Member States to reject a claim that has been explicitly withdrawn only if Article 27 of the Amended Proposal is modified to include a clause that requires an adequate examination of its substance before the rejection. This requirement would mirror Article 28 (1). UNHCR would also support the possibility for Member States to reject a claim that has been explicitly withdrawn if the proposed obligation for Member States to inform applicants about the consequences of the explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) is maintained.

Recommendation: Article 27 (1) is acceptable if it is modified to include a clause that requires an adequate examination of its substance before the rejection. The proposed obligation for Member States to inform applicants about the consequences of the explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) would also assist in addressing the problem that could otherwise result from this provision.

20. Examination procedures

UNHCR reiterates that it is in the interest of all parties to ensure efficient, as well as fair, procedures for the determination of international protection needs within a reasonable time. This requirement emerges, *inter alia*, from CJEU case law.[91] The right to have "his or her affair handled […] within a reasonable time" is also set out by Article 41 of the EU Charter of Fundamental Rights[92] which, according to some expert commentators, can be "invoked where Member States implement EC law",[93] including in asylum procedures.

Overly lengthy procedures have been seen to present a "pull factor" where it would appear that certain categories of applicants claim international protection only in order to enjoy reception conditions for the time the determining authority takes to reach a decision. Quality decisions taken within a short timeframe are in the interest of Member

[90] European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, at: http://www.unhcr.org/refworld/docid/4157e75e4. html

[91] Rights guaranteed by EU law require a "*procedural system which is […] capable of ensuring that the persons concerned will have their applications dealt with objectively and within a* ***reasonable time*** …." In *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie,* C-327/02, European Union: European Court of Justice, 16 November 2004, paragraph 27, at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0327:EN:HTML..

[92] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: http://www.unhcr.org/refworld/docid/3ae6b3b70.html

[93] Costello, C: *The European asylum procedures directive in legal context*, page 26, see footnote 71; see also UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures*, para. 32, 21 May 2010, at: http://www.unhcr.org/refworld/docid/4bf67fa12.html.

States as they would reduce the costs of both of procedures and reception conditions. This is one of the arguments underlying the frontloading principle. A decision taken within a reasonable time is also in the interest of applicants, who would not be left in uncertainty for long periods.

Article 31 (3) of the Amended Proposal adds two reasons Member States may invoke to extend, for a maximum of six further months, the proposed six-month deadline to conclude the procedure. These are: where "b) *a large number of third country nationals or stateless persons simultaneously request international protection which makes it impossible in practice to conclude the procedure within the six-month time-limit;* [and] *(c) where the delay can clearly be attributed to the failure of the applicant to comply with his/her obligations under Article 13"*.

As expressed above,[94] to render this and related provisions clear and consistently implementable, UNHCR considers it necessary to define "*a large number of third country nationals or stateless persons [that] simultaneously request international protection."* In the absence of a clear definition, this concept could lead to unjustified prolongation of procedures, with associated costs and uncertainties for all concerned.

Article 31 (3) of the Amended Proposal, last indent, adds the possibility for Member States to postpone the conclusion of procedures where the determining authority cannot reasonably be expected to decide within the time limit of six months "*due to an uncertain situation in the country of origin which is expected to be temporary*". As explained by the Commission,[95] there is no time limit on this possibility, and the postponement of the conclusion of the application could be extended indefinitely. While UNHCR accepts that in certain circumstances, the examination of application could validly be suspended or deprioritised for short periods, this should be done in narrowly circumscribd cases and for short periods only, which are subject to regular reassessment.

UNHCR considers in its initial form, this newly introduced derogation as problematic in terms both of international refugee law as well as EU fundamental rights. It is not in line with the case law of the CJEU[96] and could trigger increased costs in procedures and reception entitlements, which Member States are bound to continue to afford for the duration of the "uncertain" situation.

