



**ECRE Comments on the Commission Proposal for
an Asylum Procedures Regulation**

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Summary of views

ECRE submits the following key observations and recommendations on the Commission proposal for a Regulation establishing a common procedure for international protection in the European Union:

1. **Article 15:** Applicants' access to free legal assistance should be strengthened through the deletion of the possibility for Member States to make such assistance conditional on merits testing.
2. **Article 30:** Member States' obligation to properly inform third country nationals in detention facilities or at border crossing points of the possibility to apply for international protection should not be conditional on any subjective and premature assessment of a person's vulnerability or need of international protection.
3. **Article 25:** Applicants for international protection expressing a wish for international protection must be provided with documentation certifying their status as an applicant as of the moment of making the application for international protection.
4. **Article 28:** The time limit for lodging an asylum application should be extended to at least 20 working days and non-compliance with this time limit should never lead to the rejection of an application as implicitly withdrawn or abandoned as long as the applicant is at the disposal of the authorities. Rejection of an application as implicitly withdrawn or abandoned under **Article 39** should remain optional for Member States.
5. **Article 4:** Given their crucial role in the design of the common procedure, 'registration' and 'lodging' of applications for international protection should be more accurately defined to properly reflect their respective functions in the asylum process.
6. **Articles 34 and 40:** Where a determining authority is unable to decide within the foreseen time limits for the accelerated examination procedure or the examination to determine the admissibility of an application, the Regulation should ensure a mandatory automatic referral to the examination procedure. The extremely short time limit of ten working days for the Member State of first application concluding the admissibility procedure on the basis of safe third country or first country of asylum concept and of eight working days in one specific case in the accelerated examination procedure must be deleted.
7. **Article 47:** The safe country of origin concept should be deleted as it is at odds with the obligation of Member States under Article 3 of the 1951 Refugee Convention to apply its provisions without discrimination as to race, religion or country of origin.
8. **Articles 44 - 45:** The application of the first country of asylum and safe third country concepts should always remain optional and the criteria for their application further strengthened to properly reflect jurisprudence and international human rights standards. The concept of sufficient protection should be deleted as an insufficient legal basis to deflect responsibility for refugee protection in both provisions.
9. **Articles 46 and 48 - 50:** The provisions on the EU designation of safe third countries or safe countries of origin should be deleted.
10. **Article 53:** The limitation with respect to the submission of new elements at the appeal stage must be deleted in order to ensure compliance with the requirement of a full and *ex nunc* examination of both facts and points of law in accordance with Article 47 of the EU Charter and the jurisprudence of the ECtHR and CJEU on the right to an effective remedy.
11. **Article 54:** As it is key to ensuring full respect for the principle of *non refoulement*, applicants' access to an appeal with automatic suspensive effect with respect to decisions taken in the common procedure must be consolidated.

Introduction*

The harmonisation at EU level of procedural standards applicable to the examination of applications for international protection has proven to be a challenging task. During the two phases of harmonisation of the asylum *acquis*, the debate on uniform procedural safeguards for applicants and the need for administrative efficiency has been constrained by the desire of Member States to maintain practices and legal concepts rooted in national administrative law and practice.

As part of an ambitious and fundamental reform of the EU asylum *acquis*,¹ the Commission proposal establishing a “common procedure for international protection in the Union”² marks an important shift in the approach taken by the EU institutions. Whereas the issue is currently regulated in a Directive,³ leaving considerable discretion to Member States as regards the transposition and implementation of the standards agreed at EU level in national law, the current proposal opts for a regulation as the means to bring about a higher level of harmonisation. The choice of legal instrument is justified by the objective to establish a “truly” common procedure and to achieve “a higher degree of harmonisation and greater uniformity in the outcome of asylum procedures across all Member States, thereby removing incentives for asylum shopping and secondary movements between Member States.”⁴

The current disparities between Member States as regards the level of procedural safeguards have been widely documented and seems interconnected to the flexibility and complexity of the EU recast Asylum Procedures Directive.⁵ Such divergence is certainly problematic from the perspective of the general architecture of the Common European Asylum System (CEAS) and needs to be addressed in view of the adverse effects it may generate for the protection of the fundamental rights of persons applying for international protection in the EU.

However, whether greater uniformity in procedural standards alone would be effective in removing incentives for asylum shopping and secondary movements, as assumed by the Commission, is more questionable. Research indicates that secondary movements are the result of numerous factors but primarily driven by the conditions or lack thereof in the country where protection was sought, rather than a perception of the level of procedural safeguards offered by a particular country.⁶ Other reasons include the influence of agents and smugglers, the presence of family and social networks, historical ties between countries and a general respect and belief in destination countries’ rule of law.⁷

The transformation of the recast Asylum Procedures Directive into a Regulation and the reduction of Member States’ levels of discretion may be the logical step required to achieve harmonised procedural

* ECRE thanks the members of its Asylum Systems Core Group for their comments. All errors remain our own.

¹ The reform of the EU asylum *acquis* consists of 7 legislative proposals reforming the building blocks of the CEAS, including further recasts of the Eurodac and Dublin Regulations and the Reception Conditions Directive, a proposal for a Regulation replacing the Qualification Directive and the transformation of the European Asylum Support Office (EASO) into an EU Agency for Asylum.

² European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* (hereafter “Commission proposal”), COM(2016) 476, 13 July 2016.

³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter “recast Asylum Procedures Directive”), OJ 2013 L180/60.

⁴ Commission proposal, Explanatory Memorandum, 3-4.

⁵ For an overview and analysis of current procedural standards in law and practice in 17 EU Member States plus Serbia, Switzerland and Turkey, see the annual reports and thematic reports published by the Asylum Information Database, available at www.asylumineurope.org.

⁶ See e.g. with respect to secondary movements of unaccompanied Afghan children, Christine Mougne, *Trees Only Move in the Wind: A Study of Unaccompanied Afghan Children in Europe*, June 2010, PDES/2010/05, available at: <http://goo.gl/VCxgpp>.

⁷ See e.g. Harriet Spinks, *Destination anywhere? Factors affecting asylum seekers’ choice of destination country*, Parliament of Australia, Social Policy Section, 2013, available at: <http://goo.gl/D7P72C>.

standards, but it also risks creating lower levels of procedural guarantees for asylum seekers as they traverse through the asylum procedure.

Firstly, the proposed deletion of the possibility for Member States to introduce or retain more favourable standards, potentially leaves a significant protection gap. Refugee and human rights law in general establish a level of protection that Contracting States are obliged to respect at a minimum without precluding them to apply higher standards.

To the extent that rules under EU asylum law set a binding norm from which no derogation is possible would force states to act in violation of their obligations under international or regional human rights instruments, where EU law norms are not compatible with the latter. Secondly, as will be discussed in more detail below, the Commission proposal also entails an obligation for Member States to apply highly problematic safe country concepts, whereas under the current Asylum Procedures Directive, this is purely optional for states.⁸

While such an approach may be logical from a harmonisation perspective, it proliferates the use of concepts that may obstruct in practice a full and fair examination of claims for international protection and entrench in the EU asylum *acquis* a policy of externalisation of protection obligations of EU Member States as pursued by the recent EU-Turkey Statement.⁹

Such an approach also raises important questions more generally regarding the overall purpose of harmonisation of asylum standards through EU law.

In ECRE's view, EU harmonisation should always be considered as a means to achieve a protection system that lives up to the promises of high protection standards,¹⁰ and can be a model for other regions in the world. In particular, as global forced displacement has reached an unprecedented level, the EU should lead by example and assume its fair share in protecting those fleeing conflict, persecution and serious human rights violations.

Therefore, further harmonisation should aim at establishing high standards of protection across the EU and raising protection standards where they are currently insufficient. It should under no circumstances be used as a pretext to engage in an exercise of lowering standards to the bare minimum required under human rights law as such an approach is on the long term self-defeating. In this regard, it should be noted that, contrary the Commission proposals relating to the reform of the Dublin Regulation or the Qualification Directive, the Asylum Procedures Regulation proposal is not supported by any impact assessment nor a comprehensive study on the implementation of the recast Asylum Procedures Directive. Moreover, a considerable number of Member States failed to meet the July 2015 deadline for transposition of the Directive.¹¹ Therefore, it should be noted that the current fundamental reform of the recast Asylum Procedures Directive is presented at a time where evidence on its potential impact, including on the degree of harmonisation that could be achieved, is limited.

⁸ See Articles 35-39 recast Asylum Procedures Directive. A considerable number of Member States have chosen not to transpose into national law or make use of one more of the 4 safe country concepts. See with regard to the safe third country and first country of asylum concepts, AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, and with regard to the safe country of origin concept, ECRE, "*Safe countries of origin*": *A Safe Concept?*, September 2015, available at: <http://goo.gl/IKJ2yu>.

⁹ European Council, *EU-Turkey statement*, 144/16, 18 March 2016, available at: <http://goo.gl/GquCbr>.

¹⁰ European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, OJ 2010 C115/32.

¹¹ With the exception of Article 31(3)(4) and (5) recast Asylum Procedures Directive, for which the deadline for transposition is 20 July 2018: Article 51(2) recast Asylum Procedures Directive.

Mainstreaming frontloading or procedural pitfalls?

In addition to the general objective of achieving greater uniformity in the outcome of asylum procedures across all EU Member States and removing incentives for secondary movements as mentioned above, the proposal claims to promote the objective of “ensuring fast but high quality decision making at all stages of the procedure”.¹² In order to do so, the proposal emphasises the importance of making sufficient resources available for “quick but solid” decision-making at the administrative (or first instance) stage of the procedure. ECRE has long advocated for the frontloading of asylum systems, the policy of investing in the quality of decision making at the first instance through the provision of sufficient resources for the competent authorities, training of their staff as well as key procedural guarantees, including free legal assistance, to enable applicants to submit all elements of their claims at the earliest possible stage.¹³

However, in ECRE’s view, frontloading is not about acceleration of the asylum procedure for its own sake. A rapid and effective decision making process is in the interest of both the applicants and Member States, provided that applicants for international protection have effective access to procedural guarantees to ensure that their fundamental rights are fully respected in practice. Seen from that perspective, the Commission proposal presents too much of a mixed bag of promising improvements from a fundamental rights perspective and measures aiming at enhancing expediency to such extent that fundamental rights may be seriously undermined. As will be discussed below, the provisions aiming at preventing so-called abuse of the system through the expansion of admissibility, accelerated and border procedures and the introduction of extremely short time limits for applicants, seem to introduce procedural pitfalls which may be difficult for the applicant to avoid in practice, even with free legal assistance.

Moreover, while non-compliance with deadlines imposed on applicants may result in the rejection of their application, non-compliance by state authorities in the various types of procedures envisaged under the proposal is generally not sanctioned. The effectiveness and feasibility of such time limits for asylum authorities in practice is arguably limited, in particular at the appeal stage, while the time pressure on the decision-making body could also have adverse effects as it may prompt less thorough examinations and decisions taken on applications for international protection.

ECRE’s comments and recommendations concentrate on key provisions in the Commission proposal which raise particular concerns from a fundamental rights perspective or overall fairness or effectiveness of the asylum procedure, without aiming to present a comprehensive article-by-article analysis. This paper should be read in combination with ECRE’s comments and observations on the other Commission proposals on the reform of the CEAS, in particular the proposal recasting the Dublin Regulation, the Reception Conditions Directive, and the proposal for a Qualification Regulation.

Analysis of key provisions

ECRE’s analysis of key provisions of the proposal is structured around 4 Chapters: (i) general provisions; (ii) basic guarantees and principles; (iii) administrative procedures; and (iv) the appeal procedure.

¹² Commission proposal, Explanatory Memorandum, 4.

¹³ ECRE, *The Way Forward, Europe’s role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <http://goo.gl/7l5m3v>, 38.

Chapter I. General provisions

1. Responsible authorities: Article 5

Article 5 further clarifies and simplifies Article 4 of the recast Asylum Procedures Directive by requiring Member States to designate one single authority as responsible for carrying out all key functions of the status determination procedure and enter into regular assessments of that authority's needs for carrying out its tasks properly.

However, **Article 5(1) and (3)** still leaves ambiguity as to the competent authority for determining the Member State responsible under the Dublin Regulation. ECtHR and CJEU jurisprudence relating to Dublin cases have clarified that decisions on the responsible Member State require an assessment of the applicant's risk of being subjected to *refoulement* or other human rights violations in that Member State.¹⁴ As the application of Dublin criteria is inextricably linked to a person's protection needs, this task should be assumed by the determining authority. This would not only constitute a better guarantee to ensure that protection considerations are fully taken into account in Dublin procedures, but would also increase efficiency as it avoids additional administrative delays resulting from transferring files between different administrations, in case the Member State where the application is made is the responsible Member State. **Therefore, ECRE recommends to amend Article 5(1) accordingly.**

Furthermore, **Article 5(3)** presents a welcome extension, of the obligation to receive and register asylum applications for international protection, to other authorities, which in practice often are the first points of contact of applicants upon arrival in a Member State. Currently, asylum seekers often face significant delays in having their asylum applications registered and subsequently lodged, which in practice often denies them effective access to basic services and puts them at risk of serious human rights violations. Recent examples of such delays may be found in **Austria, Germany, France, Belgium** and **Greece** among other countries.¹⁵ Combined with the obligation under **Article 29(1)** to issue a document certifying the applicant's right to remain on the territory issued upon registration, the obligation for such authorities to register applications enhances the protection of applicants from *refoulement* and legal certainty.¹⁶

However, in order for this to be effective, those other authorities will not only have to be trained and instructed as foreseen in **Article 5(5)**, they will also have to be adequately equipped to ensure that applications are registered accurately. This may be challenging in Member States where local authorities are not connected to a central registration database. As inaccuracies in the registration of personal details may negatively impact credibility assessments at a later stage in the procedure, the obligation to provide the determining authority with appropriate means and ensure regular assessments, should be extended to the authorities referred to in paragraph 3.

Finally, **Article 5(4)** explicitly refers to the possibility for Member States to receive assistance from other Member States in receiving, registering and examining applications for international protection.

¹⁴ See, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011 and CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.

¹⁵ See e.g. ECRE, *Navigating the Maze: Structural barriers to accessing protection in Austria*, December 2015, available at: <http://goo.gl/qEPFJB>, 13-15; AIDA, *Country Report Germany*, Fourth Update, November 2015, 15; AIDA, 'France: Authorities under court order to register asylum applications', 25 April 2016, available at: <http://goo.gl/SzfrTg>; AIDA, *Country Report Belgium*, Fourth Update, December 2015, 13; ECRE and AIRE Centre, *With Greece: Recommendations for refugee protection*, July 2016, available at: <http://goo.gl/aBtK6f>, 14.

¹⁶ For further recommendations as regards documentation of applicants, see section on [Documents](#).

Such support can be provided either through EU Asylum Agency deployed experts or on a bilateral basis between Member State authorities. Additional external support for the determining authority in carrying out its core tasks may be crucial to ensure the proper functioning of the asylum procedure in the Member State concerned. However, where such support would normally have no impact on the outcome of the procedure where it concerns administrative functions such as receiving and registering claims, support for examining applications potentially entails much greater impact on the final decision. In absence of a clear definition of “assistance” this may imply a variety of activities ranging from deploying interpreters or technical support with regard to country of origin information to conducting interviews and making recommendations for a decision to be taken by the determining authority.¹⁷ In light of the proposed EU Asylum Agency’s expanded means for coordinating and supporting such “joint processing” activities and the quality tools it has developed,¹⁸ the deployment of experts through the agency present more guarantees that such assistance meets EU standards and contributes to convergence of decision-making.

Therefore, ECRE recommends deleting the possibility under **Article 5(4)(a)** of the Commission proposal for Member States to entrust authorities of another Member State to assist with “examining applications for international protection” and limit such assistance to the reception and registration of applications. Moreover, the involvement of experts from other Member States on a bilateral basis between Member States or through the EU Asylum Agency should also be made conditional on such experts having the appropriate knowledge and having been provided with the necessary training and instructions, as it is the case for personnel of that Member State’s determining authority or other authority mentioned in **Article 5(3)**.¹⁹ ECRE therefore recommends amending **Article 5(5)** of the Commission proposal accordingly.

ECRE recommends the following amendments to Article 5:

Article 5(1)(d): *processing and deciding on cases pursuant to [the Dublin IV Regulation]*

Article 5(2): Each Member State shall provide the determining authority *and the authorities referred to in paragraph 3* with appropriate means, including sufficient competent personnel to carry out its tasks in accordance with this Regulation. For that purpose, each Member State shall regularly assess the needs of the determining authority to ensure that it is always in a position to deal with applications for international protection in an effective manner, particularly when receiving a disproportionate number of simultaneous applications.

Article 5(4)(a): the authorities of another Member State who have been entrusted by that Member State with the task of receiving *or [deleted text]* registering applications for international protection;

Article 5(5): Member States shall ensure that the personnel of the determining authority, or of any other authority responsible for receiving and registering applications for international protection in accordance with paragraph 3 *or 4*, have the appropriate knowledge and are provided with the necessary training and instructions to fulfil their obligations when applying this Regulation.

¹⁷ As is the case in the admissibility procedure in **Greece** since April 2016 as part of the implementation of the EU-Turkey statement. This was integrated in the domestic legal framework in June 2016: AIDA, ‘Greece: Appeal rules amended after rebuttal of Turkey’s safety’, 16 June 2016, available at: <http://goo.gl/2JS7wt>.

¹⁸ See European Commission, *Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, COM(2016) 271, 4 May 2016. For ECRE’s analysis and comments, see ECRE, *Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, July 2016, available at: <http://goo.gl/DPuZQQ>.

¹⁹ For experts deployed by the EU Asylum Agency this is already ensured under **Article 7(7) of the EU Asylum Agency proposal**.

Chapter II. Basic guarantees and principles

1. Rights and obligations of applicants

1.1. *Obligations of applicants: Article 7*

The applicant's obligations in the common procedure are laid down in **Article 7**. Compared to the recast Asylum Procedures Directive, the Commission proposal introduces an obligation to apply for international protection in the Member State of first entry or of habitual residence, reiterating the obligation laid down in **Article 4 of the Dublin IV proposal**. Moreover, the duty to cooperate now covers four aspects:

- (i) the provision of personal data;
- (ii) the provision of fingerprints and facial image;²⁰
- (iii) the submission of all elements at the applicant's disposal to substantiate the application; and
- (iv) the handing over of all documents relevant for the examination of the application.

The failure or refusal of the applicant to provide this information is sanctioned by the rejection of the application as an "abandoned" application in accordance with **Article 29** for implicitly withdrawn applications. ECRE is concerned that the ambiguous wording of **Article 7(3)** may undermine legal certainty for the applicant and could have negative consequences for the examination of the application at a later stage. In particular, the reference to the "details necessary for the examination of the application" remains undefined in the Commission proposal, leaving ample room for being interpreted widely to the disadvantage of the applicant.

As it stands, the provision leaves a considerable margin of discretion for determining authorities as regards the assessment of the level of detail to be provided by the applicant in order to avoid being rejected as an "abandoned application". By including the insufficiently detailed provision of information regarding the merits of the application as a ground for refusing an application as implicitly withdrawn, **Article 7(3)** increases the risk of applicants for international protection being effectively denied access to a full examination of their need for international protection in violation of the right to asylum, as guaranteed under Article 18 of the EU Charter of Fundamental Rights (hereinafter 'the EU Charter').

The implicit withdrawal of asylum applications is a technique used, and allowed under the recast Asylum Procedures Directive, by administrations to respond to situations where asylum seekers are presumed either no longer to be on the territory of the host state or no longer interested in continuing their procedure. In any case, a crucial characteristic of implicit withdrawal under the existing EU asylum *acquis* is that it deals with a situation where the applicant does not respond to requests from the authorities, leaving them without any information about his or her exact whereabouts. However, if adopted, **Article 7(3)** would allow determining authorities to simply consider the application as abandoned, even where the applicant is still at their disposal, but simply because it is considered that the applicant has not provided a sufficient level of detail with regard to his or her application.

Therefore, the vagueness of the term "necessary details" not only risks resulting in arbitrary, highly subjective and widely diverging interpretations across the EU, but may also dilute the determining authority's duty to assist the applicant in establishing the facts. According to UNHCR's Handbook on

²⁰ Which mirrors the extension of data storage in the proposed recast Eurodac Regulation. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' (recast)*, COM(2016) 272, 4 May 2016. For ECRE's analysis and comments, see ECRE, *Comments on the Commission Proposal to recast the Eurodac Regulation*, July 2016, available at: <http://goo.gl/NKh3aA>.

procedures, whereas the burden of proof in refugee status determination procedures lies in principle on the person submitting a claim, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examining authority. This means that “in some cases, it may be for the examiner to produce the necessary evidence in support of the application” and therefore the obligation to substantiate the claim is shared between the applicant and the authority examining the application.²¹ Moreover, it is acknowledged that, because of the circumstances of flight, the application may include statements which are not susceptible to proof and therefore, it may be necessary, provided the applicant’s account appears credible, to give them the benefit of the doubt.²² If interpreted broadly, sanctioning the failure to submit the “necessary details” by a rejection of the application as abandoned, before a proper examination has even started, would therefore result in a breach of what constitutes a key procedural guarantee according to UNHCR.