UNHCR notes that the Amended Proposal already provides Member States with the possibility to extend the time limit for the examination of the application. In fact, cases where there is "*an uncertain situation in the country of origin*" fall within the scope of application of Article 31 (3)(a) which grants Member States the possibility to extend the time limit of "f*urther six months where: (a) complex issues of* ***facts*** *and law are involved;* […]:.[97]

"Uncertainty" is an inherent feature of most or all modern conflicts and other situations in which persecution and serious harm are prevalent. Asylum decision-makers are required in a large majority of cases to weigh the risk of future persecution or serious harm in situations that are dynamic. It is thus questionable whether such a provision is useful in

[94] See paragraph on: Definitions
[95] *Detailed Explanation of the Amended Proposal*, page 11. See footnote 42.
[96] See footnote 912.
[97] Emphasis added.

the context of asylum procedures in the EU today, or can be reconciled with the obligation to provide protection to those who meet the legal criteria under European and international law.

Article 18 of the EU Charter of Fundamental Rights states that the "*Right to asylum **shall be guaranteed** in accordance with the Geneva Convention […]*".[98] The Charter enshrines a positive obligation for Member States to provide international protection. Such postponement of the enjoyment of the right to asylum would potentially be at variance with the Charter.

The 1951 Geneva Convention[99] and the European *acquis* provides for cases where an "uncertain situation" in the country of origin ends. When the circumstances in connection with which the applicant has been granted international protection have ceased to exist, cessation[100] or withdrawal of his/her status can be invoked.[101] Rather than postponing the conclusion of the procedure, Member States should process applications, grant international protection where required, and make use of the instruments provided for by the EU instruments to withdraw international protection when the circumstances in connection with which the applicant has been granted international protection cease to exist. Considering the above, UNHCR strongly recommends deleting the last indent of Article 31 (3). If the provision is maintained, a defined, short maximum period of time for such possible suspension should be specified.

Article 31 (5) (b) of the Amended Proposal includes the possibility for Member States to prioritise the examination of an application "*where the applicant is vulnerable within the meaning of Article 22 of the Reception Directive[102] or in need of special procedural guarantees, in particular unaccompanied minors"*. The proposed provision ensures that the APD rules regarding one of the so called "horizontal issues" is aligned with other relevant provisions of the second generation asylum instruments. UNHCR welcomes this proposed modification.

Recommendations:

- ✓ UNHCR recommends defining "*a large number of third country nationals or stateless persons [that] simultaneously request international protection.* [103]
- ✓ UNHCR strongly recommends deleting the last indent of Article 31 (3) or, if it is retained, inserting a short maximum period for such a suspension.

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[98] *Charter of Fundamental Rights of the European Union,* Article 18, emphasis added. See footnote 92.
[99] UN General Assembly, *Convention Relating to the Status of Refugees*. See footnote 92
[100] UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, at: http://www.unhcr.org/refworld/docid/3e50de6b4.html
[101] See Articles 14 and 16 of the Qualification Directive. European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, at: http://www.unhcr.org/refworld/docid/4157e75e4.html . See also Articles 37 and 38 of the APD. See footnote 4.
[102] *Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)*. See footnote 809.
[103] See paragraph on: Definitions.

21. Accelerated Procedures

Article 31 (6) allows Member States to "*provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated* ***and/or conducted at the border in accordance with Article 43***" in seven exhaustive cases. In response to the concerns expressed by some Member States, it repeats what was already made clear by the 2009 recast,[104] namely that accelerated procedures can also be applied at the border.

In addition, Article 31 (6) allows Member States to examine at the border claims made **within** their territory in seven exhaustive grounds. In these cases, UNHCR understands that Article 4 (2) does not grant to the authority other than the determining authority the prerogative to examine the claim or to interview the applicant at the border.[105]

Article 31 (6) (re)introduces two further grounds to the exhaustive list of reasons required for channeling a claim into accelerated procedures.

According to Article 31 (6) (e),[106] the examination of a claim may be accelerated if the "*applicant has made clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his/her claim clearly unconvincing"* in relation to whether s/he qualifies for international protection.[107] In UNHCR's view, only claims which are "clearly abusive" (i.e. clearly fraudulent) or "manifestly unfounded" (i.e. unrelated to the criteria for the granting international protection)[108] can be channeled into accelerated procedures. This was agreed by the Executive Committee of the High Commissioners Program and its member states in 1983.[109]

The first part of this proposed provision appears to take into account UNHCR's position. In fact, it requires that the representation made by the applicant is "**clearly false,"** i.e. clearly abusive/fraudulent. However, the second part does not seem to be in line with the same position as, due to the disjunctive conjugation "**or**", it allows MS also to channel into accelerated procedures claims of applicants which have made "**obviously improbable**" representations. In UNHCR's view, the fact that an applicant has made "improbable representations" does not necessarily imply that his/her claim is clearly abusive, fraudulent or unfounded.

UNHCR strongly supports the range of safeguards established in the Amended Proposal for claims that are channeled into accelerated procedures. These include: no omission of the personal interview in such cases (Article 14(2)); reasonable time limits for the adoption of the decision and an adequate and complete examination, including of

[104] Article 37 (1) (b) 2009 recast.
[105] See paragraph on: Responsible authorities
[106] Corresponding to Article 27(4) (g) APD.
[107] Article 31 (6) (e) Amended Proposal.
[108] See UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, at: http://www.unhcr.org/refworld/docid/3b36f2fca.html. See also: UN High Commissioner for Refugees, *Note on International Protection*, 7 July 1999, A/AC.96/914, para III B, at: http://www.unhcr.org/refworld/docid/3ae68d98b.html
[109] UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, at:http://www.unhcr.org/refworld/docid/3ae68c6118.html

manifestly unfounded claims (Article 31 (7)); reasonable time limits for appeal (Article 46 (4)); and the possibility to ask for suspensive effect of an appeal (Article 46 (6)). These are essential to ensure that claims in accelerated procedures are examined fairly and correct decisions are made. Provided these safeguards are maintained, UNHCR could accept the use of accelerated procedures for "clearly false" claims. However, this would require that the subsequent wording related to "improbable representations" were omitted, or the word "**or**" replaced by the word "**and**".

According to Article 31 (6) (g), the examination of a claim may be accelerated if "*the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law*". While improving the text by adding "*may for serious reasons be considered*", Article 31 (6) (g) reintroduces Article 23 (4) (m) of the current APD.

As stated above, in UNHCR's view, the examination of an application can only be accelerated in cases of manifestly unfounded or clearly abusive claims. The newly proposed provision encompasses claims falling outside these categories (as implicitly recognized by Article 32 (2)), and which may be based on serious grounds requiring detailed examination including with regard to exclusion[110] considerations. Moreover, there are more effective and proportionate measures to deal with cases involving *national security or public order.*
Given the severe consequences of a negative decision in cases of applications raising issues of national security, the Parliamentary Assembly of the Council of Europe[111] has recommended that these be exempted from accelerated procedures. UNHCR supports this recommendation. This ground should therefore not be invoked to accelerate such claims.[112]

Article 27 (7) of the 2009 recast, requiring Member States to conduct an adequate and complete examination of the application before rejecting it as manifestly unfounded, has been deleted and the current formulation of Article 28 APD retained.[113] UNHCR considers that national procedures for the determination of international protection needs may usefully include special provisions for dealing expeditiously with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure,[114] limited to manifestly unfounded or clearly abusive claims. In consideration of the above, UNHCR would consider acceptable the deletion of Article 27 (7) of the 2009 recast only if the word "or" contained in Article 31 (6) (e) is replaced by "and".

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[110] See UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, at: http://www.unhcr.org/refworld/docid/3f5857684.html
[111] Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), para 8.9, at: http://www.unhcr.org/refworld/docid/43f349e04.html
[112] *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, page 32. See footnote 468.
[113] Article 32 (2) Amended Proposal.
[114] *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, para (d). See footnote 1088.

In this framework, UNHCR notes with satisfaction that a claim involving elements of national security or public order (which is *per se* neither manifestly unfounded nor clearly abusive) cannot be declared as manifestly unfounded.[115]

Recommendations:

- ✓ UNHCR recommends that in Article 31 (6) (e), "or" is replaced by "and".
- ✓ UNHCR recommends deleting Article 31 (6) (g) allowing for the acceleration of claims related to national security or public order.
- ✓ UNHCR would consider acceptable the deletion of Article 27 (7) of the 2009 recast only if the disjunctive conjunction "or" contained in Article 31 (6) (e) is replaced by the conjunction "and".