This is highly problematic from the perspective of the ECtHR and CJEU case law. In the case of *F.G. v. Sweden*, the ECtHR reiterated that it was, in principle, for the individual to submit, as soon as possible, his or her asylum application together with the reasons and evidence in support of that application. However, if the State has been “made aware facts relating to a specific individual” that could expose him or her to a risk of ill-treatment on expulsion, regardless of whether the applicant chooses to rely on those facts, the authorities are required to carry out an assessment of that risk “on their own motion”.²³ In the case of *J.K. and Others v. Sweden*, the ECtHR also highlighted that it was important for the asylum authorities to “take into account all the difficulties which an asylum-seeker may encounter when collecting evidence abroad”.²⁴ Moreover, in the case of *MM*, the CJEU held that Member States should actively cooperate with the applicant in order to assemble all the elements needed to substantiate the application for international protection, in particular where the Member State is “better placed than an applicant to gain access to certain types of documents”.²⁵

In ECRE’s view, the reference to the failure of the applicant to provide the details necessary for the examination in **Article 7(7)** of the Commission proposal should be deleted,²⁶ as it undermines the positive obligation for the determining authority to investigate all aspects of the asylum application, even where they have not been explicitly raised by the applicant, where it has access to such information.²⁷

ECRE recommends deleting the words “by not providing the details necessary for the examination of the application and” in **Article 7(3)**.

1.2. Right to information: Article 8, Recital 25

The proposal provides that applicants shall be informed “in language which they understand or are reasonably meant to understand” of their rights and obligations throughout the procedure. The proposal slightly amends the wording of Article 11(a) of the current Directive, which uses the term “supposed to understand”.

²¹ See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Reissued, Geneva, December 2011, par. 196.

²² For ECRE’s specific recommendations to incorporate this principle more accurately in EU asylum law, see ECRE, *Comments on the Commission proposal for a Qualification Regulation*, November 2016.

²³ ECtHR, *F.G. v. Sweden [GC]*, Application No. 43611/11, Judgment of 23 March 2016, par. 156.

²⁴ ECtHR, *J.K. and Others v. Sweden [GC]*, Application No 59166/12, Judgment of 23 August 2016, par. 97.

²⁵ CJEU, *MM. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2012, par. 66.

²⁶ ECRE also recommends amending **Article 39(1)(c)** on implicit withdrawal of the application accordingly. See below Section on [Implicit Withdrawal of Applications](#).

²⁷ See also Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014), 206-208.

ECRE highlights a strong need for enhancing the guarantees relating to information provision. The permissive language of the proposal raises the risk of a number of asylum seekers not accessing information in a language which they actually understand, thereby hindering their possibility to exercise their rights and developing trust in the asylum system.

Moreover, the means and format in which authorities communicate information to applicants has a crucial bearing on their understanding of their rights and obligations in the procedure. Yet neither **Article 8** nor **Recital 25** provide guidance on the requisite quality and level of detail of this information, despite clear evidence of the difficulties applicants encounter when given information in unduly technical or otherwise complex language. These examples have been documented throughout most countries in the EU.²⁸

Similar provisions have been welcomed in the context of **Article 30 of the Eurodac proposal**, which requires authorities to provide information “in a concise, transparent, intelligible and easily accessible form, using clear and plain language.”²⁹

ECRE recommends the following amendments:

Article 8(2) start: The determining authority shall inform applicants, in a language which they understand *[deleted text]*, **in a concise, transparent, intelligible and easily accessible form, using clear and plain language**, of the following:

Recital 25: The applicant should be informed properly of his or her rights and obligations in a timely manner and in a language that he or she understands *[deleted text]*. **Information should be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language.** Having regard to the fact that where, for instance, the applicant refuses to cooperate with the national authorities by not providing the elements necessary for the examination of the application and by not providing his or her fingerprints or facial image, or fails to lodge his or her application within the set time limit, the application could be rejected as abandoned, it is necessary that the applicant be informed of the consequences for not complying with those obligations.

1.3. *Exception to the right to remain for subsequent applications: Articles 9 and 43*

The right to remain on the territory of the Member States pending the examination of the asylum application and until a final decision on such application is taken is obviously crucial to ensuring that the principle of *non-refoulement* is fully respected. The right to an effective remedy under Article 13 ECHR as well as Article 47 of the EU Charter, requires such right to remain to extend to the appeals stage in the asylum procedure, as discussed below. ECRE welcomes the Commission proposal’s asserting the applicant’s “right” to remain on the territory rather than them being “allowed” to remain in the territory as is the case under the recast Asylum Procedures Directive.³⁰ This wording more clearly reflects the applicant’s status as a person legally authorised to enter and reside in the territory of the Member State already implied in EU law,³¹ which further strengthens the protection against deprivation of liberty in line with the case law of the ECtHR on Article 5 ECHR,³² as well as the corresponding right to liberty and security of person laid down in Article 6 of the EU Charter.

²⁸ See e.g. ECRE and AIRE Centre, *With Greece: Recommendations for refugee protection*, July 2016, 23-25.

²⁹ See ECRE, *Comments on the Commission proposal to recast the Eurodac Regulation*, July 2016, 14.

³⁰ Article 9(1) recast Asylum Procedures Directive.

³¹ Article 9 recast Asylum Procedures Directive and Recital 9 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter “Return Directive”), OJ 2008 L348/98.

³² ECtHR, *Suso Musa v. Malta*, Application No. 42337/12, Judgment of 23 July 2013, par. 97.

Compared to the recast Asylum Procedures Directive, **Article 9(3)**, in combination with **Article 43**, extends the currently existing exceptions to the right to remain during the administrative procedure under EU law, in case of a subsequent application. Under Article 41 of the recast Asylum Procedures Directive, such exception is only possible in narrowly described circumstances:

- a. where a person has lodged a subsequent application, which is considered inadmissible, merely in order to frustrate his or her imminent removal; and
- b. in case of a subsequent application following a final decision considering a first subsequent application inadmissible or unfounded.

Article 9(3)(a) of the Commission proposal omits the requirement of a subsequent application being made merely in order to frustrate removal,³³ as well as the explicit requirement for the Member State to ascertain that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations.

Moreover, **Article 43(b)** expands the possibility to derogate from the right to remain in case of subsequent applications beyond the Member State responsible under the Dublin Regulation which rejected the initial application. Whereas **Article 9(1)** now explicitly restricts the right to remain pending the examination of the application to the territory of the *responsible* Member State, **Article 43** allows *any* Member State, where a second or further subsequent application is made by an applicant following a final decision on a previous subsequent application, to make an exception from the right to remain on their territory. This corresponds to the expanded definition of 'subsequent application' in **Article 4(i)** which includes further applications made in any Member State, contrary to the recast Asylum Procedures Directive and the perpetual responsibility of Member States for asylum applicants under the proposed Dublin reform. However, expanding the geographical impact of a decision rejecting a subsequent application to any Member State and denying the right to remain pending the examination of such an application risks creating additional protection gaps in the CEAS. Considering such an application as subsequent to a first decision taken in *another* Member State would only be permissible in a fully harmonised system. Yet, even under the current reform of the CEAS, divergent practice and interpretations of protection obligations are highly likely as Member States retain the final responsibility for individual decisions. Moreover, the mandatory application of inadmissibility grounds including on the basis of safe country concepts and the onerous procedural requirements imposed on applicants, increases the risk of applicants being denied a full examination of the substance of their claim in any Member State. Allowing a Member State to exempt an applicant from the right to remain on the basis of a subsequent application rejected in *another* Member State, before even examining such an application may result in such applicants being subject to *refoulement* or inhuman and degrading treatment as a result of the lack of access to reception conditions in violation of ECtHR jurisprudence and their human dignity guaranteed by the EU Charter.

Article 43(a) relates to the situation where a first subsequent application has already been rejected by the same determining authority of the same Member State responsible and therefore mainly aims at exempting such applicants from the right to remain pending the examination of their appeal laid down in **Article 54(1)**. However, **Article 54(2)(b)** requires that an applicant making a subsequent application has at least the possibility to request a court or tribunal to rule on whether the applicant may remain on the territory of the Member State *responsible* pending the appeal. As a result, **Article 43(a)** is inconsistent with **Article 54(2)(b)** and should therefore be deleted.

Revoking the right to remain in the territory pending the examination of a subsequent application risks undermining the principle of *non-refoulement* in practice, in particular where it concerns a first subsequent application. Applicants for international protection may be forced to submit a subsequent

³³ While revocation in case of a subsequent application must be in accordance with Article 43, **Article 43(a)** of the Commission proposal simply refers, with respect to a first subsequent application, to applications which have been rejected by the determining authority as inadmissible or manifestly unfounded.

application for a variety of reasons, including because of shortcomings in the asylum procedure that are beyond their control. Therefore, the submission of a subsequent asylum application should not be presumed to be fraudulent or abusive *per se*.³⁴

Combined with such applicants not having access to an appeal with automatic suspensive effect,³⁵ **Article 9(3)(a)** and **Article 43(a)** would result in the Regulation not meeting the requirements under international human rights law and the EU Charter to ensure compliance with *non-refoulement* obligations.

If co-legislators wish to maintain a possibility to revoke the right to remain in the territory with respect to subsequent applications in the Regulation, ECRE strongly recommends restricting such possibility to **second or further subsequent applications for international protection, submitted to the determining authority of the responsible Member State** which rejected the initial and first subsequent application for international protection. Building on existing standards laid down in the recast Asylum Procedures Directive,³⁶ this should only be possible where it is demonstrated that a full examination of the merits of the first asylum application has taken place in accordance with the necessary procedural safeguards and no new elements have been submitted and that such application is submitted merely to delay or frustrate an imminent removal decision. Moreover, as such revocation can be decided by an authority other than the determining authority and trigger the issuance of a return decision, such decisions should not be taken without prior consultation of the determining authority as is the case with respect to extradition decisions.

ECRE recommends amending Article 9(3)-(4) and Article 43 as follows:

Article 9(3): The responsible authorities of the Member State *responsible* may revoke the applicant's right to remain on their territory during administrative procedure where:

(a) a person makes a *second or further* subsequent application in accordance with Article 42 and in accordance with the conditions laid down in Article 43;

(b) a person is surrendered or extradited, as appropriate, to another Member State pursuant to obligations in accordance with a European arrest warrant or to a third country or to international criminal courts or tribunals.

Article 9(4): A Member State may extradite *or expel* and applicant to a third country pursuant to paragraph 3(a) and (b) only where the determining authority is satisfied that an extradition *or return* decision will not result in direct or indirect *refoulement* in breach of the international and Union obligations of that Member State.

Article 43: Without prejudice to the principle of non *refoulement* and **Article 54(2)(b)**, Member States may provide an exception from the right to remain on their territory *[deleted text]* **where a person makes a second or further subsequent application in the Member State responsible following a final decision rejecting a previous subsequent application as inadmissible or unfounded and merely to delay or frustrate the enforcement of a decision which would result in his/her imminent removal from that Member State.**

³⁴ The Commission's approach on the right to remain for subsequent applicants is also in contrast to existing legislation and practice in some Member States. In the **Netherlands**, for instance, subsequent applicants have a right to remain on the territory, regardless of whether it is a first or further subsequent application, until the intention of the Immigration and Naturalisation Service (IND) to reject the application is notified to the applicant: Article 8(f) Dutch Aliens Act.

³⁵ See **Article 54(2)(b)** and the discussion below on the [right to an effective remedy](#).

³⁶ See Article 41(1) recast Asylum Procedures Directive.

Member States may make such exception only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State's international and Union obligations.

2. Personal interviews: Articles 10-13

An applicants' right to an interview both on the admissibility and substance of their application for international protection is guaranteed in **Articles 10 and 11** of the Commission proposal. The central role of such interview in the individual assessment of applicants' need for international protection and risk of *refoulement*, has long been acknowledged in UNHCR EXCOM Conclusions³⁷ and the UNHCR Handbook,³⁸ as well as jurisprudence of European Courts³⁹ and of international human rights treaty bodies.⁴⁰ This is due to the specific nature of requests for international protection, which often rely predominantly on the applicant's oral statements. This is also consolidated in existing EU legislation and in particular the recast Asylum Procedures Directive. ECRE welcomes the consolidation of the core guarantees with respect to the right to a personal interview in **Articles 10 to 13**, subject to the following observations and recommendations.

The requirement of the person conducting the interview to not wear a military or law enforcement uniform is only included with respect to the *substantive interview* in **Article 11(3)**. The aim of such rule is to ensure a sufficient degree of trust of applicants in the authorities responsible for processing their application for international protection. Symbols that applicants may associate with persecution or serious harm inflicted by military or law enforcement authorities in their country of origin may prevent them from fully disclosing all elements of the application at the earliest possible stage. Given the aim of the provision it should also be guaranteed with respect to all types of interviews affecting the outcome of the applicant's application for international protection. In this regard, it should be noted that in **Article 12(3)**, personnel of the determining authority of the Member State are exclusively entrusted with the competence to conduct personal interviews without distinguishing between admissibility and substantive interviews.⁴¹ This is consistent with the restricted powers of authorities other than the determining authority in the asylum process as laid down in **Article 5(3)** and which exclude any role for such activities in the examination of applications for international protection.

Consequently, in order to ensure that all personal interviews on applications for international protection are conducted in circumstances conducive to building the applicants trust in the asylum process and the determining authority, ECRE recommends extending the prohibition for persons conducting interviews not to wear a military or law enforcement uniform in **Article 10** to admissibility interviews.

ECRE recommends inserting a new paragraph to Article 10 as follows:

³⁷ See UNHCR, EXCOM Conclusions Nos. 8 and 30.

³⁸ According to which basic information given by completing a standard questionnaire will normally not be sufficient to enable the examiner to reach a decision and that one or more personal interviews will be required. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Reissued, December 2011, par. 200.

³⁹ In the case of *I.M. v. France*, for instance, when assessing the compatibility of the accelerated asylum procedure in France with that State's obligations under the ECHR, the ECtHR attached importance to the fact that the personal interview only last 30 minutes, in particular as it concerned a first application for international protection: ECtHR, *I.M. v. France*, Application No. 9152/09, Judgment of 2 February 2012, par. 155.

⁴⁰ In the case of *Ke Chun Rong v Australia*, the UN Committee of the Convention against Torture found a violation of Article 3 of the Convention against Torture inter alia on the basis of the finding that the complainant had not been interviewed either by the Immigration Department or by the Refugee Review Tribunal. See Committee against Torture, *Ke Chun Rong v. Australia*, Communication No. 416/2010, 29 November 2012, par. 7.4.

⁴¹ See **Article 12(3)** of the Commission proposal which furthermore refers to the assistance of personnel of authorities of other Member States but does not include the other authorities referred to in **Article 5(3)**.

Article 10(3): A person who conducts the substantive or admissibility interview of an application shall not wear a military or law enforcement uniform.

2.1. Interview requirements: Article 12

Article 12 of the Commission proposal sets the requirements for personal interviews. It maintains existing key guarantees in the recast Asylum Procedures Directive with regard to exceptional situations in which the personal interview may be omitted; the competences and required level of training of the personnel of the determining authority responsible for conducting personal interviews; and the provision of an interpreter to ensure appropriate communication.

Furthermore, the proposal no longer provides for the possibility for Member States to use non-specialised personnel when conducting admissibility interviews. ECRE welcomes the deletion of such a possibility. Given the critical role of admissibility concepts in the new architecture of the CEAS, it is even more important to ensure that personal interviews are conducted by properly trained staff of the specialised authority exclusively mandated with processing applications for international protection.

Nonetheless, according to **Article 12(3)**, the determining authority may receive assistance with conducting personal interviews from personnel of authorities of other Member States referred to in **Article 5(4)(a)** or experts deployed by the European Union Agency for Asylum.⁴² For reasons explained above, in ECRE's view the involvement of personnel from other EU Member States outside of an EU Agency for Asylum deployment should be limited to reception and registration of applications for international protection. In order to ensure that such assistance does not result in a lower quality of personal interviews, the deployment of experts through the EU Agency on Asylum offers better guarantees that such assistance is provided by sufficiently qualified and trained staff. Accordingly, ECRE recommends deleting the possibility for the personnel of authorities of other Member States to assist with personal interviews in **Article 12(3)** and **Article 12(4)**.

Moreover, ECRE notes that such assistance referred to in **Article 12** is not only limited to situations of a disproportionate number of simultaneous applications for international protection in a Member State. It is unclear what the added value of proposed **Article 12(4)** is in light of the fact that such assistance can be provided under paragraph 3 without this being conditional on the Member State benefitting from such assistance demonstrating a lack of capacity.

ECRE recommends the following amendment to Article 12(3) and (4):

Article 12(3): Personal interviews shall be conducted by the personnel of the determining authority, which may be assisted by *[deleted text]* experts deployed by the European Union Agency for Asylum referred to in Article 5(4)(b).

Article 12(4): Where simultaneous ..each applicant, the determining authority may be assisted by *[deleted text]* experts deployed by the European Union Agency for Asylum referred to in Article 5(4)(b), to conduct such interviews.

2.2. Reporting and recording of interviews: Article 13

Accurate reporting of the applicant's statements during the personal interview is crucial for the conduct of a fair and efficient asylum procedure. It often is the main source of information for assessing the applicant's need for international protection and therefore it is in the interest of both the applicant and

⁴² See **Article 12(3)** of the Commission proposal.

the determining authority and appeal authorities to have a detailed and correct transcript of the personal interview.

Article 13(1) maintains two options with regard to the personal interview report: either “a thorough and factual report containing all substantive elements” or a “transcript” of every personal interview. In light of the possible involvement of other experts in conducting the personal interview, such an obligation is extended to “any other authority or experts” assisting or conducting the determining authority. However, as the proposal does not provide any further details as to which authorities or experts are referred to, this could potentially include staff of any national or other Member State authority.

This raises important questions from a practical and legal perspective. Firstly, the applicable national legal framework may preclude the involvement of foreign experts in conducting interviews or may require that any official reporting on the interview be drafted in one of the official languages in the Member State concerned.⁴³ As it stands the Commission proposal does not specify the language of such factual report or transcript but it may not be compatible with national constitutional law in some Member States to use any other language than the national one.

Secondly, even if it were allowed under national law, drafting such reports in a language other than the national language may have important repercussions on applicants’ ability to fully exercise their rights and access to all elements of the file. In current joint processing carried out in **Greece**, experts deployed from other EU Member States operate in English as the working language as they lacked a sufficient level of knowledge of Greek. However, this means that the interview is conducted in English and the report of the interview is drafted in English as well.⁴⁴ This presupposes a considerably high level of English on behalf of all the actors involved which may not exist in practice and which may have adverse effects on the quality of decision-making as well as on the quality of legal assistance and representation, including at the appeal stage. Further analysis and evaluation of the impact of the involvement of foreign experts in conducting personal interviews should be carried out before consolidating the responsibility for such experts to submit a transcript or factual and thorough report in EU asylum law.

In ECRE’s view, in order to ensure legal clarity and in light of the crucial role of the personal interview in the refugee status determination process, the determining authority should be the sole authority responsible for making a report or transcript. This does not exclude a role for such experts in the conduct of interviews, but such assistance, should not include final responsibility for drafting a factual report or transcript of the interview.

Furthermore, ECRE believes that the combination of a verbatim transcript and audio-recording of each personal interview with the informed consent of the applicant constitutes best practice and should be consolidated in the Regulation. Such an approach precludes any discussion or debate about what has been said during the interview, which is beneficial for both the applicant and the determining authority and allows the latter to make a first instance decision based on a correct and full understanding of the applicant’s statement.

On the other hand, ECRE questions the added value in the use of “audio-visual” recording of the personal interview. It may be intimidating for applicants for international protection, in particular those who have been subjected to torture or other traumatising experiences such as rape, to speak about

⁴³ This is the case for instance in **Belgium**, where the interview report must be written in one of the two languages of the procedure, *i.e.* Dutch or French. The language of the procedure is determined at the start of the procedure.

⁴⁴ See Greek Council for Refugees, *Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium & Greece (Appl. No 30696/09 and related cases, 1259 meeting (7-9 June 2016) (DH)*, Athens, 30 May 2016, p. 8.

past persecution or their fear for persecution or serious harm in front of a camera. Moreover, there is little practical experience with video-recording of asylum interviews, while in-depth research on the impact of such techniques, in particular as a means to assess credibility of the applicant's statements is scarce. Therefore, ECRE recommends deleting the option of "audio-visual" means of recording in proposed **Article 13(2)**. A written verbatim report combined with the possibility of audio-taping with the informed consent of the applicant for international protection provides all actors in the asylum process with a solid record of the interview.