22. Inadmissible applications

Article 33 (2) (d) of the Amended Proposal has been modified with new provisions aiming to clarify the concept of and rules on inadmissibility, notably concerning subsequent applications. The Article no longer refers to "*identical applications*" but to "*subsequent application[s], where no new elements or findings relating to the examination"* of whether the applicant qualifies for international protection are present.

Considering that a preliminary examination is still required to verify if new elements or findings have arisen before certifying a subsequent application as inadmissible, UNHCR supports this modification. However, UNHCR reaffirms that an explicitly withdrawn claim should only be considered as a subsequent application – and in this case subject to an inadmissibility procedure – only if it is rejected after an analysis of its merits; or if the obligation for Member States to inform the applicant of the consequences of withdrawal, as provided for by proposed Article 12 (1) (a), is maintained.[116]

Recommendation: UNHCR would consider acceptable the provision that an explicitly withdrawn claim should be considered as a subsequent application, and certified as inadmissible, only if it is rejected after an analysis on the merits, or if the obligation for Member States to inform the applicant of the consequences of withdrawal under Article 12 (1) (a) is maintained.

[115] The list contained in Article 32 (2) Amended Proposal does not include Article 31 (6) (g).
[116] See paragraph on: Guarantees for applicants for international protection and on Procedures in case of withdrawal of the application.

23. Special rules on admissibility interviews

Article 34 of the Amended Proposal has been aligned with the general rule on personal interviews,[117] requiring that the interviewer does not wear a military or law enforcement uniform. UNHCR supports this amendment.

According to proposed Articles 34 (1) and 14 (1) an authority other than the determining authority may conduct the admissibility interview. An incorrect certification of a claim as inadmissible may have dramatic impact on the life of an applicant. It is therefore necessary that the interviewer be qualified and prepared. UNHCR would accept that an authority other than the determining authority conduct the admissibility interview only if the concerned personnel receives the *initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010* ***and*** *the training established and developed by the European Asylum Support Office,"* including the European Asylum Curriculum.

Recommendation: An authority other than the determining authority could conduct an admissibility interview only if it receives the "*initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010* ***and*** *the training established and developed by the European Asylum Support Office"* including the European Asylum Curriculum.

24. The concept of first country of asylum

UNHCR welcomes the Amended Proposal's new formulation for Article 35,[118] which provides the applicant with the possibility to rebut the presumption of safety in cases where the first country of asylum concept is applied. Other recommendations expressed in UNHCR's previous comments are reiterated.[119]

25. The European safe third country concept

A new paragraph requiring Member States periodically to inform the Commission about the countries to which the European safe third country is applied has been added to the Amended Proposal in Article 39. UNHCR supports this addition.

However, UNHCR continues to question the utility and consistency with international refugee law of the European safe third country concept. No minimum principles and guarantees appear to govern the procedure under Article 39 of the Amended Proposal.

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[117] Article 15 (3) (d) Amended Proposal.
[118] I.e. replacing the term "*sufficient*" with "effective" protection, drawing up an annex to the Amended Proposal setting out the criteria for effective protection and requiring Member States to take into account the criteria for safety under the "Safe third country provision". See: *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, page 33. See footnote 18.
[119] *Ibid.*

The implication is that access to territory and to an asylum procedure may be denied altogether to asylum seekers who may have protection needs. Such a denial could be at variance with international refugee law.

Some Member States have strongly supported the maintenance of this provision. However, the findings of recent research conducted by UNHCR revealed that it has never been used.[120] UNHCR accordingly reiterates its previous recommendation to delete the European safe third country concept.

Recommendation: UNHCR recommends deleting Recital 36 and Article 29 from the Amended Proposal, relating to the European safe third country concept.