2.3. Additional comments to the report prior to the decision: Article 13(3)

Beyond the obligation to ensure an accurate and comprehensive recording of the applicant's statements during the personal interview, the Commission proposal maintains two other components of the right to be heard:

- a. the opportunity for applicants to correct mistakes or misrepresentations of what was said during the interview or to clarify misunderstandings before a first instance decision is taken;⁴⁵ and
- b. the right of applicants, their advisers and counsellors to have access to the report, transcript or recording of the personal interview before a first instance decision is taken.⁴⁶

Giving applicants the opportunity to make comments or provide clarification orally or in writing before the determining authority takes a decision is key to ensuring quality decision-making and an essential part of the frontloading of the asylum procedure. It provides the applicant and the determining authority with an opportunity to timely rectify any misconceptions and to provide any additional information necessary to ensure that the first instance decision is taken on the basis of correct and comprehensive information. An effective opportunity for applicants to provide comments or clarifications on the report or transcript will in principle imply that applicants are provided with sufficient time after the personal interview to exercise this right, without excessively prolonging the asylum procedure. The jurisprudence of the CJEU relating to the EU general principle of the right to be heard requires that the person concerned is given a reasonable time to effectively present his or her views.⁴⁷

In ECRE's view, providing such a possibility at the end of the personal interview as foreseen under **Article 13(3)** in certain cases may be difficult to reconcile in practice with the principle of effectiveness and the right to be heard. Therefore, the preamble to the Regulation should clarify that Member States should not make use of such possibility in case the personal interview was a lengthy one or where the applicant is a person in need of special procedural guarantees in accordance with **Articles 19 to 22** and for whom the personal interview may have been particularly stressful.

2.4. Access to the file prior to a first instance decision: Article 13(5)

Access of applicants and their legal advisers to the report/transcript and audio-recording of the personal interviews before a decision is taken as laid down in **Article 13(5)** constitutes another crucial procedural guarantee contributing to increased transparency and fairness in the asylum procedure. Access to one's file is an inherent part of the right to good administration which reflects a general principle of EU law.⁴⁸ However, the discretion allowed to determining authorities to grant such access

⁴⁵ See **Article 13(3)** of the Commission proposal.

⁴⁶ See **Article 13(5)** of the Commission proposal.

⁴⁷ See for instance CJEU, Case C-462/98 *Mediocurso v Commission*, Judgment of 21 December 2000, par. 38: "However, no reasonable period was granted to it between the time at which it was able to examine the reports and the time at which it had to express its view. Indeed, it was on the very day that the reports were disclosed to it, during a meeting, that the appellant was called on to comment on the reports if it wished to do so. It must be held that, in such circumstances, the appellant did not on that occasion have an opportunity effectively to put forward its views on those documents."

⁴⁸ See e.g. CJEU Case C-604/12, *H.N.*, par. 49.

at the same time as the decision is made in the context of the accelerated examination procedure, risks undermining the relevance of this important guarantee in practice, in particular given the broad scope of such procedure envisaged in **Article 40**. Providing access at the same time as the decision is taken deprives the applicant of an opportunity to provide additional clarifications where the report or transcript may remain unclear or misrepresents the applicants' statements. It also deprives the determining authority of an opportunity to verify whether the intended decision is based on a correct understanding of the applicant's statements before taking the decision. The risk of the report of the personal interview being incomplete or inaccurate is seriously increased in the accelerated examination procedure as envisaged in the Commission proposal, not least because of the extremely short time limits foreseen for concluding the procedure.⁴⁹ As mentioned above, such an approach undermines the right to be heard and the right of access to one's file as laid down in the jurisprudence of the CJEU. Consequently, ECRE recommends deleting **Article 13(5)**.

ECRE recommends amending Article 13 and Recital 13 as follows:

Article 13(1): The determining authority *[deleted text]* shall make a thorough and factual report containing all substantive elements or a transcript of every personal interview.

Article 13(2): The personal interview shall be **audio** recorded **with the consent of the applicant**. The applicant shall be informed in advance of such recording.

Article 13(5): *[deleted provision]*

Recital 13: The applicant should be provided with an effective opportunity to present all relevant elements at his or her disposal to the determining authority. For this reason, the applicant should, subject to limited exceptions, enjoy the right to be heard through a personal interview on the admissibility or on merits of his or her application, as appropriate. For the right to a personal interview to be effective, the applicant should be assisted by an interpreter and be given the opportunity to provide his or her explanations concerning the grounds for his or her application in a comprehensive manner. The applicant should be given sufficient time to prepare and consult with his or her legal adviser or counsellor, and he or she may be assisted by the legal adviser or counsellor during the interview. The personal interview should be conducted under conditions which ensure appropriate confidentiality and by adequately trained and competent personnel, including where necessary, personnel from authorities of other Member States or experts deployed by the European Union Agency for Asylum. The personal interview may only be omitted when the determining authority is to take a positive decision on the application or is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstance beyond his or her control. Given that the personal interview is an essential part of the examination of the application, the interview should be recorded and the applicants and their legal advisers should be given access to the recording, as well as to the report or transcript of the interview before the determining authority takes a decision, or in the case of an accelerated examination procedure, at the same time as the decision is made. ***Applicants should always be given an opportunity to provide further clarifications orally or in writing with regard to any incorrect translations or misunderstandings in the report or in the transcript. In case the interview was lengthy and where the person is an applicant in need of special procedural guarantees in accordance with Articles 19 to 22, the applicant should be given the opportunity to provide such specifications within a reasonable time after the personal interview.***

⁴⁹ Which may be as short as eight working days in certain cases. See **Article 40(2)** of the Commission proposal.

3. Provision of legal assistance and representation: Articles 14-18

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure the asylum applicant's access to justice and the overall fairness and efficiency of the asylum process. Asylum applicants find themselves by definition in a disadvantaged position in the asylum process as they are unfamiliar with the legal framework and in most cases do not speak the language in which the procedure is conducted. Despite its objective of establishing a simplified and streamlined common asylum procedure, the Commission's proposal remains characterised by extreme complexity. It provides for special procedures with varying procedural time limits, the mainstreaming of three different categories of safe concepts and a complex system of appeals requiring separate actions to trigger the suspensive effect of such an appeal in certain cases within very short time limits. In such a context, professional and independent legal assistance and representation is indispensable in order for applicants to assert their rights under the EU asylum *acquis* and to ensure that all aspects of their case are fully taken into account by asylum authorities.

The important role of free legal assistance and representation in safeguarding the rights of applicants for international protection throughout the procedure is acknowledged in the Commission's proposal. Compared to the recast Asylum Procedures Directive, the right to legal assistance and representation is strengthened by making the provision of free legal assistance and representation in principle mandatory for Member States at both stages of the procedure, including the first instance procedure.⁵⁰

ECRE welcomes the extension of the obligation to provide free legal assistance and representation to the administrative stage of the procedure, as a key safeguard in the construction of the CEAS and as a core aspect of frontloading.⁵¹ **Article 15(1)** of the Commission proposal sets an important standard contributing to the overall fairness and efficiency of the CEAS. The importance of effective access to legal assistance and representation in protecting individual's rights under the ECHR and the EU Charter is also increasingly highlighted in the jurisprudence of the ECtHR and the CJEU. In a number of cases, the ECtHR has held that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 ECHR to the point that it becomes inaccessible.⁵² In the case of *DEB*, the CJEU held that the principle of effectiveness meant that procedural rules should not inhibit the exercise of a person's rights derived from EU law. The CJEU accepted that this could be rendered impossible in practice where a person did not qualify for legal aid but was also unable to afford the costs of taking a case to the court.⁵³

⁵⁰ See **Article 15(1)** of the Commission proposal. This is mirrored in **Article 14** on the right to legal assistance and representation which is now defined as the right of applicants to consult in an effective manner a legal adviser or other counsellor on matters relating to their application at all stages of the procedure. Unlike the corresponding Article 22(1) of the recast Asylum Procedures Directive, it no longer mentions that this is at the applicants own cost.

⁵¹ See ECRE, *The Way Forward, Europe's role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <http://goo.gl/7l5m3vE>; *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, December 2014.

⁵² In the case of *M.S.S. v. Belgium and Greece*, for instance, the Court found a violation of Article 13 in conjunction with Article 3 ECHR inter alia because the applicant has no practical means of paying a lawyer and received no information on organisations offering legal assistance, which was considered essential in securing access to the asylum procedure in Greece, See, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 21 January 2011, par. 319.

⁵³ See CJEU, C-279/09, *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010. For a discussion, see Nuala Mole, 'The right to legal assistance, legal representation and legal aid' in ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 61-62.

3.1. Merits testing: Article 15(3)-(5)

Nevertheless, ECRE firmly opposes the possibility for Member States to exclude the provision of free legal assistance and representation in (i) the administrative procedure where “the application is considered as not having any tangible prospect of success” or in case of a subsequent application;⁵⁴ and in (ii) the appeal procedure “where the appeal is considered as not having any tangible prospect of success”.⁵⁵ This leaves extensive scope for Member States to deprive applicants of the right to free legal assistance in particular through an unduly broad application of the so-called ‘merits test’.

In ECRE’s view, given the indispensable role of legal assistance in safeguarding the rights of applicants for international protection during the asylum procedure, as a rule, the applicant’s entitlement to such legal assistance and representation should only be excluded where he or she has sufficient financial resources. ECRE remains opposed to the application of a so-called “merits-test” as envisaged in **Article 15** with respect to free legal assistance and representation both in the administrative and in the appeal procedure. The application of a merits test at the appeal stage of the procedure is in theory justified by the objective to avoid so-called “abuse” of the procedure by discouraging appeals in cases that presumably have little or no substance. However, in asylum cases this may in practice result in depriving asylum applicants from an essential procedural guarantee and increase the risk of violations of the principle of non *refoulement* as a result of the wrongful denial of international protection. This is because it constitutes an exercise in trying to predict the outcome of an application for international protection based on a preliminary and incomplete pre-assessment of the merits of the case. Such an approach is at odds with the requirements of a full and extensive review of possible violations of Article 3 ECHR under the ECtHR jurisprudence relating to Article 13 ECHR.⁵⁶ Currently, practice in EU Member States on merits-testing differs widely: while it is unknown in some Member States, it is applied in others albeit to varying degrees of relevance.⁵⁷ In countries such as **France**, the standard is set more rigorously towards discouraging “manifestly unfounded” appeals from benefitting from legal aid, rather than examining the prospect of success of the appeal.⁵⁸ In **Cyprus**, where legal aid applications were until recently subjected to a merits test by the Supreme Court up until January 2016, this results in the vast majority of them being rejected. During the period 2010-2015, out of 50 applications for legal aid submitted by asylum seekers, only 5 were granted, whereas in the period January-October 2016, out of 12 submitted applications, only 1 was successful.⁵⁹

The refusal of free legal assistance and representation on the basis of a lack of tangible prospects of success in the administrative procedure carries even greater risks of denying applicants access to a full and thorough examination of their application. Denying asylum applicants for international protection the right to free legal assistance and representation at this stage of the procedure, based on the presumption that their application is manifestly unfounded, is likely to affect in particular applicants from countries designated as a safe third country, a safe country of origin or first country of asylum.

⁵⁴ See **Article 15(3)(b) and (c)** of the Commission proposal

⁵⁵ See **Article 15(5)(b)** of the Commission proposal.

⁵⁶ See ECtHR, *Singh and Others v. Belgium*, Application no. 3320/11, Judgment of 2 October 2012; *S.J. v. Belgium*, Application No 77005/10, Judgment of 27 July 2014 (French only) and *M.S.S. v. Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011.

⁵⁷ **Switzerland** abolished merits testing for legal assistance in the asylum with the adoption of the Asylum Act in February 2014. See AIDA, *Country Report Switzerland*, First Update, October 2015, 24. In the **UK**, the system of merits testing, combined with other measures cutting legal aid, impacts significantly on access to free legal assistance. From 2014, legal aid was abolished for civil court cases where the merits are assessed as ‘borderline’, i.e. over 50% but not more than 60%, while legal aid would not be granted for judicial review applications unless the court granted permission for the judicial review to go ahead. The regulations introducing these cuts to legal aid were declared unlawful by the High Court in 2015: AIDA, *Country Report United Kingdom*, Fourth Update, November 2015, 26.

⁵⁸ AIDA, *Country Report France*, Fourth Update, December 2015, 33.

⁵⁹ See AIDA, ‘Transposition of Asylum Directives fifteen months after deadline’, 7 November 2016, <https://goo.gl/f1Uh5S>.

Refusing such applicants free legal assistance and representation from the outset, further adds to their already disadvantaged position and deprives them of an indispensable tool to effectively rebut presumptions of safety at this stage in the procedure, as guaranteed in the respective provisions dealing with safe country concepts.⁶⁰ In doing so **Article 15(3)** further contributes to safe country concepts becoming self-fulfilling prophecies: presumptions of such applications being manifestly unfounded are confirmed by substantially reducing applicant's chances for rebutting such presumptions. In order to ensure equality of arms in the asylum procedure and to avoid that the effectiveness of applicants' right to rebut presumptions of safety is fundamentally undermined, ECRE strongly recommends deleting **Article 15(3)(b)**.

The exclusion from free legal assistance and representation in case of subsequent applications raises similar concerns of procedural unfairness where legal assistance is often essential in order to enable the applicant concerned to submit the new elements required to meet the admissibility threshold laid down in **Article 42(2)**. The intervention of free legal aid providers, for instance, in obtaining official documentation from the country of origin or substantiating sexual orientation-based claims and justifying late disclosure as a new element, is almost indispensable in highly bureaucratised asylum processes. Excluding subsequent applications from the right to free legal assistance deprives the applicants concerned from an essential procedural safeguard in exercising their right to asylum and being protected from *refoulement*. In line with ECRE's recommendations on exceptions to the right to remain in case of subsequent applications, ECRE recommends restricting the possibility to refuse free legal assistance and representation in such cases to second or further subsequent applications.

Finally, the current wording of **Article 15(3) and (5)** should be further strengthened to exclude any interpretation of both provisions as establishing a non-exhaustive list of exceptions to the right to free legal assistance and representation. Therefore, ECRE recommends amending Article 15(3) and (5) as indicated below.

Should EU co-legislators nevertheless maintain the possibility of a merits test at the appeal stage, as it is the case in the recast Asylum Procedures Directive, explicit reference should be made for Member States to ensure that its application does not result in legal assistance and representation being arbitrarily restricted or the applicant's effective access to justice being hindered.⁶¹

3.2. *Participation in personal interviews and start of free legal assistance: Article 15(1)*

ECRE is also concerned that the participation of the legal assistance provider in the personal interview in the administrative procedure is only included in the definition of free legal assistance and representation in **Article 15(2)(b)** as far as it is "necessary". In ECRE's view, the added value of the presence of a qualified legal advisor or counsellor during the personal interview is beyond doubt. Both in terms of building a trust relationship between the applicant and the interviewer as well as the effectiveness of the legal assistance provided, it is always preferable for the legal adviser to be present. As the participation in the personal interview is not a precondition for the interview to be conducted and **Article 15(2)** only provides for a definition of what free legal assistance should *at least* comprise of in the national procedure, there is no reason why this should be restricted to where it is necessary. This is also coherent with the right of applicants to bring a legal adviser or other counsellor to the personal interview and the right of such adviser or counsellor to intervene during the interview under **Article 16(4)**.

Finally, while imposing an obligation on Member States to provide free legal assistance and representation in the administrative procedure, **Article 15** does not indicate the exact moment in the procedure as of when such assistance should be available to the applicant. The architecture of the

⁶⁰ **Articles 44(3), 45(3)(b) and 47(4)(c)** of the Commission proposal.

⁶¹ See Article 20(3) last sentence recast Asylum Procedures Directive.

common procedure maintains the three step approach of making – registering – lodging an application for international protection at the start of the process. However, the concomitant short deadlines for registration and lodging the application is accompanied with significant negative procedural consequences for the applicant in case of non-compliance, including the rejection of the claim as abandoned. Moreover, lodging an application entails a quite onerous and critical obligation for the applicant to submit all elements of his or her claim within an extremely short deadline of ten days.⁶² In such procedural context, accessing quality legal assistance at the earliest possible stage of the procedure becomes even more important and crucial to ensure procedural fairness and efficiency.⁶³ Yet, Article 15 leaves considerable scope for Member States to determine as of when free legal assistance and representation should be provided.

Therefore, in order to ensure that applicants have timely access to free legal assistance in complying with their procedural obligations, ECRE strongly recommends for the Regulation to clarify that free legal assistance and representation must be provided as soon as possible after an application for international protection is made.

ECRE recommends amending Article 15 as follows:

Article 15: Free legal assistance and representation

1. Member States shall, at the request of the applicant ***and as soon as possible after an application is made***, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.
2. For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:
 - (a) the provision of information on the procedure in the light of the applicant's individual circumstances;
 - (b) assistance in the preparation of the application and personal interview, including participation in the personal interview ***[deleted text]***;
 - (c) explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information as to how to challenge that decision.
3. The provision of free legal assistance and representation in the administrative procedure may ***only*** be excluded where:
 - (a) the applicant has sufficient resources; ***or*** ***[deleted text]***
 - (b) the application is ***a second or further subsequent*** application.
4. For the purposes of the appeal procedure, the free legal assistance and representation shall, at least, include the preparation of the required procedural documents, the preparation of the appeal and participation in the hearing before a court or tribunal on behalf of the applicant.
5. The provision of free legal assistance and representation in the appeal procedure may ***only*** be excluded where:
 - (a) the applicant has sufficient resources; ***or*** ***[deleted text]***
 - (b) the appeal or review is at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of appeal.

⁶² **Article 28(4)** of the Commission proposal. See discussion and recommendations below.

⁶³ In particular as the lodging of an application may imply filling in extensive application forms. In **Estonia**, for instance, applicants arriving at the border are required to fill in a 16-page application form. See Bridget Anderson and Sue Conlan, *Providing Protection. Access to early legal advice for asylum seekers*, 2014, 26.

Where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal on ground that the appeal is considered as having no tangible prospect of success, the applicant shall have the right to an effective remedy before a court or tribunal against that decision, and for that purpose he or she shall be entitled to request free legal assistance and representation. ***In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.***

4. Applicants in need of special procedural guarantees: Articles 19-24

4.1. Identification and assessment of special procedural guarantees: Article 19

Early identification of applicants with special procedural needs is a crucial aspect of fair and efficient asylum systems. It avoids delays in the examination of applications, contributes to preventing the deterioration of mental and physical health of applicants and allows for more efficient planning of the determining authority's workload. **Articles 19 and 20** include the key principles to be applied by Member States to identify such applicants and assess their special procedural needs. ECRE is satisfied that current standards under the recast Asylum Procedures Directive are further clarified and strengthened in two ways.

First, the proposal more clearly describes the process of identifying the need for special procedural guarantees as a continuum, while more clearly distinguishing the respective roles of the various authorities that may be involved at different stages in the process. While authorities responsible for receiving and registering applications are entrusted with the task of detecting and indicating first indications of vulnerability which may require special guarantees,⁶⁴ the determining authority is tasked with continuing and completing the assessment of the need for special guarantees.⁶⁵ In ECRE's view such a division of tasks is logical from a procedural perspective and rightly limits the role of police and other law enforcement authorities to indicating physical signs of vulnerability, as they are neither equipped nor qualified for any additional tasks in this process.⁶⁶

Secondly, a clear obligation is introduced for the determining authority to *systematically* assess the need for special procedural guarantees⁶⁷ and for the other authorities to initiate the process of identification *as soon as an application is made*.⁶⁸ This addresses partly existing ambiguity under Article 24 of the recast Asylum Procedures Directive, which does not distinguish between the initial identification of physical signs and the actual assessment and leaves considerable flexibility to Member States as to *when* such assessment is carried out.

However, in ECRE's view both provisions would benefit from further improvements, including as regards their relationship with the provisions dealing with medical examinations. While **Article 19(1)** usefully requires a systematic assessment of the need for special procedural guarantees it does not include any time indication for the determining authority to carry out its assessment once the application is made. It would not be feasible nor desirable to impose a binding specific time limit within

⁶⁴ See **Article 20(2)** of the Commission proposal.

⁶⁵ See **Article 20(1)** of the Commission proposal.

⁶⁶ Useful tools assisting authorities in identifying signs and indications of vulnerability have been developed *inter alia* in the context of the NGO-led project Protect: ACET, BZFO, Cordelia Foundation, FTDA, IRCT, Parcours d'Exil and Pharos, *PROTECT, Processus de reconnaissance et d'orientation des victimes de torture dans les pays européens afin de faciliter l'accompagnement et l'accès aux soins*, available at: <https://goo.gl/exj1U5>. See also UNHCR and International Detention Coalition, *Vulnerability Screening Tool*, 2016, available at: <https://goo.gl/tWUukR>.

⁶⁷ See **Article 19(1)** of the Commission proposal.

⁶⁸ See **Article 20(1)** of the Commission proposal.

which such assessment must be carried out, as such assessment may require a considerable amount of time depending on the individual case. Nevertheless, as it is in the interest of both asylum applicants and the authorities that such assessment is carried out as soon as possible, this should be reflected in Article 19. This would also ensure full coherence with the Commission proposal recasting the Reception Conditions Directive requiring the assessment of special reception needs to be initiated as early as possible after an application for international protection is made.⁶⁹ Therefore, ECRE recommends amending **Article 19(1)** accordingly.

Moreover, **Article 19** continues to set an ambiguous standard as to the type of procedures that can be applied to applicants who have been identified as applicants in need of special procedural guarantees. On the one hand, **Article 19(3)** establishes a strong presumption against the examination in the accelerated or border procedure of applications from applicants in need of special procedural needs as a result of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence. On the other hand, this is not excluded either, provided adequate support can be given to applicants in such settings, while it potentially suggests a weaker presumption with respect to other categories of applicants in need of special procedural guarantees.⁷⁰

As discussed below, ECRE believes that the opportunity of the reform of the asylum *acquis* should be taken to exclude the use of accelerated and border procedures with respect to applicants who have been identified as in need of special procedural guarantees. This would be coherent with the objective of these provisions and the purpose and content of the adequate support required under the Commission proposal. Adequate support should allow applicants to benefit from their rights and comply with their obligations under the Regulation and is defined in the preamble primarily as “sufficient time enabling effective access to procedures and for presenting the elements needed to substantiate their application”.⁷¹ This in itself advocates against the use of the accelerated examination procedure or the border procedure given the extremely short time limits that apply in these procedures for submitting documentation, taking first instance decisions and lodging appeals against negative decisions.⁷² In addition, such procedures may be conducted from detention making them, as a rule, ill-suited to treat applications of persons who may have been subjected to extreme forms of violence or torture,⁷³ or other particularly vulnerable applicants, such as unaccompanied children. Moreover, as a consequence of the examination of the application in the accelerated examination or border procedures, applicants may not benefit from an appeal with automatic suspensive effect under the Commission proposal.⁷⁴

In ECRE’s view, the approach taken in **Article 19(3)** unnecessarily complicates the process by creating an additional procedural step of assessing whether or not adequate support as defined in the Regulation can be effectively provided in the context of the accelerated examination or border procedure in the individual circumstances of the applicant. Moreover, the extremely short timeframes envisaged for such procedures render the provision of adequate support to such applicants quasi impossible and may worsen their predicament. Therefore, ECRE recommends excluding applicants who have been identified as in need of special procedural guarantees from accelerated examination or border procedures as such procedures by definition do not present the necessary guarantees to

⁶⁹ See European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* (hereafter “Commission proposal recasting the Reception Conditions Directive”), COM(2016) 465, 13 July 2016, Article 21(1).

⁷⁰ By singling out the mentioned group of victims of torture and other serious violence, while the definition of an applicant in need of special procedural guarantees comprises any applicant “whose ability to benefit from the rights and comply with the obligations provided for in this Regulation is limited due to individual circumstances.” See **Article 4(2)(c)** of the Commission proposal.

⁷¹ See **Recital 17** of the Commission proposal.

⁷² For further discussion on the time limits see section on [Time Limits for Completing the Procedure](#).

⁷³ See IRCT, *Recognising Victims of Torture in National Asylum Procedures. A Comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, 2013, 66-67.

⁷⁴ See **Article 54(2)(a)** of the Commission proposal.

ensure effective access of such applicants to their rights under the Regulation or the EU Charter. This approach is also followed in countries such as **Greece**, which requires claims by such applicants always to be processed under the regular procedure.⁷⁵ In **Hungary**, applicants with special procedural needs are exempted from the border procedure.⁷⁶

ECRE recommends amending Article 19(1) and (3) as follows:

Article 19(1): The determining authority shall systematically **and as early as possible after the application has been made** assess whether an individual applicant is in need of special procedural guarantees. That assessment may be integrated into existing national procedures or into the assessment referred to in [Article 21 of the Reception Conditions Directive] and need not take the form of an administrative procedure.

For the purpose of that assessment, the determining authority shall respect the general principles for the assessment of special procedural needs set out in Article 20.

Article 19(3): Where **an applicant has been identified as applicant in need of special procedural guarantees, the determining authority shall not apply or shall cease to apply [deleted text]** the accelerated examination procedure referred to in Article 40 or the border procedure referred to in Article 41 **[deleted text]** to the applicant.

4.2. Guarantees for minors and unaccompanied minors: Articles 21 and 22

The need for special guarantees for children, both unaccompanied and within families, is expressly acknowledged in **Articles 21 and 22** of the Commission proposal. ECRE welcomes the inclusion of a specific provision on guarantees for minors as an acknowledgment of their inherent vulnerability within administrative processes such as the asylum procedure.

The child's right to a personal interview, unless this is manifestly not in the child's best interests, is prominently stated in **Article 21(2)**. Together with the obligation for the determining authority to state the reasons for not providing the opportunity of a personal interview, this constitutes an important improvement to the current standard in the recast Asylum Procedures Directive. The assessment of whether or not a personal interview would be in the child's best interest will depend on the individual case at hand. Several factors will have to be taken into account, *inter alia* the child's age and maturity, the possible adverse effects of a personal interview on the child's mental health resulting from risks of re-traumatisation and its possible impact on the relationship with its parents or other caregivers.⁷⁷

Article 21 remains silent as to whether in the case of children in families, the personal interview can be carried out in the presence of their parents or other legal or customary caregivers or adult family members accompanying them in the Member State concerned. While in principle the confidentiality of the personal interview and the individual application would require such a personal interview as this would logically result from the child making a separate application, it may be in the best interest of the child for the interview to be conducted in the presence of a family member, such as where this is necessary to establish a relationship of trust between the child and the authorities. As a result, this should be part of the best interest of the child determination to be carried out by the determining authority. In order to enhance convergence of practice across the Member States as regards the application and assessment of the best interest of the child from a procedural perspective, further guidance and instructions would be necessary based on existing best practice. The Commission implementing act envisaged in **Article 19(4)** detailing the measures for assessing and addressing the special procedural needs of applicants should include such instructions.

⁷⁵ Article 50(2) Greek Law 4375/2016.

⁷⁶ Sections 71A(7) and 72(6) Hungarian Asylum Act.

⁷⁷ See UN Committee on the Rights of the Child, *General Comment no. 12. The right of the child to be heard*, available at: <https://goo.gl/jqA4qd>, par. 24.

ECRE also supports the clarification and strengthening of standards relating to the appointment and tasks of guardians in **Article 22**. While the mandatory appointment of a guardian no later than 5 working days from the moment an application is made by an unaccompanied child may be ambitious, the delays in appointing guardians and the shortage of guardians constitute a serious problem in various Member States. Differences between national legal frameworks regulating the role and tasks of guardians in representing unaccompanied children and delays in appointing guardians have been identified as key obstacles in the relocation of children under the Council Relocation Decisions benefitting Italy and Greece.⁷⁸ In this regard, ECRE shares the view that the harmonisation of legal representation and guardianship standards across the EU is urgently needed. In this regard **Article 22** sets important and welcome standards with regard to *inter alia* the continuity of their designation as guardian; the number of unaccompanied minors they may be in charge of at the same time; measures of supervision and monitoring of the quality of the performance of their tasks and their presence and role during personal interviews.

4.3. Age assessment: Article 24

The Commission proposal dedicates a separate provision to medical examinations of unaccompanied children with a view to assessing their age, which is currently provided under Article 25(5) of the Directive. **Article 24(1)** introduces some improvements as regards the conditions for ordering a medical age assessment: contrary to the Directive, the proposal allows such an examination if there are doubts over the applicant's age "following statements by the applicant or other relevant indications including a psychosocial assessment".

Medical examinations as a last resort measure

While welcoming the introduction of psychosocial assessments as a prerequisite to a medical examination, ECRE urges for a substantial review of the provision. Firmer rules should be set out, so as to **circumscribe the use of medical examinations to a last resort measure of age assessment**. This is mandated by the principles of the "best interests of the child" and the "benefit of the doubt", governing Member States' actions in relation to children.⁷⁹ As recommended by the European Parliament and EASO, clear priority should be given to documentary evidence and other indications such as a multidisciplinary assessment by qualified professionals.⁸⁰ In the absence of well-defined constraints, the proposal would not effectively limit the risk of excessive reliance by Member States on dubious medical examinations to conduct age assessments. Examples of this may be found in **Cyprus, Sweden or Austria**, among other countries,⁸¹ whereas **France** has conducted such examinations even in cases where children hold civil status documents.⁸²

It should also be noted that the **scientific reliability of medical age assessment methods remains highly contested**,⁸³ thereby dispelling the probative value of medical examinations as a means of

⁷⁸ See for instance UNHCR, *Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively. UNHCR's Recommendations*, January 2016, pp. 6-7

⁷⁹ For a detailed discussion, see ECRE, *Detriment of the doubt: Age assessment of unaccompanied asylum-seeking children*, December 2015, available at: <http://goo.gl/KrXvFW>.

⁸⁰ European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI)); EASO, *Age assessment practice in Europe, December 2013*, 6; See also Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012.

⁸¹ ECRE, *Detriment of the doubt: Age assessment of unaccompanied asylum-seeking children*, December 2015, 4.

⁸² *Ibid.*

⁸³ See e.g. A Aynsley-Green et al, Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control, 2012, British Medical Bulletin; G Noll, 'Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum', January 2015.

determining if an applicant is underage. On the other hand, reliable age assessments cannot be based solely on the physical appearance or demeanour of the applicant, as correctly sanctioned by courts in the **United Kingdom**.⁸⁴

In order to ensure compatibility with the “best interests of the child” principle enshrined in Article 24(2) of the EU Charter, ECRE deems it necessary to reflect the last resort character of medical age assessments, which should only be ordered where doubts persist following an assessment the applicant’s statements, available documentary evidence and a multidisciplinary psychosocial assessment by qualified professionals.

Guarantees for applicants undergoing age assessment

As regards the guarantees available to the person undergoing an age assessment, **Article 24(4)** reiterates the obligation of Member States to inform the child and his or her representative of the procedure and its consequences. Echoing its observations on the right of applicants to information, ECRE stresses that **information should be provided in a language which the child actually understands**, rather than “is reasonably meant to understand.”

Moreover, **Article 24(5)** refers to an unaccompanied child’s refusal to undergo a medical examination as only triggering a rebuttable presumption that the applicant is not a child, and not preventing the determining authority from taking a decision on the application. ECRE deems it necessary to reintroduce the protective clause contained in Article 25(5)(c) of the Directive, detailing that the person’s refusal to undergo a medical examination may not be the sole reason for rejecting an application.

Finally, the proposal does not resolve the omission of the right to an effective remedy against an age assessment decision. Under Article 47 of the EU Charter, applicants should be allowed to appeal a decision determining their age, given the far-reaching consequences this has for the examination of their application. In the absence of a clear provision on the right to such appeal, unaccompanied children in countries such as **Hungary** and **Sweden** may only contest the age assessment when appealing against the substantive decision on the application, or in other countries have no remedy at all.⁸⁵ The proposal should include the possibility to exercise the right. The relevance of appeals should also be reflected in **Article 24(6)**, which brings about a welcome rule of mutual recognition of age assessment decisions. Mutual recognition should apply to final decisions after a potential appeal has been decided, however.

ECRE recommends the following amendments to Article 24:

Article 24: Age assessment [deleted text] of unaccompanied minors

1. Where there are doubts as to whether or not an unaccompanied minor is under the age of 18, following statements by the applicant, available documentary evidence or other relevant indications, Member States may order a psychosocial assessment by qualified professionals to determine the age of the applicant in the framework of the examination of an application. The age assessment shall not be solely based on the applicant’s physical appearance or demeanour.

⁸⁴ See AIDA, ‘UK: Age assessment based on appearance ruled unlawful’, 21 June 2016, <http://goo.gl/WP6m6>.

⁸⁵ ECRE, *Detriment of the doubt: Age assessment of unaccompanied asylum-seeking children*, December 2015, 6.

1a. Where doubts over an unaccompanied minor's age persist following the procedure set out in paragraph 1, medical examinations may be used as a measure of last resort to determine the age of unaccompanied minors within the framework of the examination of an application [deleted text]. Where the result of the medical examination is not conclusive, or includes an age-range below 18 years, Member States shall assume that the applicant is a minor.

2. The medical examination to determine the age of unaccompanied minors shall not be carried out without their consent or the consent of their guardians.

3. Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing for the most reliable result possible.

4. Where medical examinations are used to determine the age of unaccompanied minors, the determining authority shall ensure that unaccompanied minors are informed, prior to the examination of their application for international protection, and in a language that they understand [deleted text], of the possibility that their age be determined by medical examination. This shall include information on the method of examination and possible consequences which the result of the medical examination may have for the examination of the application, **including the right to appeal the decision on the medical examination**, as well as on the possibility and consequences of a refusal on the part of the unaccompanied minor, or of his or her guardian, to undergo the medical examination. **All documents concerning the medical examination shall be entered in the applicant's file.**

5. The refusal by the unaccompanied minors or their guardians to carry out the medical examination may only be considered as a rebuttable presumption that the applicant is not a minor and it shall not [deleted text] **be the sole reason for rejecting the application for international protection.**

5a. Unaccompanied minors have the right to an effective remedy against a decision determining their age.

Chapter III. Administrative procedures

The architecture of the administrative stage of the common procedure is organised around four types of procedure: an “examination procedure” and three special procedures, the accelerated examination procedure, the border procedure and subsequent applications. The proposal also envisages four types of decisions that can be made, resulting in either granting or refusing international protection: (i) decisions on admissibility; (ii) on the merits (iii) explicit withdrawal of applications; and (iv) implicit withdrawal of applications.

While the proposal’s objective is to simplify and streamline procedures, and to clarify the current complex legal framework set by the recast Asylum Procedures Directive, this does not translate into a substantial reduction of the grounds for admissibility or accelerated procedures. The Commission proposal rather relies on creating sharp timeframes for concluding examinations in first instance procedures and penalisation of applicants for non-compliance with procedural deadlines, in order to achieve the desired level of efficiency. In addition, while the proposed deletion of the unlawful concept of “European safe third country” is welcome and long awaited, the revised provisions with respect to the “first country or asylum”, “safe third country” and “safe country of origin” concepts worryingly put such concepts centre stage, despite their questionable legality under human rights law.

1. Access to the procedure

Today, asylum seekers arriving in EU Member States may encounter serious delays in either making or lodging their application, or having their application registered. Deficiencies in access to the procedure stem from the gaps resulting from unclear legal distinctions between the notions of making and lodging applications in national legislation, as well as insufficient capacity of national administrations for the timely registration of applications. A notable example is **Greece**, where various *ad hoc* measures, including a process of making appointments through skype with the Greek Asylum Service with a view to registering the application, have failed to take away the hurdles for accessing the procedure and have not prevented asylum seekers from being in a legal limbo for months.⁸⁶ Similar problems persist in **France**, leading to successful litigation before the Administrative Tribunal of Paris to order Prefectures to register asylum applications of persons unsuccessfully trying to access the procedure.⁸⁷ Also in other EU Member States, including **Belgium**, **Austria** and **Germany**, asylum seekers have repeatedly experienced delays of several weeks or even months before the registration or lodging of their application had been completed, leaving them in certain cases destitute.⁸⁸

⁸⁶ For a recent analysis, see ECRE and The AIRE Centre, *With Greece: Recommendations for refugee protection*, July 2016, 13-17. A system set up in cooperation with EASO and UNHCR seems to have been successful in the speedy pre-registration of thousands of persons applying for international protection in Greece, collecting basic information and personal details. Those registered as of 1 August are then to be informed by text message of the date of their appointment with the Greek Asylum Service for the lodging of their application, leaving the starting date of the actual examination of their application entirely at the discretion of the authorities: UNHCR, Greek Asylum Service and EASO, ‘End of large scale pre-registration on mainland Greece’, 1 August 2016, available at: <https://goo.gl/Zz8fKP>.

⁸⁷ See e.g. AIDA, ‘France: Authorities under court order to register asylum applications’, 25 April 2016, available at: <http://goo.gl/SzfrTg>. See also the European Database of Asylum Law (EDAL) case-summaries at: <http://goo.gl/6M27xq>.

⁸⁸ AIDA, *Navigating the Maze: Structural barriers to accessing protection in Austria*, December 2015.

1.1. The three step-approach to accessing the asylum procedure: Articles 25-28 and 4

Articles 25 to 28 of the Commission proposal describe a three-staged approach to accessing the examination procedure of making, registration and lodging of the application for international protection. The current state of EU asylum law⁸⁹ is clarified to some extent.

Firstly, contrary to the recast Asylum Procedures Directive, Article 25 adds further precision as to when an application must be considered as made and the consequences of this act. The expression by a third-country national or stateless person of a wish for international protection to officials of the determining authorities or other authorities equates the making of an application. This implies that the person must as of that moment be “considered as an applicant for international protection” until a final decision is made on the application. This has important consequences in terms of the applicant’s legal position and the rights derived from such status, as this entails *inter alia*:

- (i) a right to remain in the Member State responsible;⁹⁰ and
- (ii) access to material reception conditions.⁹¹

Importantly, as the proposal does not (and should not) prescribe any particular formula to be used in expressing the wish for international protection, Article 25(2) imposes an obligation on the officials of responsible authorities to expressly verify the intention of a person where they are in doubt as to whether a person’s declarations constitute such an expression. This is an important safeguard to ensure full respect for the right to asylum guaranteed under Article 18 of the EU Charter, in particular at Member States’ external borders, and consolidates their obligations resulting from the jurisprudence of the ECtHR. In the case of *Hirsi Jamaa and Others v. Italy*, concerning the interception at sea and immediate expulsion by the Italian authorities of a group of Somali and Eritrean nationals to Libya, the ECtHR held that obligations under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum. According to the Court, it was for the Italian authorities, faced with persons who had left Libya to “find out about the treatment to which the applicants would be exposed after their return” and to ascertain “how the Libyan authorities fulfilled their obligations in relation to the protection of refugees”.⁹²

Secondly, contrary to the recast Asylum Procedures Directive, a maximum period of 10 working days after registration is introduced by **Article 28(1)** for the applicant to lodge the application, while maintaining the current requirement of the applicant having an effective opportunity to comply with this obligation. The time period of 10 working days is extended to one month in case a Member State is confronted with a situation of a disproportionate number of persons applying simultaneously.⁹³

Thirdly, the act of “lodging an application”⁹⁴ is clarified by referring to the applicant’s obligations under **Article 4(1) of the Qualification Regulation** to submit all elements available to him or her which substantiate the application. Completing the process of lodging the application triggers a range of consequences for the applicant including:

- (i) the start of the actual examination of the application, whether in the examination or the special procedures (border procedure, accelerated examination, or subsequent application procedure);
- (ii) the applicant’s access to the labour market; and

⁸⁹ Article 6 recast Asylum Procedures Directive equally distinguishes the same three steps in accessing the asylum procedure with the same maximum time limit of 3 working days for registration with a possible extension up to 10 working days in case of a large number of applications being made simultaneously.

⁹⁰ See **Article 9(1)** of the Commission proposal.

⁹¹ Article 16(1) of the Commission proposal recasting the Reception Conditions Directive.

⁹² ECtHR, *Hirsi Jamaa and Others v. Italy*, par. 133 and 157.

⁹³ See **Article 28(3)** of the Commission proposal.

⁹⁴ Lodging an application is also mentioned in Article 6 recast Asylum Procedures Directive as a procedural step the applicant should have an effective opportunity to complete but without specific time limit for its completion nor mentioning of the elements to be submitted by the applicant.

- (iii) the applicant's entitlement to a document certifying his or her status as an applicant.

Fourthly, the applicant must be given an *appointment* to lodge an application at the moment of registration. This constitutes an important guarantee in ensuring that the applicant has an effective opportunity to lodge the application with the determining authority, as required under **Article 28(1)**.

In ECRE's view, **Article 26** and **27** include welcome but obvious specifications of the tasks of the responsible authorities when an application is made as well as the type of information the responsible authorities are required to register.

Although the Commission proposal certainly clarifies the ambiguity with respect to making/registering and lodging of applications in Article 6 of the recast Asylum Procedures Directive, it complicates the process of accessing the asylum procedure by imposing on Member States an obligation to establish a three step procedural process before an application is considered lodged. This creates additional hurdles for applicants to access the asylum procedure, as discussed below. Requiring asylum applicants to present themselves to the same authority at different moments to comply with registration and lodging requirements in addition to personal interviews may also result in excessive and unnecessary administrative burdens and travel costs, in particular where applicants are accommodated far away from the determining authority. Moreover, a number of Member States do not currently distinguish between the making, registration and lodging of an application and apply a straightforward system whereby an asylum application is registered the day it is made without requiring applicants to formally lodge their application. Whereas this may not be logistically feasible in practice in some Member States because of geographic conditions for instance, the Asylum Procedures Regulation should encourage rather than prevent Member States from applying a one-step registration process where possible. Recital 23 already partially endorses such an approach by stating the objective that an application should be registered as soon as it is made. However, in ECRE's view, this could be further strengthened by disconnecting the lodging from the registration of the application and create a rest and preparation period instead as suggested below.