26. Subsequent applications

UNHCR welcomes and supports the European Commission's effort to simplify provisions relating to subsequent applications throughout the text, in particular by adding a definition of the concept.[121]

Article 40 of the Amended Proposal also clarifies significantly the procedure applying to subsequent applications. It foresees that, if after a preliminary examination[122] it is determined that no new elements have arisen or have been presented by the applicant, a subsequent application must be declared inadmissible.[123] Member States may provide that no interview is conducted during the preliminary examination.[124]

In a change from the 2009 recast,[125] the Amended Proposal reintroduces the possibility to consider implicitly withdrawn claims as subsequent applications.[126] In this framework, UNHCR supports the requirement that only implicitly withdrawn claims rejected after an adequate analysis of their merits can be considered as subsequent applications and channeled (along with other subsequent applications as defined by Article 2 (q) of the Amended Proposal) into a preliminary examination to establish if new elements or findings have arisen (under Article 40 (2) of the Amended Proposal).

By contrast, the Amended Proposal includes in the definition of "subsequent application" explicitly withdrawn claims that have been rejected.[127] Consequently, these can be channeled through the preliminary examination foreseen by Article 40 (2).

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[120] *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendation.* See footnote 5.
[121] See comments to Article 2 (q) in paragraphs on: Definitions, Procedures in case of implicit withdrawal or abandonment of the application and . Procedures in case of withdrawal of the application
[122] Article 40 (2). See footnote 1.
[123] Article 40 (5). *Ibid.*
[124] Article 42 (2) (b). *Ibid.*
[125] Article 24 of the 2009 recast deleted the possibility to reject implicitly withdrawn claims. They could be discontinued and re-opened upon request from the applicant.
[126] Article 2 (q) Amended Proposal. See footnote 1.
[127] Article 2 (q) Amended proposal. See paragraph on: Definitions.

Because applications for international protection should not, in principle, be rejected without an examination of their merits, UNHCR would support this provision only if Article 27 of the Amended Proposal is modified to include a clause that requires an adequate examination of its substance before the rejection (mirroring Article 28 (1)). The proposed obligation for Member States to inform applicants about the consequences of the explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) would also assist in addressing the problem that could otherwise result from this provision

In order to simplify the Directive, the 2009 recast provision regulating subsequent applications has been split, with the addition of a newly-proposed Article 41. This allows Member States to derogate from certain guarantees when an applicant introduces a new claim after a final decision to reject his/her previous subsequent application, or a decision to declare it inadmissible. The derogations relate to: 1) the right to remain in the territory, 2) the acceleration of the examination and 3) the time limit for accelerated and inadmissibility procedures.

1) When a Member State wants to make an exception to the **right of the applicant to remain** in the territory – after s/he has lodged a subsequent application for the "third time"[128] – it must be satisfied that the return decision will not lead to direct or indirect *refoulement*. This is in line with the case law of the European Court on Human Rights.
2) As a general rule, UNHCR does not oppose the **acceleration of subsequent applications** if the original claim has been examined on the merits, and new elements do not appear to reinforce the earlier claim.[129]

3) UNHCR notes that reduction of **time limits** for accelerated and inadmissibility procedures – when the applicant has lodged a subsequent application for the "third time"[130] – may serve as a justified procedural device to dissuade unfounded multiple applications. It should nevertheless be possible for people with protection needs to pursue their claims within reasonable timeframes.

Recommendation: Under Article 40 of the Amended Proposal, UNHCR would consider acceptable the possibility to channel explicitly withdrawn claims that have been rejected into a preliminary examination, if Article 27 Amended Proposal is modified to include a clause that requires a an adequate examination of the substance of a claim. The proposed obligation for Member States to inform applicants about the consequences of the explicit withdrawal of their applications (Article 12 (1) (a) Amended Proposal) would also assist in addressing the problem that could otherwise result from this provision

27. Border procedures

Article 43 (1) (a) of the Amended Proposal, dealing with border procedures, cross-refers to Article 33 relating to inadmissibility. In this way, the Amended Proposal allows for the

[128] I.e. after an applicant has already lodged a subsequent application which has been declared inadmissible or rejected, and after the inadmissibility or rejection has been confirmed in appeal.
[129] See, *inter alia*, UNHCR *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,* page 31. See footnote 46.
[130] See footnote 128.

preliminary examination of subsequent applications (defined by Article 40 (2)) to be conducted at a Member State border.