Moreover, whereas the three procedural steps are more clearly distinguished with respect to the authorities in charge and what needs to be registered and lodged, the justification for legally distinguishing the registration from the lodging of the application remains ambiguous in the Commission Proposal for lack of a clear legal definition in the text. Recital 24 refers to the lodging of the application as "the act that formalises the application for international protection", which triggers the time-limits for the various administrative procedures and the obligation to issue the applicant with a document certifying the person's status as an applicant. This creates further ambiguity and tension with other provisions in the *acquis* confirming the individual's status as an applicant for international protection as of the moment an application is made. Rather than formalising the application of international protection, lodging the application marks the submission of elements by the applicant which substantiate the claim and to which the applicant is entitled to do throughout the administrative procedure as is explicitly acknowledged in Article 28(4). Therefore, the Asylum Procedures Regulation should define the act of lodging not as a necessary step in order to *complete* the making of an application, as this is already achieved by the registration of the application, but as the act of *substantiating* the application to the applicant's ability. Seen from this perspective, the lodging of the application is to be understood as formalising the submission of elements relevant to the substance of the application in accordance with Article 4 of the proposed Qualification Regulation. Consequently, for reasons of internal consistency and legal certainty and in order to take away any legal ambiguity as regards the moment as of which a person is legally considered an applicant for international protection under the EU asylum *acquis*, ECRE recommends to include a definition of lodging and registration in Article 4 which reflects their actual role in the procedure more accurately.

ECRE recommends inserting the following definitions to Article 4(2), and a corresponding amendment to Recital 24:

Article 4(2)(ba): ‘registering’ of an application for international protection means the recording of the personal details, including fingerprints and a facial image in accordance with [Article 10(1) of the Eurodac Regulation] of an applicant for international protection, which formalises the application for international protection;

Article 4(2)(bb): ‘lodging’ of an application for international protection means the submission of elements available to the applicant which substantiate the application for international protection in accordance with [Article 4(1) of the Qualification Regulation];

Recital 24: The lodging of the application is the act **of submitting all relevant elements at the applicant’s disposal in accordance with [Article 4(1) of the Qualification Regulation] [deleted text]**. At this stage he or she is required to submit all the elements at his or her disposal needed to substantiate **[deleted text]** the application. The time-limit for the administrative procedure starts to run from the moment an application is lodged **[deleted text]**.

Time frame for lodging the application

ECRE is concerned that the **period of ten working days** from the date of registration for the applicant to lodge the application is too short in light of the amount of information the applicant is required to submit within such timeframe. By requiring the applicant to submit all the elements referred to in Article 4(1) of the proposed Qualification Regulation, **Article 28(4)** imposes a more than burdensome procedural step for the applicant. This includes, in addition to all the elements substantiating the application the following elements:

- (i) the applicant’s statements;
- (ii) all documentation at the applicant’s disposal regarding the applicant’s age, background and personal data of “relevant relatives”, including their places of previous residence;
- (iii) previous applications;
- (iv) travel routes and travel documents; and
- (v) reasons for applying for international protection.

While the relevance of the previous addresses and age of relevant relatives for examining a claim may be questionable, the scope of the obligation for the applicant to submit all elements substantiating the application turns the lodging of the application into a most critical moment for the applicant. Incomplete submission of elements at that stage can have serious consequences for the applicant, including the rejection of the application. Although the later submission of additional elements is explicitly allowed under Article 28, this may nevertheless be interpreted as casting serious doubts over the applicant’s credibility.⁹⁵ Moreover, although the Commission proposal does not explicitly require the use of a questionnaire, as is the case in many Member States today, it does not exclude it either. In particular, where a questionnaire needs to be completed by an applicant who is not entitled or has no access to free legal assistance, and in the language of the Member State concerned, the time frame of ten working days is neither fair nor reasonable. In a recent judgment concerning the requirement in Irish law for applicants who have been refused refugee status to submit an application for subsidiary protection within a period of 15 days, the CJEU held that such rule was incompatible with the principle of effectiveness.⁹⁶ With specific reference to the difficulties applicants may face because of the difficult human and material situation in which they may find themselves and the protection of the rights of defence and the principle of legal certainty, the Court found such time limit particularly short. It also held that it cannot reasonably be justified for the purposes of ensuring the proper conduct of the

⁹⁵ For an analysis of the impact of late submission of information on credibility assessment in the **Netherlands** and **Belgium**, see UNHCR, *Beyond Proof – Credibility Assessments in EU asylum systems*, May 2013, 97-102.

⁹⁶ See CJEU, Case C-429/15 *Evelyn Danqua v. Minister for Justice and Equality, Ireland, Attorney General*, Judgment of 20 October 2016.

procedure and is therefore “capable of compromising the ability of applicants for subsidiary protection actually to avail themselves of the rights conferred to them by Directive 2004/83”.⁹⁷ By analogy a period of 10 working days for lodging the application may be considered liable of rendering impossible in practice or excessively difficult the exercise of the rights conferred by the EU legal order.

Furthermore, compliance with the time limits for lodging the application as laid down in **Article 28(1) and (3)** depends as much on the capacity of the determining authority to receive the elements submitted by the applicant for that purpose as on the applicant’s diligence. In reality, the responsible authorities may not be able to give applicants an appointment for lodging the application within the set time-frames.⁹⁸ In such instances, in line with the EU law principle of the right good administration, non-compliance with the time-limits mentioned cannot be held against the applicant as he or she would not have had an effective opportunity to do so. Conversely, in order to provide the applicant with sufficient time to submit as many elements as possible substantiating the application, the date of the appointment given at the moment of registration of the application should not be set earlier than 20 working days after the date of registration. Moreover, the abovementioned delays of several weeks or even months in some EU Member States for *registering* applications due to the unprecedented increase in numbers of asylum applicants raise doubts about the capability of the responsible authorities to give applicants an appointment with a view to the lodging the claim within one month in such circumstances.

Finally, as the moment of lodging the application constitutes a critical moment in an individual’s asylum procedure and in view of the grave consequences for not complying with lodging obligations as mentioned above, ensuring effective access to legal assistance for the purpose of submitting the elements required is essential. As argued above, in ECRE’s view free legal assistance should be available as soon as possible after an application is made. However, as in practice it may take some time before a lawyer or legal advisor is appointed, the time period for lodging the application should be tied to the moment of assignment of the legal advisor or lawyer to the individual applicant or the refusal of free legal assistance in accordance with **Article 15(3)** amended as suggested by ECRE above.

Therefore, ECRE recommends including a more realistic minimum **20 working days** from the date the application is registered for lodging the application and to provide that the date of appointment given to the applicant shall not be set before 20 working days after the date of registration, unless the applicant consents to an earlier date. The aspirational nature of the one month time-limit in Article 28(3) should be emphasised in the preamble.

ECRE remains concerned over the penalisation of applicants for not complying with their obligations to lodge their applications within the time limits prescribed in the proposal by the obligation to reject their application as abandoned or implicitly withdrawn. These are discussed in more detail in section on [Implicit Withdrawals](#).

ECRE recommends amending Article 28(1) and (5) as follows:

Article 28(1): the applicant shall lodge the application within *[deleted text]* **twenty** working days from the date when the registration is registered **or at the latest at the date of the appointment given in accordance with paragraph 5**, provided that he or she is given an effective opportunity to do so. **Where free legal assistance is requested, the time period for lodging the application shall start to run upon the appointment of a legal advisor or other counsellor, or where the provision of free legal assistance and representation is refused in accordance with Article 15(3).**

⁹⁷ See CJEU, *Danqua*, par. 46.

⁹⁸ See **Article 28(3)** of the Commission proposal.

Article 28(5): The applications for international protection shall be lodged in person and at a designated place. For that purpose, when the application is registered, the applicant shall be given an appointment with the authorities competent for the lodging of the application. ***The date of such appointment shall be set not earlier than twenty working days from the date when the application is registered, unless the consent of the applicant is provided.***

Finally, whereas the Commission proposal sets specific time-limits for registration and lodging of the application, it does not provide a time frame for organising the personal interview after the application is registered. ECRE has long advocated for a **preparation period** to be provided to the applicant at the start of the asylum procedure.⁹⁹ As many asylum seekers arrive after a long and often traumatising journey, they need a period of rest before they can be subjected to a personal interview. During that time they can contact specialised NGOs and lawyers to receive specialist advice on the procedure and support with collecting evidence and documents to substantiate their claim. At the same time, such a period allows for additional steps to be taken in the identification and assessment of possible special needs the applicant may have. This is not only in the interest of the applicant but also of the determining authority as this allows for better caseload management and preparation of the personal interview. In ECRE's view, such preparation time before the personal interview should be at least four weeks after the registration of the application, unless the applicant consents to a shorter time period. Incorporating a rest and preparation period in a meaningful way in the common procedure as set out in the Commission proposal would require substantial changes to key aspects of its architecture, in particular the time limits for decision making at first instance. This would mean, for instance, that an admissibility or substantive interview in accordance with Article 10 and 11 respectively, could not be organised before one month after the application was registered. If ECRE's recommendation to give applicants at least 20 working days to lodge their application were adopted, the time-period for lodging an asylum application could operate as a preparation period, **provided the necessary support and legal assistance is available in practice** and access to material reception conditions is guaranteed as soon as the application is made.¹⁰⁰ In such case, the date for lodging the application could coincide with the date of the personal interview. However, where the complexity of the case or the personal circumstances of the applicant so require, the determining authority would always have the possibility to organise the personal interview at a later date. The concept of a preparation period is already applied in practice in the **Netherlands** today with the aim of providing the applicant with some time to rest in order to cope with their new situation. During this period, the applicant receives counselling by the Dutch Council for Refugees, while a number of other procedural steps are taken such as a medical examination, the EURODAC check etc.¹⁰¹

1.2. Documents: Article 29

In line with the procedural distinction made between making, registering and lodging of the application, **Article 29** provides for two types of documents to be issued to the applicant:

⁹⁹ See ECRE, *The Way Forward: Europe's role in the Global Protection Refugee Protection System. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, 49-50.

¹⁰⁰ As is required by Article 16(1) Commission Proposal recasting the Reception Conditions Directive and Article 17(1) recast Reception Conditions Directive. As mentioned above, in a number of Member States asylum seekers may be barred from accessing material reception conditions or accommodation for several weeks due to delays in the registration of their application or even after such registration. The effectiveness of a rest and preparation period would be conditional on rigorous screening and enforcement of Member States' obligations to provide effective access to material reception conditions, accommodation and legal assistance as soon as an application is made. The monitoring and assessment mechanism envisaged in the EU Asylum Agency Proposal could constitute an important tool in this regard.

¹⁰¹ In the **Netherlands**, which has a system of a short regular procedure aiming at concluding the first instance procedure in 8 working days with a possibility to refer cases to an extended procedure, the duration of the preparation period is at least six days. See AIDA, *Country Report The Netherlands*, Fourth Update, November 2015, 14-15.

- (i) a document certifying that an application has been made upon registration,¹⁰² i.e. in principle three working days after the application was made, extendable to 10 working days;¹⁰³ and
- (ii) a document to be provided within three working days of the lodging of the application, certifying, among other aspects “the status of the individual as an applicant”.¹⁰⁴

ECRE welcomes the strengthened obligations of Member States to provide applicants with a document relating to their status as individuals requesting international protection but is concerned that **Article 29(1) and (2)** introduces an unnecessary distinction, which risks undermining rather than contributing to legal certainty concerning the status of the individual as an applicant for international protection. As it stands, **Article 29(1)** only creates an obligation for Member States to certify that an application has been made upon registration, while the duration of that document’s validity is limited to the period needed to have the application lodged. This leaves the applicant undocumented in the period between arrival and registration, notwithstanding the applicant’s entitlement to remain on the territory under the proposed Regulation as soon as an application is made.¹⁰⁵

At the same time, although the definition of applicant for international protection qualifies a person as such from the moment an application is made,¹⁰⁶ certification of the status of an individual as an applicant is only explicitly required in the document to be issued after an application has been lodged. Furthermore, contrary to the document confirming the lodging of the application, the Commission proposal does not include an explicit requirement for the document referred to in Article 29(1) to be provided in the applicant’s own name, leaving considerable ambiguity as to the content and practical purpose of such document.

In ECRE’s view, **Article 29** should be further revised in order to strengthen the applicant’s protection from *refoulement* and enhance legal certainty for applicants and reflect the proper function of the lodging of the application in the asylum procedure as the moment where the claim is substantiated.

Firstly, in the interest of both asylum applicants and Member States’ authorities, and because the lodging of the application may only be completed after a considerable period of time, the individual’s status as an applicant for international protection should be certified at the moment the application is *made*, rather than only within three working days from the *lodging* of the application. Preferably, such a document should be provided at the moment the application is made. Provided the competent authorities are adequately equipped and staffed, there is, in principle, no reason why the document provided to the applicant upon registration could not contain the standard information currently listed in **Article 29(2)** with respect to the applicant’s personal details and rights. However, there may be situations where this is not possible for practical reasons, for instance where an application is made to one of the authorities listed in **Article 5(3)** in a remote area. In such cases it should be nonetheless feasible for such authorities to provide applicants with a standard template document certifying their status as an applicant and to which the basic personal details (name, date of birth and nationality) of the applicant can be added. Such a document would enhance legal certainty for authorities and applicants until full registration of the application in accordance with **Article 29(2)**, amended as suggested below. Therefore, ECRE recommends further amending **Article 29(1)** requiring Member States to provide an applicant with a document in their own name, certifying their status as an applicant immediately after an application is made.

¹⁰² See **Article 29(1)** of the Commission proposal.

¹⁰³ As per **Article 27(1) and (3)** of the Commission proposal discussed above.

¹⁰⁴ See **Article 29(2)(c)** of the Commission proposal. Other information to be mandatorily included in such document includes the identity of the applicant, the issuing authority, the applicant’s right to remain on the territory and possible limitations to his/her freedom of movement within the territory of the Member State concerned and the applicant’s right to take up gainful employment.

¹⁰⁵ See **Articles 9(1) and 25(2)** of the Commission proposal.

¹⁰⁶ See **Article 4(2)(b)** of the Commission proposal.

Secondly, applicants should be provided with a document including the elements currently listed in proposed **Article 29(2)**, upon *registration*. Issuing a document to applicants stating their basic personal details and their status as an applicant only at the moment of lodging the application is inconsistent with **Article 25(2)** according to which individuals must be considered as applicants under EU law as of the moment of making the application. In order to properly define the moment of lodging as the moment where the elements of the claim are formally submitted for the first time and for reasons of conceptual clarity, as suggested above, **Article 29(2)** should only require the determining authority to provide the applicant with a document certifying the fact that lodging requirements are fulfilled. In this regard, it should be noted that, notwithstanding its critical importance in the common asylum procedure as designed by the Commission, the proposal does not require Member States to provide applicants with a document certifying that they have complied with lodging requirements.

Thirdly, in order to enable Member State to maintain current good practice as mentioned above, **Article 29** should only allow for distinguishing making and registration of the application as two separate steps, where it is for logistical or practical reasons not possible for the authorities to register and document the applicant at the moment the application is made. Such an approach would allow authorities to issue one single document which reduces administrative burdens and increases legal certainty for the applicant. In particular, where the application is made directly to the determining authority, this should be encouraged as standard practice.

It should be noted that providing the information as to whether the applicant has permission to take up gainful employment, as foreseen under **Article 29(2)(f)**, would raise a difficulty in light of the possibility to exclude certain applicants in the accelerated procedure from access to the labour market as foreseen in the Commission proposal recasting the Reception Conditions Directive. As this would require an initial assessment of the substance of the application first, this would not be possible to do either at the moment of registration or lodging of the application. However, ECRE opposes the possibility to discriminate between categories of applicants as regards their access to the labour market, for reasons explained in ECRE's analysis of the Commission proposal recasting the Reception Conditions Directive.¹⁰⁷

ECRE recommends amending Article 29(1)-(3a) and Recital 22 as follows:

Article 29(1): The authorities of the Member State where an application for international protection is made shall, upon registration, provide the applicant with a document ***[deleted text] in his own name:***

- (a) stating the identity of the applicant by including at least the data referred to in Article 27(1)(a) and (b), verified and updated where necessary, as well as a facial image of the applicant, signature ***and*** current place of residence ***[deleted text]***;
- (b) stating the issuing authority, date and place of issue and period of validity of the document;
- (c) certifying the status of the individual as an applicant;
- (d) stating that the applicant has the right to remain on the territory of that Member State and indicating whether the applicant is free to move within all or part of the territory of that Member State;
- (e) stating that the document is not a valid travel document and indicating that the applicant is not allowed to travel without authorisation to the territory of other Member States until the procedure for the determination of the Member State responsible for the examination of the application in accordance with [the Dublin Regulation] has taken place;
- (f) stating whether the applicant has permission to take up gainful employment.

Article 29(2): ***[deleted text] Where it is not possible to provide the applicant with the document referred to in paragraph 1 at the time the application is made, the authorities referred to in***

¹⁰⁷ ECRE, *Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: <https://goo.gl/uPoBsj>.

Article 5 shall provide the applicant with a document in his or her own name certifying, in particular, his or her status as an applicant and stating that the applicant may remain on the territory of that Member State in accordance with this Regulation, upon making the application.

Article 29(3): Where, following a procedure of determination in accordance with [the Dublin Regulation], another Member State is designated as responsible for the examination of the application, the authorities of that Member State shall provide the applicant with a document referred to in paragraph **[deleted text] 1** within three working days from the transfer of the applicant to that Member State.

Article 29(3a): The determining authority shall provide the applicant with a document certifying that an application has been lodged in accordance with Article 28 and listing the elements submitted by the applicant, upon lodging the application.

Recital 22: Access to the common procedure should be based on a three-step approach consisting of the making, registering and lodging of an application. Making an application is the first step that triggers the application of this Regulation. A third-country national or stateless person is considered to have made an application when expressing a wish to receive international protection from a Member State. Such a wish may be expressed in any form and the individual applicant need not necessarily use specific words such as international protection, asylum or subsidiary protection. The defining element should be the expression by the third country national or the stateless person of a fear of persecution or serious harm upon return to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence. In case of doubt whether a certain declaration may be construed as an application for international protection, the third-country national or stateless person should be expressly asked whether he or she wishes to receive international protection. The applicant should benefit from rights under this Regulation and [the Reception Conditions Directive] as soon as he or she makes an application. **The applicant should be given a document which certifies his or her status as an applicant and which should be valid for the duration of his or her right to remain on the territory, at the time when the application is made.**

1.3. Access to the procedure in detention and border crossing points: Article 30

The provision of accurate and timely information with regard to the possibility to apply for international protection and the modalities for making such an application is crucial to ensure “effective access to the examination procedure”, as required by the recast Asylum Procedures Directive¹⁰⁸ and the Commission proposal. ECRE is concerned that the wording used in **Article 30(1)**, copied from Article 8(1) of the recast Asylum Procedures Directive, is unclear and therefore fails to set a useful standard for Member States. It is hard to see how in practice border guards at border crossing-points or personnel in detention facilities should interpret “indications that third country nationals or stateless persons... may wish to make an application for international protection”. This provision leaves too much to the official’s subjective assessment of whatever ‘indications’ may be presented, itself being such a vague concept that it seems liable to create arbitrariness. As argued elsewhere by ECRE,¹⁰⁹ a mere “indication” is not suitable as a benchmark to establish Member States’ obligations to provide third country nationals in such locations with information on the possibility to do so. If such a standard were to be applied on an individual basis it would most likely result in discriminatory treatment of third country nationals, as an unqualified and subjective indication as to whether a person may or may not

¹⁰⁸ See Recital 26 recast Asylum Procedures Directive, emphasising the crucial role of officials who come first into contact with persons seeking international protection, in particular border guards in ensuring access to the asylum procedure and the importance of training in providing persons who make an application for international protection with the relevant information as where and how to lodge such an application.

¹⁰⁹ ECRE, *Information Note on Directive 2013/32/EU*, December 2014, 13-14.

wish to apply for asylum cannot qualify as an objective justification for withholding such information from that person.

In ECRE's view, the principle of non-discrimination laid down in Article 21 of the EU Charter, requires information detailing the possibility of making an application for international protection to be available to all third country nationals present in such locations. In order to be effective, such information must be provided pro-actively to all those apprehended at the border or held in detention facilities on an equal footing. Informing individuals of the possibility to make an asylum application is not an overly complicated task and does not require the use of disproportionate resources, as it can be provided by way of information leaflets and through oral communication, including audio-visual material that is freely accessible in detention facilities or border crossing points.¹¹⁰ ECRE therefore recommends amending **Article 30(1)** accordingly.

ECRE recommends the following amendment to Article 30(1):

Article 30(1): [deleted text] The responsible authorities shall inform all third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders of the possibility to apply for international protection.

2. Examination procedure

As mentioned above, specific time-limits are imposed on the relevant authorities for the conclusion of both the administrative first instance and the appeal procedure as well as on applicants for lodging appeals against the various types of decisions envisaged in the Commission proposal,¹¹¹ with a view to streamlining the procedures and enhancing their effectiveness. This important change compared to the flexibility left to Member States under the recast Asylum Procedures Directive carries important risks from a fundamental rights perspective and the quality of decision-making. Furthermore, the Commission proposal distinguishes between decisions on the admissibility and the merits of the application, in addition to explicit and implicit withdrawals as possible decisions for the determining authority. This section raises a number of specific concerns with regard to the aforementioned aspects. As it raises similar issues as **Article 34**, the duration of first level appeals dealt with in **Article 55** is discussed in this section as well. Time-limits for lodging appeals are discussed in the section on the [Time Limits for Appeals](#).

2.1. Duration of administrative procedures: Article 34(1)

While the Commission proposal confirms the current maximum time limit of six months for concluding the examination procedure in the regular procedure under the recast Asylum Procedures Directive, as the benchmark for the examination procedure on the merits, it sets extremely short deadlines for "determining the admissibility of an application". Such procedure is to be concluded within one month from the lodging of the application according to **Article 34(1)**, a time period which is reduced to ten working days for the Member State of first application applying the first country of asylum or safe third country concept.

Only in the case of an examination procedure on the merits may the time-limits be extended with a period of not more than three months in case of a disproportionate number of third country nationals applying for international protection at the same time or in complex cases.¹¹² In addition to a possible extension, as is the case under the recast Asylum Procedures Directive, the Commission proposal

¹¹⁰ See also EASO and Frontex, *Practical Guide: Access to the Asylum Procedure*, 2016, available at: <https://goo.gl/7js7tE>.

¹¹¹ See **Article 53(6)** of the Commission proposal and section on the [appeal procedure](#) below.

¹¹² See **Article 34(3)** of the Commission proposal.

allows for the postponement of the conclusion of the examination where the determining authority cannot reasonably be expected to decide within the proscribed time-limits “due to an uncertain situation in the country of origin which is expected to be temporary”. However, whereas currently such postponement may delay the taking of a decision on an individual application up to 21 months, this is reduced to 15 months in the Commission proposal.¹¹³

ECRE considers the conclusion at first instance of the examination of the **merits of an application** within six months from the lodging of the application a reasonable objective allowing in many cases a fair and full examination of the claim while respecting all procedural safeguards, provided the determining authority is sufficiently resourced and its staff well-trained. At the same time, flexibility is needed where the complexity of the case so requires or in case of large numbers of asylum seekers arriving simultaneously in a Member State. Rather than setting a binding norm, maximum time limits for concluding examination procedures should always remain aspirational. In this regard, the possibility for a three-month extension foreseen under **Article 34(3)** for complex cases or in case of large numbers of asylum seekers applying, is considerably shorter than the maximum 12 months allowed under the recast Asylum Procedures Directive. ECRE questions whether imposing such limited extension period is realistic, time limits for decision-making laid down in Article 31 of the recast Asylum Procedures are hardly respected in practice today.¹¹⁴ At the same time, more rigorous scrutiny of compliance with the time limits set, including through the future EU Asylum Agency may put undue pressure on the determining authority to take a decision, even where further research or additional interviews would be necessary in order to enable quality decision-making.

2.2. *Legal consequences of non-compliance with time limits by the determining authority: Article 34(1)*

Under the Commission proposal, non-compliance by the determining authority with the time-limits foreseen for the in-merit examination or the examination of admissibility has no legal consequences for the determining authority. Moreover, the Commission proposal, contrary to the recast Asylum Procedures Directive, omits the obligation for the determining authority to inform the applicants of the reasons for the delay and an indication of the time frame within which a decision is to be expected. This is problematic in two respects. First, the right to good administration as general principle of EU law entails the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time.¹¹⁵ In particular, as EU law prescribes specific time limits within which decisions should be taken and includes an obligation on States to inform applicants thereof, this creates a legitimate expectation on behalf of the applicant for the decision to be served within such time limits. Where this is not the case, the applicants should be duly informed of the reasons.¹¹⁶

Therefore, ECRE recommends reinserting the obligation contained in Article 31(6) of the recast Asylum Procedures Directive to inform the applicant of the reasons why a decision is not taken within the prescribed time-limit and the time-frame within which a decision can be expected.

¹¹³ See **Article 34(5)** of the Commission proposal.

¹¹⁴ On this point, see ECRE, *The length of asylum procedures in Europe*, AIDA Legal Briefing No 7, October 2016, available at: <https://goo.gl/q6hlJn>.

¹¹⁵ In the case of *Ys*, the CJEU confirmed that Article 41 EU Charter of Fundamental Rights, although it is not addressed to Member States, reflects a general principle of EU law. See CJEU, Case C-141/12, *Ys v. Minister voor Immigratie, Integratie en Asiel en Minister voor Immigratie, Integratie en Asiel v. M, S*, Judgment of 17 July 2014, par. 68.

¹¹⁶ This has been sanctioned recently by German courts. See Administrative Court of Munich, Judgment M 12 K 16.31503 of 29 July 2016, in which the applicant complained that he had not received a first instance decision after 12 months from the lodging of his claim and had not been informed of the reasons for the delay. Citing the recast Asylum Procedures Directive, the court found that the 12 months had gone over the scale of deadlines in the Directive and that the permanent overloading of the authorities was no excuse. The court obliged the administrative authority to give a first decision within 3 months. See also Administrative Court of Würzburg, Judgment W 3 K 15.30604 of 4 March 2016; Order 3 K 15.30267 of 23 February 2016; Administrative Court of Munich, Judgment M 15 K 16.30647 of 5 April 2016.

Secondly, the lack of any procedural consequence for not complying with the time limits set for admissibility decisions or the accelerated examination procedure, raises questions as to the added value of such time limits and from the perspective of procedural fairness and internal consistency of the proposal. In the context of a border procedure, non-compliance with the obligation to take a decision within four weeks mandatorily results in the applicant being “granted entry to the territory for his or her application to be processed in accordance with the other provisions of this Regulation.” However, where a case is too complex to be examined under an accelerated examination procedure, which necessarily is linked to the reduced time frame of two months or eight working days foreseen for such procedure, the proposal only provides for a *possibility* to continue the examination of the “merits of the claim”. This contrasts with approaches in **Germany** and **Sweden**, where failure to observe the expeditious time limits of the accelerated procedure entails an *obligation* on the authorities to examine the application under the regular procedure.¹¹⁷ ECRE sees no reason why non-compliance with the time limits applicable to admissibility decisions on behalf of the determining authority should remain without any consequences. The ECtHR has found in instances that Article 6 of the ECHR was violated when the applicant was not informed of the reasons for a delay in their case.¹¹⁸ While the delay depends on the circumstances of the case, the applicant, for reasons of legal certainty and reasonable expectation needs to be informed of such a delay. The regulation and the provisions therein need to be read in light of the EU Charter. Article 47 of the EU Charter is informed by Article 6 ECHR and its case law, and as such, it is now applicable to asylum law.

The objectives of procedural fairness and administrative efficiency, underlying the Commission proposal,¹¹⁹ require that admissibility criteria should be applied at the initial stage of the procedure or not at all. Allowing the rejection of the application on admissibility grounds several months after an application was lodged, not only unnecessarily delays applicants’ access to the examination of their claim and undermines legal certainty for the individual, it also contradicts the proposal’s own logic of filtering out such applications as soon as possible in the process. Failure of the determining authority to identify a safe third country or first country of asylum for the applicant within the set time frame should be equated with a finding that the criteria for applying the safe third country or first country of asylum concepts are not met. Therefore, while ensuring an effective possibility for the applicant to rebut the safety of another country in his or her individual circumstances, the determining authority should **automatically continue the examination on the merits of the application**, where it is unable to reject an application as inadmissible within one month.

At the same time, ECRE considers the mandatory time limit of ten working days for the Member State of first entry to apply the safe third country or first country or asylum concepts, pursuant to **Article 3(3) of the Dublin IV proposal**, as excessively short. This could in practice result in a blanket application of such concepts, make the provision of quality free legal assistance close to impossible and deprive the applicant of an effective opportunity to rebut presumptions of safety in his or her circumstances.¹²⁰ This would be incompatible with the general EU law principle of effectiveness according to which national rules and procedures should not render the exercise of EU rights impossible or excessively difficult in practice,¹²¹ which should *a fortiori* be upheld with respect to procedural rules laid down in an EU Regulation.

ECRE recommends amending Article 34 as follows:

¹¹⁷ On this point, see ECRE, *The length of asylum procedures in Europe*, October 2016.

¹¹⁸ ECtHR, *Eckle v. the Federal Republic of Germany*, Application No 8130/78, Judgment of 15 July 1982, par. 80; *Foti and others v. Italy*, Application No 7604/76, Judgment of 10 December 1982, par. 76.

¹¹⁹ See **Recital 33** according to which maximum time-limits for the duration of the administrative procedure as well as for the first level of appeal should be established to streamline the procedure for international protection with the purpose of enabling applicants to “receive a decision on their application within the least amount of time possible in all Member States thereby ensuring a speedy and efficient procedure”.

¹²⁰ As guaranteed under **Articles 45(3)(b) and 44(3)** of the Commission proposal.

¹²¹ See CJEU, Case C-13/01 *Safalero Srl.v.Prefetto di Genova*, Judgment of 11 September 2003, par. 49.

Article 34(1): The examination to determine the admissibility of an application in accordance with Article 36(1) shall not take longer than one month from the lodging of an application.

[deleted text] Where the determining authority does not determine the admissibility of an application within one month, it shall continue the examination of the application in accordance with paragraph 2 and 3 and Article 37.

Article 34(4a): Where the determining authority cannot take a decision within the time-limits mentioned in paragraph 1 or 2, it shall inform the applicant concerned of the delay, its reasons and the time-frame within which a decision on his or her application is to be expected.

2.3. “Freezing” the examination of applications due to “an uncertain situation in the country of origin”: Article 34(5)

ECRE equally remains most concerned with the possibility under **Article 34(5)** for the determining authority to postpone taking a decision on the merits, whether in a regular or accelerated examination procedure, due to an uncertain situation in the country of origin which is expected to be temporary”. In an asylum context, the reference to the uncertainty and temporariness of the situation in the country of origin sets a very arbitrary benchmark for such administrative practice as theoretically any situation could qualify as such.¹²² In **Spain**, where postponement has been systematically used for certain nationalities such as Côte d’Ivoire, Mali, the Democratic Republic of Congo (DRC), Iraq and Ukraine,¹²³ the Spanish Ombudsman has sharply criticised this practice.¹²⁴

Whereas the evolving situation in a country of origin obviously is an important factor in the assessment of an asylum application and may indeed result in asylum authorities needing more time to take a decision, as discussed above, Member States should grant protection to those in need when they require it and as soon as they qualify as such. Postponing a decision has significant consequences for the applicant who may be confronted with poor reception or detention conditions, continued lack of access to the labour market and will have to wait even longer to be reunited with his or her family members. Furthermore, it also undermines the EU law principle of legal certainty. Swift quality decision-making is also in the State’s interests as it contributes to the efficiency of the procedure and reduces the period of provision of reception conditions to asylum seekers.

Despite the proposed reduction of the time period during which the decision may be postponed for such reason from 21 to 15 months and the more regular review of the situation in the country of origin, ECRE questions the added value of consolidating the administrative practice of “freezing” the examination of applications for international protection. In ECRE’s view, **Article 34(2)** offers sufficient flexibility to the determining authority to address the complexity of certain caseloads. The possibility of postponing decisions on the basis of the uncertain situation in the country of origin entails a risk of asylum authorities overstating the importance of minor positive developments in the country of origin in assessing the need for international protection of the applicant. Finally, Member States always have the possibility under international refugee law and the EU asylum *acquis* to apply the cessation clauses, the purpose of which is to end the protection status *inter alia* where the circumstances have significantly changed and those changes are of a non-temporary nature.

¹²² See also Cathryn Costello and Emily Hancox, ‘The recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in Vincent Chetail *et al.*, *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff 2016), 411.

¹²³ AIDA, *Country Report Spain*, April 2016, 35; Spanish Ombudsman, *El asilo en España: La protección internacional y los recursos del sistema de acogida*, June 2016, available in Spanish at: <http://goo.gl/7goNfF>, 64.

¹²⁴ Spanish Ombudsman, *El asilo en España: La protección internacional y los recursos del sistema de acogida*, June 2016, 64.

ECRE recommends deleting Article 34(5).

2.4. *Translation of documents in the asylum procedure: Articles 33(4) and 53(5)*

Applicants for international protection may have obtained documents from the country of origin or expert opinions supporting their claim. National administrative law in some Member States requires such documents to be translated into the official national language in order to be admissible in the first instance procedure or in court proceedings. Translation costs may be considerable and if imposed on applicants may deprive them in practice from the possibility of submitting essential information with respect to the examination of their application for international protection. Whereas the recast Asylum Procedures Directive remains silent on this matter, **Articles 33(4) and 53(5)** of the Commission proposal explicitly state that documents relevant for the examination of applications by the determining authority or Court or tribunal at the stage of first level appeal, shall be translated where necessary. Whereas this is a welcome clarification and important principle reflecting current practice in many Member States, the current formulation leaves room for interpretation as to who should bear the costs of translation. Unlike the provisions on the provision of interpretation services, proposed **Articles 33(4) and 53(5)** do not refer to such costs being covered by public funds. Similar lack of clarity exists with respect to translation costs of documents submitted in age assessment or family reunification in the context of Dublin procedures. In ECRE's view, where such documents are submitted and translation is required by the determining authority or Court or Tribunal, translation costs should as a principle be paid from public funds for reasons of fairness and ensuring quality of decision-making and access to justice. This reflects existing practice in a number of Member States such as **Germany, Denmark, Cyprus, Slovenia and Poland**.¹²⁵ In order to avoid diverging interpretation among Member States, ECRE recommends incorporating this principle in the preamble.

ECRE recommends inserting the following Recital 12a:

Recital 12a: *In order to ensure the principle of effective legal protection is upheld, where an official translation of documents relevant for the examination of an application for international protection is required, recourse to official public funds should be provided where the costs cannot be borne by the applicant.*

2.5. *Maximum time limits for appeal bodies deciding on first level appeals: Article 55*

Parallel to the time-limits for the various administrative procedures, **Article 55** proposes maximum time-limits for the national courts and tribunals to decide on first level appeals. ECRE seriously questions both the feasibility and added value of this provision in light of the obligation to ensure access to an effective remedy. Firstly, in many Member States, courts and tribunals dealing with appeals against negative decisions on asylum applications are non-specialised, meaning that asylum law is only one area of law within their competence. Imposing time limits for deciding on appeals in asylum cases is likely to be a complicating factor in planning and managing caseloads. Secondly, non-compliance with these time limits entails no procedural consequences whatsoever either on behalf of the court or tribunal concerned or the applicant. As a result, the mentioned time-limits remain entirely aspirational and have no legal consequences.

Should this provision be maintained, ECRE considers it necessary, for reasons of coherence of the EU asylum *acquis* to align this provision with the principle of detaining asylum applicants only for as short a period as possible as laid down in Article 9(1) recast Reception Conditions Directive and the

¹²⁵ Information provided by the ELENA Coordinators Network, June 2016.

right to a speedy judicial review of the detention in accordance with Article 9(3) of this Directive.¹²⁶ In light of the adverse effects of deprivation of liberty on the mental and physical health of the individual and the presumption against detention of asylum seekers in international refugee and human rights law, the duration of the first level appeal should be as short as possible. In this regard, ECRE considers providing for a longer maximum duration of the first level appeal in case the applicant is held in detention (two months) than in the case of an appeal against a decision rejecting a subsequent application (one month) illogical and incoherent.

2.6. *Decision on the merits of an application: Article 37*

ECRE welcomes the confirmation in **Article 37(1)** of the mandatory sequence for examining the applicant's eligibility for one of the two protection statuses defined under EU law.¹²⁷ Recent decision-making practice in EU Member States with regard to asylum applications from persons fleeing the conflict in Syria,¹²⁸ has shown that such sequence is not always applied by first instance asylum authorities in EU Member States. Its explicit consolidation in this Commission proposal is important in light of the differences between refugee status and subsidiary protection status maintained in the Commission proposal for a Qualification Regulation.¹²⁹

However, ECRE questions the relevance of the obligation for the determining authority to declare an unfounded application to be manifestly unfounded in five circumstances where the accelerated examination procedure must be applied, included in **Article 37(3)**, whereas this is optional under the recast Asylum Procedures Directive.¹³⁰ Under the Commission proposal, there is no legal difference between declaring an application processed in the accelerated examination procedure "manifestly unfounded" or "unfounded" for the purpose of the asylum procedure, as in both cases the same time limits apply for the determining authority and the applicant. At the same time, the Commission proposal does not require the determining authority to state the reasons why it considers an application to be "manifestly unfounded" rather than unfounded. However, qualification as manifestly unfounded allows Member States to deprive rejected applicants from a period for voluntary departure under the Return Directive, which triggers the mandatory issuance of an entry ban accompanying the return decision, which may be valid up to 5 years.¹³¹ This is likely to result in arbitrariness at the discretion of determining authorities, and may encourage decisions on asylum applications being dictated by return policy objectives rather than protection considerations. Moreover, declaring an application "manifestly" unfounded further adds to stereotyping such application as abusive and implies an additional but unsubstantiated negative qualification of the substance of the claim which may *de facto* result in an increased burden of proof for the applicant in challenging a negative first instance decision before a Court or Tribunal.

¹²⁶ Article 9 recast Reception Conditions Directive is not amended by the Commission proposal recasting the Reception Conditions Directive.

¹²⁷ This is already implied in the definition of beneficiary of subsidiary protection in the recast Qualification Directive as a third country national or stateless person "who does not qualify as a refugee" but in respect of whom the eligibility grounds of Article 15 apply. See Article 2(f) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* 2011 L337/9.

¹²⁸ See for instance, ECRE/ELENA, *Information Note on Syrian Asylum Seekers and Refugees in Europe*, November 2013; AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, 19.

¹²⁹ In particular with respect to the duration of the residence permit and access to social assistance. See European Commission, *Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM(2016) 466 final, 13 July 2016, Articles 26 and 34.

¹³⁰ See Article 32(2) recast Asylum Procedures Directive.

¹³¹ See Articles 7(4) and 11(1) Return Directive.

ECRE recommends amending Article 37(3) as follows:

Article 37(3): The determining authority *[deleted text]* **may** declare an unfounded application to be manifestly unfounded in the cases referred to Articles 40(1)(a),(b),(c),(d) and (e).

2.7. *Decision on the admissibility of the application: Article 36*

Contrary to Article 33 of the recast Asylum Procedures Directive, **Article 36** obliges Member States to assess admissibility and reject an application as inadmissible where the first country of asylum or safe third country concept can be applied, in case of a subsequent application or in case of an application lodged by a spouse, partner or accompanied minor who previously consented to an application made on his or her behalf.

The mandatory assessment of the admissibility of applications for international protection, in particular on the basis of safe country concepts, primarily serves the overall objective of shifting protection responsibilities as much as possible to countries outside the EU, which underpins the reform of the CEAS. As discussed below,¹³² the obligatory application of the safe third country and first country of asylum concepts, as envisaged by the Commission proposal, is likely to have a significant **adverse impact on access to protection in the EU**, as it will result in increasing numbers of applicants being barred from a full examination of the merits of their claim.

At the same time, imposing an obligation on the determining authority to carry out a separate admissibility assessment of every application for international protection creates **additional administrative burdens** and complicates the process for both applicants and asylum authorities. Rebutting presumptions of safety in their individual cases within expedited processing times, which may be as short as 10 working days will, in many cases, be very onerous on all parties. At the same time, where a case cannot be dismissed as inadmissible, the determining authority will be required to assess the same facts as part of a separate substantive examination. Such fragmentation of the asylum process is therefore not only undermining procedural fairness but also creates administrative and organisational costs resulting from the duplication of procedural steps within the examination procedure. This is inconsistent with the proposal's overall objective of establishing simpler, clearer and shorter procedures in the EU.¹³³ Member States such as **Italy** and **Sweden**, some of the countries processing most asylum applications,¹³⁴ have managed to effectively examine caseloads without an admissibility procedure.¹³⁵

It is noted that derogations from the prescriptive approach with regard to admissibility decisions are only allowed, where the determining authority *prima facie* considers that an application may be rejected as manifestly unfounded.¹³⁶ However, no such derogation from the obligation to assess the admissibility of the application is explicitly foreseen where protection needs are *prima facie* well-founded. As a result, procedural expediency is only encouraged where an application can be easily dismissed, while a determining authority will be obliged to pronounce itself on the admissibility and the merits of the case in two separate decisions, where a claim is likely to be well-founded.

¹³² See ECRE's recommendations on Articles 44, 45, 46 and 50 relating to the first country of asylum and safe third country concept.

¹³³ See Explanatory Memorandum, 4.

¹³⁴ Out of a total 474,865 first instance decisions taken in the EU in the first half of 2016, over 54% were processed in **Germany**, followed by 10% in **Italy** and 7.1% in **Sweden**: Eurostat, *First instance decisions Quarterly data*, migr_asydcfstq.

¹³⁵ AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, 16.

¹³⁶ See Article 36(5) of the Commission proposal.

Under the current optional provision in the recast Asylum Procedures Directive, a significant number of Member States do not currently apply the two main inadmissibility grounds listed in Article 36, i.e. the first country of asylum,¹³⁷ and safe third country concept.¹³⁸ Moreover, under the 1951 Refugee Convention, as well as constitutional provisions in countries such as France or Germany,¹³⁹ states **retain the sovereign right to examine an asylum application on the merits**. To ensure compliance with the right to asylum, the Regulation must at all instances allow Member States to enter into a substantial examination of the claim where they consider it appropriate. Therefore, ECRE strongly recommends maintaining admissibility assessment as an optional feature of the common procedure.