The reference in Article 43 (1) (b) to Article 31 (6) of the Amended Proposal also allows Member States to examine at the border claims introduced **within** their territory which relate to the seven grounds for accelerated procedures, under the exhaustive list defined by Article 31 (6) (a) to (g) inclusive.[131] In these cases, UNHCR understands that Article 4 (2) does not grant to the authority other than the determining authority the prerogative to examine the claim or to interview the applicant on the substance of the application at the border. UNHCR would oppose any different interpretation.

28. The right to an effective remedy

The right to an effective remedy, in cases where entitlements guaranteed by EU law are affected, is a fundamental right under the EU Charter.[132] It is also one of the general principles of EU law.[133]

According to expert commentators, the right to an effective remedy would thus automatically be guaranteed even if the Directive were silent on the issue.[134] This underlines the essential nature of the rights concerned, and the unquestionable need to ensure that procedures facilitate their exercise in practice.

Article 46 of the Amended Proposal generally maintains the structure and the content of the 2009 recast's provision on this issue, which aimed to ensure the Directive would conform to international and EU law, including as expressed in settled case law of the CJEU and of the ECtHR.[135]

In the list of decisions against which the applicant is entitled to an effective remedy, the 2009 recast in Article 41 (1) (a) (iv) included the decision "*not to conduct an examination*

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[131] See paragraph on: Examination procedures

[132] "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal […]", Charter of Fundamental Rights of the European Union,* Article 47. See footnote 92

[133] See, *inter alia*, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: European Court of Justice, 28 July 2011, para 49, at: http://www.unhcr.org/refworld/docid/4e37bd2b2.html : "*That principle* [of judicial protection] *is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union* […]" ; *Arcor AG & Co. KG,* Case C-55/06, European Union: European Court of Justice, 24 April 2008, para 174, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0055:EN:HTML: "*That provision* [the right to appeal] *is an expression of the principle of effective judicial protection, which is a general principle of Community law stemming from the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, pursuant to which it is for the courts of the Member States to ensure judicial protection of an individual's rights under Community law"* ; *Booker Aquaculture Ltd and others v the Scottish Ministers*, Case C-20/00 and C-64/00, European Union: European Court of Justice, 10 July 2003, at: http://eur-lex.europa.eu/LexUriServ/_LexUriServ.do?uri=CELEX:62000J0020:EN:HTML para 65**:** "[…] *according to settled case-law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures.* […]",

[134] *Setting up a Common European Asylum System Study,* page 341. See footnote 25.

[135] For relevant case law see also *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, pages 39 to 42. See footnote 18.

pursuant to the application of" the European safe third country concept. Article 46 (1) (a) of the Amended Proposal, however, deletes it.

While UNHCR reaffirms its recommendation to delete Article 39 of the Amended Proposal on the European safe third country concept in general,[136] it takes the view that this omission of the explicit right to a remedy against decisions under this concept has no effect. As the list in Article 46 (1) is non-exhaustive[137] and the right to an effective remedy is a fundamental right and a general principle of EU law, the deletion cannot serve to remove or undermine the right in law.

Article 46 (3) confirms that during an appeal, the independent court or tribunal should conduct a review *ex nunc*[138] of facts and law.[139] UNHCR confirms its strong support for this provision.

Article 46 (4) maintains that the time limit for the applicant to exercise his/her right to an effective remedy must be "reasonable".[140] UNHCR affirms its support for this provision. However, taking into account the position of the European Parliament[141] and recent case law of the CJEU,[142] the legislators could consider setting fixed, reasonable minimum time limits for the applicant to exercise his/her right to an effective remedy. In bringing about closer harmonization, this would be a further step forward towards the establishment of "common procedures".