ECRE recommends amending the first sentence of **Article 36(1)** as follows:

Article 36(1): The determining authority *[deleted text]* **may** assess the admissibility of an application, in accordance with the basic principles and guarantees provided for in Chapter II and *[deleted text]* **may** reject an application as inadmissible *[deleted text]* **only if:**

2.8. *Implicit withdrawal of applications: Article 39*

Article 39 presents a different approach to implicit withdrawals compared to the corresponding provision in the recast Asylum Procedures Directive in two ways. First, according to Article 39(1) Member States have no other option than to reject an application as abandoned in the six cases listed, whereas under the recast Asylum Procedures Directive, Member States may simply opt for the discontinuation of its examination without rejecting the application. Secondly, resumption of the examination of the application is only possible in case the applicant reports back to the determining authority within one month after written notice was sent of the decision to discontinue its examination and demonstrates circumstances beyond his or her control being responsible for the applicant's non-compliance. Currently, Member States may only decide not to reopen the applicant's case after at least nine months after a decision to discontinue was taken.

ECRE favours a cautious approach with respect to implicit withdrawals in light of the potentially grave consequences for the applicant that may result from it, including violations of the applicant's fundamental rights, including the right to asylum and the principle of non *refoulement*. Furthermore, it should be noted that non-compliance with certain procedural obligations incumbent on the applicant may be the result of factors over which he or she may have no control. In any administrative process, miscommunications between the individual and the authorities may result from a variety of factors, including administrative errors, sudden illness etc. Such risks are even greater in the asylum procedure, as applicants are in most cases unfamiliar with the language and legal framework of the country concerned and may have difficulties to cope with their personal situation and recent experiences, in particular at the start of the process.

In ECRE's view, imposing an obligation on Member States to reject applications as abandoned is disproportionate and deprives them of any flexibility to adopt a more cautious approach where they consider this necessary to comply with their obligations under international human rights law or the EU Charter. Moreover, **Article 39** does not necessarily enhance administrative efficiency and expediency, which may be better served by a flexible process of reopening and examining an applicant's file without having to resort to the more complicated procedural step of lodging a new application, which

¹³⁷ Including **Austria, Belgium, Bulgaria, Italy, Sweden** and the **UK**. See AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, 16.

¹³⁸ Including **Belgium, France, Ireland, Italy, Poland**. *Ibid.*

¹³⁹ See Article 53-1 of the French Constitution, which expressly recognises this right.

under the Commission proposal in all cases will have to be treated as a subsequent application.¹⁴⁰ This means that asylum applicants who have been found not to qualify for international protection but possibly without having had the chance of further substantiating their claim, can only access the asylum procedure again upon submission of new elements which “significantly” increase the likelihood of them qualifying as a beneficiary of international protection, or which relate to the reasons for which the previous application was rejected as inadmissible.¹⁴¹ This not only creates an additional hurdle on accessing the asylum procedure by imposing an excessive burden of proof on the applicant which may be extremely difficult to meet in practice, it also adds another layer to the asylum procedure, which can be easily avoided by adopting a less bureaucratic and more protective approach. Moreover, due to the fact that the rules regarding subsequent applications not only apply to further applications made in the Member State which rejected the previous application but also to such applications made in any Member State, the mandatory rejection of applications as implicitly withdrawn, expands the human rights implications of such decisions for the individual applicant enormously compared to the recast Asylum Procedures Directive.¹⁴² Consequently, ECRE recommends maintaining sufficient flexibility for Member States with respect to the way in which implicit withdrawals are dealt with administratively.

Furthermore, **Article 39(1)** includes two criteria for rejecting an application as abandoned, which are not per se related to the fact that the applicant is not at the disposal of the determining authority for the examination of their application. The finding that an applicant is not providing the necessary details for the application clearly relates to the examination of the merits of the application and should therefore lead to a rejection of the application as unfounded rather than abandoned. Leaving the place of residence without informing the authorities or without authorisation, does not necessarily imply that the applicant is no longer available to the determining authority for the examination of their claim either. It may be that the applicant has left the place of residence only for a short period of time and as long as the applicant cooperates with the determining authority and replies to requests for information and appears for personal interviews, this should not trigger any consequences in the asylum procedure as such. Therefore, ECRE recommends deleting **Article 39(1)(e)** and the reference to applicants’ refusal to provide the necessary details for the application to be examined in **Article 39(1)(c)**.

ECRE recommends amending Article 39(1) as follows:

Article 39(1): The determining authority *[deleted text]* **may** reject an application as abandoned where:

- (a) the applicant has not lodged his or her application in accordance with Article 28, despite having had an effective opportunity to do so;
- (b) a spouse, partner or minor has not lodged his or her application after the applicant failed to lodge the application on his or her own behalf as referred to in Article 31(3) and (8);
- (c) the applicant refuses to cooperate *[deleted text]* by not providing his or her fingerprints and facial image pursuant to Article 7(3);
- (d) the applicant has not appeared for a personal interview although he was required to do so pursuant to Articles 10 to 12;

[deleted text]

- (e) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 7(5).

¹⁴⁰ According to **Article 42(1)**, any further application made by the same applicant in any Member State, after a previous application had been rejected by means of a *final decision*, must be considered to be a subsequent application. A rejection of an application as abandoned which can no longer be subject to an appeal procedure in the Member State concerned, is included in the definition of “final decision” in **Article 4(2)(d)** of the Commission proposal.

¹⁴¹ See **Article 42(2)** of the Commission proposal

¹⁴² See Article 40(1) recast Asylum Procedures Directive on subsequent applications limiting its scope to persons making further representations or a subsequent application in the *same* Member State.

3. Special procedures

Recent data published by EASO reveal that the use of special procedures such as border and accelerated procedures generally result in a much higher proportion of applications being rejected than is the case in regular procedures. To illustrate, 90 % of applications examined under accelerated procedures and 88% of applications examined in border procedures in the EU in 2015 resulted in negative decisions.¹⁴³ As special procedures in the EU Member States are typically characterised by often extremely short time frames for the authorities for processing claims, reduced time limits for applicants to lodge appeals and the lack of appeals with automatic suspensive effect, the use of such procedures continues to raise serious fundamental rights concerns, despite the increased procedural guarantees with respect to such procedures included in the recast Asylum Procedures Directive. Practice shows that the conditions in which such procedures are carried out, may make a fair and qualitative examination of applicants' need for international protection close to impossible, in particular as applicants have insufficient time to prepare their application properly or to appeal a negative decision effectively. There has been a worrying trend in many Member States, *inter alia* encouraged by the EU asylum *acquis*, of such special procedures becoming the norm rather than the exception.¹⁴⁴ ECRE is concerned that the Commission proposal consolidates rather than counters such trend, to the detriment of applicants' rights under international law and the EU Charter.

3.1. Accelerated examination procedure: Article 40

Compared to the recast Asylum Procedures Directive, **Article 40** further reduces the number of possible grounds for acceleration to 8, introduces a maximum duration of two months (reduced to eight working days in one case) for concluding of the examination and explicitly allows Member States to switch to the "regular" procedure where the complexity of the case so requires. Moreover, instead of being optional, the Commission proposal now makes the use of accelerated examination procedure mandatory in the cases listed exhaustively in paragraph 1.

While the deletion of a number grounds for acceleration allowed under the recast Asylum Procedures Directive is welcomed, the Commission proposal maintains grounds which ECRE considers problematic and includes two new grounds: (1) non-compliance with obligations under the Dublin Regulation; and (2) subsequent applications without tangible prospect of success. ECRE has consistently advocated for a restricted use of accelerated procedures, given the fundamental rights risks they entail. In line with UNHCR's EXCOM Conclusion No. 30, where States want to accelerate the examination procedure, this should be limited to cases which are clearly fraudulent or where the applicant has only submitted issues that are not related to the grounds for granting international protection. In ECRE's view, the grounds mentioned in **Article 40(1)(c), (d), (e), (f) and (g)** raise concern in this respect as they suggest that the determining authority makes a value judgment with respect to elements that may be part of the assessment of the substance of the claim but should not, as such, determine whether or not the examination should be processed within shorter time limits. In this regard, the evaluation whether an applicant makes an application in order to delay or frustrate the enforcement of an earlier or imminent return decision can be highly subjective. As such, this should remain distinct from assessing whether a person has a well-founded fear of persecution or a real risk of serious harm, which is the only assessment that matters once as person has applied for international protection. As ECRE opposes the safe country of origin concept as explained below, it should not be used as a ground for accelerating the examination procedure. The same applies to the situation where an applicant does not comply with the obligation to apply in the Member State of first entry laid down in **Article 4 of the Dublin IV proposal**. As argued elsewhere, an applicant's

¹⁴³ See EASO, *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, 96.

¹⁴⁴ For an overview and critical analysis see, AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, 75-81.

secondary movement to another than the responsible Member State is as such unrelated to the individual's well-founded fear for persecution or risk of serious harm or other human rights violations in the country of origin or habitual residence.¹⁴⁵ The mandatory application of an accelerated procedure in such cases cannot therefore be justified on the basis that the application is unrelated to grounds for international protection, and would result in procedural unfairness.

ECRE also considers that Member States should under no circumstances be under an obligation to process applications in an accelerated procedure, in light of the serious human rights consequences this may entail. While most Member States currently have an accelerated procedure in the law, some of them, such as **Cyprus**,¹⁴⁶ do not use them in practice, whereas a number of EU Member States, including **Ireland** and **Sweden**,¹⁴⁷ are perfectly capable of managing their caseloads without having such a procedure formalised in legislation. Member States' flexibility to treat an application in a "regular" procedure should extend beyond complex cases as referred to in paragraph 4, where they consider this necessary in an individual case. With a view to ensuring quality of decision-making, ECRE recommends further strengthening **Article 40(4)** by providing for a mandatory referral of the case to the "regular" procedure where the complexity of the facts or the law so require. The finding that a case is complex is self-indicative of the fact that more time is necessary to examine the application than is allowed under the accelerated examination procedure. The same applies to the failure of the determining authority to take a decision within the time-limits foreseen, the procedural consequences of which are ambiguously stated under the Commission proposal and seem to be limited to complex cases. The added value of such time limits in practice is highly questionable if it is not accompanied by clear procedural consequences in case of non-compliance, as it is the case for procedural time limits which have to be respected by applicants. Procedural fairness and the principle of equality of arms require that where the determining authority cannot take a decision within the time-limits foreseen, the application should automatically be dealt with in accordance with **Articles 34 and 37**.

Current rules in EU Member States show that the general duration of accelerated asylum procedures at the first instance varies widely between EU Member States and may be as short as 6 days in **Malta** or up to 5 months in **Austria**.¹⁴⁸ Whereas a two-month time limit may be tight but acceptable provided the necessary procedural safeguards are in place and the proposal is amended as suggested by ECRE, the eight working day time-limit as proposed by the Commission is excessively short. This risks depriving applicants in practice from an effective opportunity to sufficiently substantiate their claim and access legal assistance prior to the decision, in order to counter the assumption that the sole purpose of the claim is to frustrate imminent return. Moreover, such distinction is discriminatory without any objective justification for singling out this particular type of application.

ECRE recommends amending Article 40 as follows:

Article 40: Accelerated examination procedure

1. The determining authority **[deleted text] may**, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:

- (a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with [the Qualification Regulation];
- (b) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or

¹⁴⁵ See ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation*, October 2016, 20-24.

¹⁴⁶ AIDA, *Country Report Cyprus*, Second Update, November 2015.

¹⁴⁷ AIDA, *Country Report Sweden*, Third Update, December 2015; AIDA, *Country Report Ireland*, Fourth Update, November 2015.

¹⁴⁸ ECRE, *The length of asylum procedures in Europe*, October 2016, 7-8.

her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of [the Qualification Regulation];

[deleted text]

(c) the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success

2. The determining authority shall conclude the accelerated examination procedure within two months from the lodging of the application. **[deleted text]**

3. Where an application is subject to the procedure laid down in [the Dublin Regulation], the time-limits referred to in paragraph 2 shall start to run from the moment the Member State responsible is determined in accordance with that Regulation, the applicant is on the territory of that Member State and he or she has been taken in charge in accordance with [the Dublin Regulation].

4. Where the determining authority considers that the examination of the application involves issues that are **too** complex to be examined under an accelerated examination procedure, or where a decision cannot be taken within the time-limits referred to in paragraph 2, it **[deleted text] shall** continue the examination on the merits in accordance with Articles 34 and 37. In such cases, **[deleted text]** the applicant shall be informed of the change in procedure.

5. **[deleted text] The accelerated examination procedure shall not be applied to unaccompanied minors.**

3.2. *Unaccompanied minors in accelerated examination and border procedures: Articles 40(5) and 41(5)*

The particular vulnerability of unaccompanied children in asylum and migration related procedures and their need for special protection and safeguards is acknowledged in international human rights standards,¹⁴⁹ EU law and jurisprudence.¹⁵⁰ Because of their age and as they travel unaccompanied by their parents or other adults having the legal capacity to represent them, they are not only frequently subject to human rights violations during their journey, but increasingly also subject to various forms of violence and exploitation, including trafficking, after their arrival in Europe. The percentage of unaccompanied asylum seeking children in EU Member States has increased significantly in recent years. According to EASO, in 2015, 7% of all asylum applications in the EU were lodged by unaccompanied minors (95,985 in absolute numbers), while they accounted for 4% of all applications in 2014.¹⁵¹

While the Commission proposal includes important improvements with regard to the role of guardians, compared to the recast Asylum Procedures Directive,¹⁵² it regrettably maintains the Directive's approach to the examination of applications of unaccompanied children in accelerated and border procedures.

In ECRE's view, asylum applications of unaccompanied children should never be examined in accelerated or border procedures as they are ill fitted to take into account their particular vulnerability

¹⁴⁹ See UN Committee on the rights of the Child, *General Comment No 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, par. 1.

¹⁵⁰ In the case of *Mubulanzila Mayeka and Kaniki Mitunga v. Belgium*, concerning the expulsion of a 5 year old child, the Court considered that she was in an "extremely vulnerable situation" and that she "indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention": ECtHR, *Mubulanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No 13178/03, Judgment of 12 October 2006, par. 55.

¹⁵¹ See EASO, *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, 109.

¹⁵² See section on [Guarantees for Minors](#).

and ensure that their need for special procedural guarantees can be addressed in practice. As a rule, such procedures do not provide the necessary guarantees for compliance with Member States obligations' under international standards, including Articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC), according to which the best interest of the child shall always be a primary consideration and appropriate measures shall be taken to ensure that a child who is seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights. Rather, in light of their particular vulnerability, the asylum applications of unaccompanied children should be prioritised as foreseen under **Article 33(5)(b)** of the Commission proposal.

Proposed **Article 41(5)** on the application of the border procedure to unaccompanied minors includes the possibility of such procedure being carried out while the applicants are detained in accordance with the relevant provisions in the recast Reception Conditions Directive. The harmful effects of immigration detention on children, and in particular unaccompanied children, have been widely documented and acknowledged in jurisprudence. In ECRE's view, children, whether accompanied or unaccompanied, should never be detained as this is never in their best interests.¹⁵³ Their double vulnerability stemming from their intrinsic vulnerability as asylum seekers and children, and their specific needs are decisive factors which must take precedence over considerations of immigration control. Under existing EU asylum law, the exceptional nature of detention of unaccompanied children is acknowledged in Article 11 of the recast Reception Conditions Directive. Read in light of the principle of best interest of the child, which according to the UNCRC must be a primary consideration in any decision concerning children, this already leaves very little scope for States to lawfully detain children and in particular unaccompanied children. Also the jurisprudence of the European Courts militates against the detention of unaccompanied children, which has on various occasions held that their detention in premises not suitable to their needs, violates States' obligations under Article 3 ECHR.¹⁵⁴ Today, a number of Member States such as **Italy** and **Belgium** do not detain unaccompanied children in practice, while the **Netherlands** prohibits the detention of unaccompanied children at the border, and only allows their detention in a closed reception centre on the territory in case of indications of human trafficking.¹⁵⁵ As processing applications for international protection in a border procedure in practice automatically implies the detention of the applicant, ECRE believes that the possibility of examining applications for international protection of children in a border procedure should be excluded in the common procedure. In addition, despite the formulation of an exhaustive list of four grounds for applying the border procedure to unaccompanied minors, **Article 41(5)** leaves considerable scope for Member States to make systematic use of such procedure, including on the basis of the safe country or origin and safe third country concepts. In practice, where border procedures are conducted at remote locations at the external borders of the EU, unaccompanied children have often no access to guardians and legal representatives. This is indispensable to navigate them through a complex procedure and in particular where safe country concepts are applied in order to have an effective opportunity to exercise their right to rebut safety presumptions in their individual circumstances. However, even where such representation is available, in the case of border procedures in particular, it is to be provided in conditions which are not adapted to their specific needs, which inevitably undermines its quality and effectiveness.

Therefore, ECRE strongly recommends deleting **Article 41(5)** of the Commission proposal and including an explicit prohibition to apply border procedures to unaccompanied children.

In ECRE's view, the accelerated examination procedure, as designed in the Commission proposal presents similar risks of perfunctory assessments of unaccompanied children's international protection needs and is generally ill-suited to address their particular vulnerability. Instead the examination of

¹⁵³ See ECRE, *Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, 14.

¹⁵⁴ See for instance, ECtHR, *Rahimi v. Greece*, Application No 8687/08, Judgment of 5 July 2011, *Mohamad v. Greece*, Application No 70586/11, Judgment of 11 December 2014

¹⁵⁵ See AIDA, *Country Report Netherlands*, Fourth Update, November 2015, 67.

applications of unaccompanied minors should be prioritised in the (regular) examination procedure in accordance with **Article 33(5)**.

ECRE recommends amending Articles 40(5) and 41(5) as follows:

Article 40(5): [deleted text] The accelerated examination procedure shall not be applied to unaccompanied minors.

Article 41(5): [deleted text] The border procedure shall not be applied to unaccompanied minors.

4. Safe country concepts

As highlighted above, the Commission proposal relies heavily on the mainstreaming of three different safe country concepts as a means to ensure a higher level of harmonisation and efficiency of the asylum procedure. Two of them operate on the basis of a presumption of the availability and accessibility of international protection for the individual applicant (first country of asylum) or the possibility to request and obtain international protection (safe third country) in a country outside of the EU. The safe country of origin concept refers to the absence of any well-founded fear for persecution or real risk of being subjected to serious harm for the individual applicant in his or her country of origin or habitual residence.

From an international refugee law perspective, the three concepts are highly controversial as they lack a clear legal basis in, or in the case of the safe country of origin concept arguably violate the non-discrimination clause of, the 1951 Refugee Convention. The safe third country and first country of asylum concepts in particular are also premised on a flawed interpretation of the 1951 Refugee Convention as not allowing any choice for the refugee with regard to the State of refuge but requiring the refugee to request such protection at the earliest opportunity, which also underlies the EU's system for allocating responsibility. However, whereas the Refugee Convention does not provide for an unfettered right to refugees to choose their host state, no obligation to apply in the first country refugees reach after fleeing their country of origin can be derived from international refugee law either. According to UNHCR, the primary responsibility to provide protection rests with the State where asylum is sought.¹⁵⁶ In this regard, it should be noted that UNHCR EXCOM conclusions call upon States to take asylum seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State."¹⁵⁷ Products of administrative practice of asylum authorities developed over the years, they aim at shifting protection responsibilities of States to neighbouring countries or any country asylum applicants may have transited on their way to the State they request protection from and further undermine solidarity with other regions in the world hosting the majority of the world's refugees.

In this respect, it should be noted that in the recently adopted New York Declaration, the international community has reconfirmed its commitment to "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States."¹⁵⁸ Deflecting protection obligations to third countries through the mandatory application of safe country concepts in truncated admissibility procedures,¹⁵⁹ contradicts such commitment. It may encourage third countries to replicate

¹⁵⁶ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements for asylum-seekers*, Division of International Protection, May 2013, available at: <https://goo.gl/xLPq1l>, par. 1.

¹⁵⁷ UNHCR, EXCOM Conclusion No. 15 (XXX), *Identifying the Country Responsible for Examining an Asylum Request*, available at: <http://www.unhcr.org/53b26db69.pdf>.

¹⁵⁸ See UN, General Assembly, New York Declaration for Refugees and Migrants, A/RES/71/1, 3 October 2016, par. 68.

¹⁵⁹ See Article 34 (1) of the Commission Proposal.

such approach which would result in shrinking the protection space globally at a time when the world is facing unprecedented levels of forced displacement.