Article 46 (5) maintains the general requirement for requests for an effective remedy generally to have suspensive effect.[143] However, to satisfy calls for a "*provision on the*

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[136] See paragraph on: The European safe third country concept

[137] *Improving Asylum Procedures: Detailed Research on Key Asylum Procedures Directive Provisions,* page 427*,* see footnote 17.

[138] See, *inter alia*, *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, at: http://www.unhcr.org/refworld/docid/487f578b2.html, paras 112 and 119: "*A full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities* (see *Salah Sheekh*, cited above, § 136)"

[139] See: European Union, EU Court of Justice, *Wilson*, Case C-506/04, para 60, at: http://curia.europa.eu/jurisp/cgibin/gettext.pl?where=&lang=en&num=79939080C19040506&doc=T&ouvert=T&seance=ARRET : [A provision of a Directive] "*requires actual access within a reasonable period […] to a court or tribunal as defined by Community law, which is competent to give a ruling on both fact and law".*
On the scope of the review in appeal, see also *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, para 61. See footnote 133

[140] The CJEU has held that: "***detailed procedural rules governing actions for safeguarding an individual's rights under Community law […] must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".*** *Unibet,* C-432-05, European Union: European Court of Justice, 13 March 2007, para. 43, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0432:EN:HTML.

[141] "*The Member States shall set a minimum time limit of* ***forty-five*** *working days during which applicants may exercise their right to an effective remedy. For applicants under the accelerated procedure referred to in Article 27(6), the Member States shall lay down a minimum time limit of* ***thirty*** *working days*". Amendment 48 of the *Texts Adopted at the sitting of Wednesday 6 Aril 2011.* See footnote 31.

[142] "*With 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*." *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10. See footnote 133

[143] *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, at: http://www.unhcr.org/refworld/docid/4ab8a1a42.html para 108: *"Given the*

right to appeal that reconciles the demands of ECtHR case law with the need to have rapid and effective procedures in the case of abuse of the right of asylum",[144] Article 46 (6) widens the scope of exceptions to the general principle of suspensive effect of appeals.

This is proposed through (re)introduction of two grounds in the exclusive list in Article 31 (6), namely "*when the applicant has made clearly false or obviously improbable representations*"[145] and in cases of "*danger to national security or public order*".[146] In addition, the Amended Proposal foresees that exceptions to the general principle of suspensive effect can be made when a claim is considered inadmissible because "*another Member State has granted refugee status*". [147]

While reaffirming its recommendation to delete Article 31 (6) (g),[148] UNHCR does not oppose the modifications to Article 46 (6) broadening the scope of exceptions to the general principle of automatic suspensive effect, provided that the guarantees of Article 46 in the Amended Proposal are retained. These would require, under proposed Article 46 (6): full examination of both facts and law, including *ex nunc* examination of international protection needs; reasonable time limits to appeal, including in accelerated procedures; and the possibility for a court or tribunal to rule on whether the applicant may remain on the territory of the Member State pending the outcome of the appeal; as well as the possibility for the applicant to remain in the territory pending the outcome of the decision granting suspensive effect.

Conclusion

UNHCR welcomes the commitment shown by Member States in Council, successive EU Presidencies, the European Parliament and the European Commission to achieve progress on this sensitive and complex instrument. It remains apparent that gaps and inclarities in the existing Directive, as well as its numerous problematic applications, must be addressed through principled and practically implementable amendments. UNHCR supports efforts now underway to reach compromise on the text, in a manner which can enable Member States to avoid the risk of increased costs and potential misuse, while ensuring access to fair and high quality asylum decisions for those in need of protection. UNHCR stands ready to work with the EU institutions and states to achieve this end in line with the TFEU's objectives.

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irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect"

[144] *Joint contribution of the German, French and United Kingdom delegations regarding the proposals for a directive laying down standards for the reception of asylum seekers and for asylum procedures*, para II 4. See footnote 30.

[145] Article 31 (6) (e). See footnote 1.

[146] Article 31 (6) (g). *Ibid.*

[147] Article 33 (2) (a). *Ibid.*

[148] See paragraph on: **Examination** procedures

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