Today, EU Member States' decision-making practice with regard to the application of safe country concepts varies widely, with some Member States not applying any of the three concepts in practice and others more frequently.¹⁶⁰ Due to recent evolutions in refugee flows, the use and formulation of safe country concepts have resurfaced more prominently in the political debate and has become a centrepiece of the European Commission's asylum package. The Commission proposal includes important changes to the current provisions in the recast Asylum Procedures relating to the substantial criteria used with respect to the three concepts and introduces a mechanism for designation or suspension of countries as safe countries of origin or safe third countries at EU level or their removal from an EU common list of safe countries of origin, included as an annex to the Commission proposal. Both aspects raise a number of concerns from a fundamental rights perspective.

4.1. *The first country of asylum concept: Article 44, Recital 36*

Article 44 of the Commission proposal contains significant changes to the first country of asylum provision in the recast Asylum Procedures Directive. The application of the concept is mandatory for States, whereas this is currently optional. Second, the wording as regards the protection status the applicant benefitted from in the previous country of refuge in order to enable States to consider that country as a first country of asylum is significantly changed. On the one hand, the notion of sufficient protection, currently included but undefined in the recast Asylum Procedures, is now described in detail. On the other hand, instead of requiring the applicant to have been "recognised as a refugee", the applicant should have "enjoyed protection in accordance with the Geneva Convention in that country".

Imposing an obligation on Member States to apply the first country of asylum concept, would result in a lowering of protection standards in EU law as Member States would no longer have the option of not applying such notion as is currently the case. At the same time, the mandatory nature of the first country of asylum concept would not contribute to a more effective process in many Member States. On the contrary, it would lead to more complexity as it would force a considerable number of Member States to introduce a concept which is currently irrelevant in their national practice. Therefore, if the EU legislator wishes to maintain a role for the first country of asylum concept in the EU asylum *acquis*, it should remain optional for Member States and subject to strict conditions as discussed below.

ECRE is concerned that the reference to "protection in accordance with the Geneva Convention" leaves ambiguity as to the status the applicant should have obtained and may in practice constitute a lower standard than the recast Asylum Procedures Directive. The wording "in accordance with the Geneva Convention" in current Article 38(1) recast Asylum Procedures Directive on safe third countries, has been interpreted by the Commission as including countries which have ratified the Geneva Refugee Convention with a geographical limitation.¹⁶¹ Moreover, although the preamble of the Commission proposal refers to applicant having obtained refugee status, it seems sufficient to assume that another country would grant "protection in accordance with the substantive standards of the Geneva Convention",¹⁶² which sets an even more ambiguous standard.

In ECRE's view, such interpretation raises fundamental questions from the perspective of the 1951 Refugee Convention as the foundation of the global refugee protection system as it may result in

¹⁶⁰ AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: <http://goo.gl/tuHh2D>.

¹⁶¹ Although without providing any justification for such position. See European Commission, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016) 85, 2 February 2016, 18

¹⁶² See **Recital 36** of the Commission proposal.

persons eligible for refugee status under the 1951 Convention and EU law, being effectively barred from accessing their rights.

In order to avoid any ambiguity, ECRE recommends to explicitly refer in **Article 45(1)(a)** that the applicant has been “recognised as a refugee” in accordance with the 1951 Refugee Convention and to specify in recital 36 that the concept can only be applied with respect to countries which have ratified the Geneva Refugee Convention without geographical limitation.

“Sufficient protection”

ECRE regrets that the notion of sufficient protection, despite its clearer definition in **Article 44(2)** is maintained both with regard to the first country of asylum concept and the safe third country concept. In ECRE’s view, if EU law is to allow Member States to deflect their responsibility for examining the merits of individual applications, it should only allow this where it is established that the protection received in the third country is the same as what is required under EU law. Whereas the notion of international protection in EU law comprises both refugee status and subsidiary protection status, the latter is clearly conceived as complementary to refugee status as it can only be granted after it has been established that the person does not meet the refugee definition. Without such hierarchy between the two statuses formally established in the legislation of the third country concerned, the possibility of receiving any status other than refugee status should not trigger application of the first country of asylum nor safe third country concept.

In addition, current practice of Member States and national jurisprudence militates against maintaining the concept of sufficient protection as a possibility for applying the “first country of asylum” concept. At least 4 Member States (**France, Spain, Croatia and Hungary**) which have transposed the first country of asylum concept in their national legislation, only allow application of such concept only where the applicant has obtained refugee status in accordance with the Geneva Convention and can effectively benefit from such status.¹⁶³ Rather than expanding the notion of a questionable concept, which is difficult to assess in practice, in particular in absence of any formal benchmarks in national legislation, EU law should consolidate and promote good practice currently existing in Member States.

Therefore, **ECRE’s preferred option is to delete the concept of sufficient protection in Article 44(1)(a) and (b) as well as in Article 45(1)(e) as discussed below.**

However should the co-legislators opt to maintain the concept, **Article 44(2)** should be further amended to further reduce the risk of extensive interpretations of the first country of asylum concept. In this regard ECRE has, with respect to Article 35(b) of the recast Asylum Procedures Directive, cautioned that the notion of “sufficient protection” does not represent an adequate criterion to assess whether an applicant can be returned safely to a first country of asylum, in particular without such notion being properly defined.¹⁶⁴

In line with UNHCR’s position, ECRE considers that protection must be effective and available in practice, which is better expressed by the term “effective protection”.¹⁶⁵ This means that, in order to be effective, it is essential that the protection granted, in addition to the elements listed in **Article 44(2)**, includes the following elements:

- (i) there is no risk that the person will be deprived of his/her liberty without due process;
- (ii) there is no real risk that the person would be sent by the third state to another state in which s/he would not receive effective protection;

¹⁶³ AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, 16.

¹⁶⁴ See ECRE, *Information Note on Directive 2013/32/EU*, December 2014, 41.

¹⁶⁵ See UNHCR, *Improving asylum procedures. Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 282-283.

- (iii) the person has access to means of subsistence sufficient to maintain an adequate standard of living;
- (iv) the third state takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person;
- (v) effective protection remains available until one of the durable solutions to refugee situations promoted by UNHCR, i.e. local integration, third country resettlement or voluntary return to the country of origin, is found.;
- (vi) the third country has acceded to international refugee instruments and basic human rights instruments and complies with their standards in practice.

In addition, the capacity of the third country to provide effective protection in practice in light of the effort it is already undertaking in hosting large refugee populations must necessarily part of any assessment of whether the first country of asylum concept or the safe third country concept can be applied with respect to the applicant.

Finally, in ECRE's view, applying the first country or asylum concept is not appropriate for countries where UNHCR undertakes refugee status determination because the state does not have the capacity to do so or cannot provide protection as defined above. As UNHCR recognition in such countries does not constitute recognition of a right of residence for the individual – nor can protection from *refoulement* – no effective protection can be assumed to exist. This is supported by the case law of the ECtHR. In the case of *Abdolkani and Karimnia v. Turkey* concerning the planned deportation by Turkey of two Iranian nationals, former members of the Peoples Mujahidin Organisation in Iran (PMOI), to Iraq, the ECtHR found that their deportation to Iraq would violate Article 3 ECHR, notwithstanding the fact that they both had been recognised as refugees by UNHCR in Iraq.¹⁶⁶

In line with the right to good administration as a general principle of EU law and as guaranteed already under the recast Asylum Procedures Directive,¹⁶⁷ asylum applicants must have an opportunity to submit any information or elements relevant to their case before the determining authority takes a first instance decision. This is also explicitly guaranteed under Article 28(4) of the Commission proposal. There is no reason why this should be different in case the determining authority examines the case on the basis first country of asylum concept. On the contrary, in order to ensure that the first instance decision is based on all elements of the case, it is essential that the applicant has an opportunity to submit additional information, including with regard to the first country of asylum concept, that may become available to him or her at any useful time after the interview. Therefore, ECRE recommends lifting the restriction in **Article 44(3)** to challenge the application of the concept “when lodging the application or during the admissibility interview”.

ECRE recommends amending Article 44(1)-(3) and Recital 36 as follows:

Article 44(1): A third country *[deleted text]* may be considered to be a first country of asylum for a particular applicant provided that *[deleted text]* the applicant *[deleted text]* has been recognised as a refugee in accordance with the Geneva Convention in that country before travelling to the Union and he or she can still avail himself or herself of that protection *[deleted text]*.

Article 44(2) should be deleted.

¹⁶⁶ “Given that the applicants’ deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants’ removal to Iran by the Iraqi authorities, the Court considers that there are substantial grounds for believing that the applicants risk a violation of their rights under Article 3 of the Convention if returned to Iraq” See European Court of Human Rights, *Abdolkhani and Karimnia v. Turkey*, Application No 30471/08, Judgment of 22 September 2008, par. 89.

¹⁶⁷ See Article 17(3) recast Asylum Procedures Directive.

Article 44(3): Before his or her application can be rejected as inadmissible pursuant to Article 36(1)(a), the applicant shall be allowed to challenge the application of the first country of asylum concept in light of his or her particular circumstances *[deleted text]*.

Recital 36: *[deleted text]* Member States *[deleted text]* may not examine the merits of an application where a first country of asylum has granted the applicant refugee status *[deleted text]*. Member States should proceed on that basis only where they are satisfied, based on assurances obtained from the third country concerned, that the applicant *[deleted text]* **has been recognised as a refugee** in that country in accordance with the Geneva Convention **and will be able to avail him or herself from that status upon return in that country. Recognition as a refugee in accordance with the Refugee Convention may only be considered insofar as the third country has ratified the Geneva Convention without any geographical limitation. The number of beneficiaries of international protection already hosted on the territory of the third country concerned will be taken into account when assessing the capacity of such country concerned to provide effective protection in practice. Recognition as a person of concern to UNHCR in the third country concerned shall not be equated with refugee status.**

4.2. The safe third country concept: Article 45

Article 45 includes important changes to the corresponding provision in the recast Asylum Procedures, which, if adopted would allow for a significantly broader application of the safe third country concept as currently possible under EU law. In addition to making the concept mandatory for Member States, the Commission proposal sets a lower threshold as regards the level of protection and the connection with the third country concerned.

Firstly, as it is the case with respect to the first country of asylum concept, proposed **Article 45(1)** imposes an obligation on Member States to apply the safe third country concept, whereas this is currently optional for Member States and is not widely used in practice.¹⁶⁸ As the concept is currently not widely used across EU Member States, this would necessarily result in downward harmonisation and should be strongly resisted.

Secondly, contrary to Article 38(1)(e) of the recast Asylum Procedures Directive, it is no longer required for the applicant to have a possibility to request and obtain refugee status in accordance with the Geneva Convention. A much weaker and opaque standard of “protection in accordance with the substantive standards of the Geneva Convention” is sufficient. What constitutes the substantive standards of the Geneva Convention remains undefined and therefore open to very broad and divergent interpretation. The distinction between substantive and less substantive provisions has no basis in the Geneva Convention, and implies that the Refugee Convention can be applied by states on a “pick-and-choose” basis, beyond the possibility for Contracting Parties to make reservations as allowed under the strict rules of the Convention.¹⁶⁹

The proposed wording is not compatible with the requirement in Article 78(1) TFEU for the EU’s common policy on asylum, subsidiary protection and temporary protection to be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties” and with the right to asylum laid down in Article 18 of the EU Charter. Consolidating such wording in EU law would undermine the role of the Refugee Convention as the cornerstone of the international refugee protection regime. ECRE therefore urges its deletion.

¹⁶⁸ AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016.

¹⁶⁹ According to Article 42 of the 1951 Geneva Convention, States can only make reservations at the time of signature ratification or accession to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46.

Thirdly, contrary to current Article 38(1)(e) of the recast Asylum Procedures Directive, according to **Article 45(1)(e)**, the possibility for the applicant to receive *sufficient protection* in the third country as an alternative form of protection, suffices for the country to be considered as a safe third country. This dangerously widens the scope for Member States to apply the safe third country concept and refrain from the examination of the merits of the claim in considerably more cases than is currently possible. For reasons argued above, ECRE's preferred option is the deletion of the notion of sufficient protection as an acceptable standard triggering the shifting of Member States' obligations under international human rights law to third countries. Furthermore, introducing sufficient protection as a standard to underpin the presumption of the country as a safe third country in the same way as for the application of the first country of asylum concept ignores the fact that they relate to fundamentally different situations. Whereas the first country of asylum concept strictly applies to applicants who already received a protection status in a third country and can access the same level of protection upon their return, the safe third country concept is applied with respect to applicants who could have had such protection in the third country but who have not received any status at any stage. From that perspective, the application of the safe third country concept may entail greater risks of the applicant being ultimately subjected to serious human rights violations, including *refoulement*, as the outcome and quality of such process is by definition unknown.

Moreover, for the same reasons set out above with regard to the criteria for considering a country as a first country of asylum, the safe third country concept should only be applied with respect to countries that have ratified the 1951 Geneva Refugee Convention without any geographical limitation. Long-standing jurisprudence from **Switzerland** is illustrative in this respect, ruling for instance that a person cannot find actual protection in a country that maintains geographical limitations on the Convention.¹⁷⁰

Therefore, ECRE strongly recommends deleting the possibility of applying the safe third country concept where the applicant can only request sufficient protection and strengthen the existing standard in the recast Asylum Procedures Directive.

ECRE recommends amending Article 45(1) as follows:

Article 45(1): A third country *[deleted text]* may only be designated as a safe third country provided that:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined [the Qualification Regulation];
- (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;
- (e) the possibility exists *[deleted text]* **to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention, ratified and applied without any geographical limitation.**

The assessment of whether a third country may be designated as a safe third country in accordance with this Regulation shall be based on a range of sources of information, including in particular information from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees, the Council of Europe and other relevant organisations.

Fourthly, **Article 45(3)** maintains the three additional conditions for application of the safe third country concept, linked to the individual situation of the applicant: (1) absence of any serious grounds rebutting the presumption of safety; (2) the existence of a connection with the safe third country; and (3) having an opportunity to challenge the application of the concept. However, the latter two are

¹⁷⁰ Swiss Asylum Appeals Commission, Decisions EMARK 2000/10 and 2001/14.

significantly curtailed compared to the corresponding provisions in the recast Asylum Procedures Directive.

According to **Article 45(3)** the reasonableness of the connection required between the applicant and the third country in question can be assumed on the basis that the “applicant has transited through that third country which is geographically close to the country of origin”.¹⁷¹ The recast Asylum Procedures Directive does not contain any indication of what level of connection between the applicant and the third country is required other than it being “sufficient”.¹⁷² In **Sweden, Austria, Bulgaria, the Netherlands and Greece**, the existence of a sufficient connection is interpreted as requiring more than mere transit through the third country concerned, such as for instance the presence of family members.¹⁷³ In ECRE’s view, a meaningful link with the third country concerned is necessary. What constitutes a meaningful link will depend on many factors and will have to be assessed on a case-by-case basis, also taking into account the specific vulnerability of the applicant. However, the mere transit of a person through such country cannot be considered as constituting such a meaningful link. As has been emphasised by UNHCR, transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful connection or link with a country.¹⁷⁴ National courts have also interpreted the connection with a country narrowly. The **Swedish** Migration Court of Appeal, for instance, has found ethnicity and mother tongue to be insufficient evidence per se of such connection, even where the applicant’s ethnicity would facilitate the acquisition of citizenship in the third country.¹⁷⁵ Therefore, instead of explicitly referring to transit through a country geographically close to the country of origin, this should be explicitly ruled out in the preamble.

As it is the case for the first country of asylum concept, the possibility for the applicant to challenge the application of the concept of safe third country in his or her individual circumstances, is limited to the moment of lodging the application and during the admissibility interview. For the same reasons of compatibility with the EU Charter and general principles of EU law raised above, such restriction should be deleted.

ECRE recommends amending Article 45(3) and Recital 37 as follows:

Article 45(3): The determining authority *[deleted text]* may consider a third country to be a safe third country for a particular applicant, after an individual examination of the application, only where it is satisfied of the safety of the third country for a particular applicant in accordance with the criteria established in paragraph 1 and it has established that:

- (a) there is a **meaningful** connection between the applicant and the third country in question on the basis of which it would be reasonable for that person to go to that country *[deleted text]*;
- (b) the applicant has not submitted serious grounds for considering the country not to be a safe third country in his or her particular circumstances.

¹⁷¹ With respect to the connection requirement in the recast Asylum Procedures Directive, a Commission Communication relating to the implementation of the EU-Turkey Statement mentions, in a politically rather opportunist fashion that “it can also be taken into account whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant”, without, however, submitting that this is sufficient to comply with Article 38(2) recast Asylum Procedures Directive. See European Commission, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016) 85, 2 February 2016, 18.

¹⁷² See Recital 44 recast Asylum Procedures Directive, which refers for the definition of “sufficient” connection to national law.

¹⁷³ This is the case in **Greece** for instance. See ECRE, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, 21.

¹⁷⁴ See UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016.

¹⁷⁵ See Swedish Migration Court of Appeal, MIG 2011:5, 10 March 2015.

Recital 37: The concept of safe third country *[deleted text]* may only be applied as a ground for inadmissibility where the applicant, due to a *meaningful* connection to the third country *[deleted text]*, can reasonably be expected to seek protection in that country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. *Such meaningful connection cannot be assumed on the basis of mere transit of the applicant through that third country.* Member States should proceed on that basis only where they are satisfied including, *[deleted text]* based on assurances obtained from the third country concerned, that the applicant will have the possibility to receive protection in accordance with the *[deleted text]* Geneva Convention *[deleted text]*. *The concept of safe third country may only be applied with respect to countries which have ratified the Geneva Convention without any geographical limitation.*

4.3. The safe country of origin concept: Article 47, Annex I

ECRE has consistently advocated against the use of the safe country of origin concept with international refugee law, as it is at odds with the obligation on states under Article 3 of the 1951 Geneva Refugee Convention to treat refugees without discrimination based on their country of origin. The use of safe country lists, whether nationally designated or at EU level, further contributes to a practice of stereotyping certain applications on the basis of their nationality and increases the risk of such applications not being subject to thorough examination of a person's fear for persecution or risk of serious harm on an individual basis, which is crucial to ensuring full respect for the principle of *non-refoulement*. Furthermore, the application of a presumption of safety, while rebuttable under EU law, in practice often places an almost insurmountable burden of proof on the applicant, which is exacerbated by the lack of access to quality legal assistance in many Member States.

In this regard, ECRE continues to urge Member States to refrain from using the safe country of origin concept. This is because it distracts authorities from the proper conduct of the asylum procedure which requires the individual examination of the protection needs of the asylum seeker, based on an objective and up-to-date assessment of the human rights situation in the country of origin and his or her individual circumstances,¹⁷⁶ rather than on the basis of general assumptions about the situation in that country.¹⁷⁷ Even where case-workers and decision-makers are properly trained, designating a third country as safe from the outset is likely to consciously or inadvertently influence their credibility assessment and results in a less thorough examination of the asylum application.

For those principled reasons, ECRE's preferred option is the deletion of the concept of safe country of origin as laid down in Article 47 in addition to the deletion of Article 48 establishing the rules for designation of safe countries of origin at Union level as well as Articles 49 and 50 as argued below.

However, if co-legislators wish to maintain the safe country of origin concept, ECRE notes that proposed **Article 47** incorporates essentially the same standards with regard to the requirement of an individual assessment, the possibility for the applicant to rebut the presumption of safety in his or her individual circumstances and the criteria which as a minimum have to be fulfilled by the third country concerned in order to be considered as a safe country of origin. The inclusion of these criteria in the relevant provision rather than in an annex as is currently the case under the recast Asylum Procedures Directive contributes to increased transparency, while the new criterion (c) describes the type of actions applicants should be protected from in their country of origin more clearly.¹⁷⁸ Compared

¹⁷⁶ Article 4(3) recast Qualification Directive.

¹⁷⁷ See ECRE, *Information Note on Directive 2013/32/EU*, December 2014.

¹⁷⁸ Which requires "respect for the non-refoulement principle in accordance with the Geneva Convention". While the *non-refoulement* principle as laid down in Article 33 of the Refugee Convention is the bedrock of international refugee law, it engages a State's obligations vis-à-vis the protection of non-nationals. For the purpose of the application of the safe country of origin concept, the assessment to be made is how the third country concerned treats its own nationals in light of international human rights law. As the Refugee Convention only applies to persons outside of their country of origin or habitual residence, the assessment

to the recast Asylum Procedures Directive, the requirement to take into account the common analysis of country of origin information to be produced by the future EU Agency for Asylum constitutes the most important novelty. ECRE has already raised concerns with respect to the interrelationship between such common analysis and eligibility guidelines issued by UNHCR and has made recommendations to ensure the primacy of the latter in the decision-making practice of Member States.¹⁷⁹ The reference to the common analysis in **Article 47(2)** of the Commission proposal should be interpreted accordingly.

The listed safe countries of origin and additional criteria for inclusion on the EU common list

Unsurprisingly, the **Annex** establishing the EU common list of safe countries of origin is copied from its September 2015 proposal in the EU Common list of safe countries of origin.¹⁸⁰ Also the argumentation developed for each individual country justifying their inclusion in the list is almost the same and is only adjusted to the changed wording in **Article 47(3)(c)** with respect to the absence of expulsion, removal or extradition of own citizens where they would risk being subjected to serious human rights violations. While opposing the adoption of an EU common list of safe countries of origin for the reasons explained below, ECRE reiterates its concern that the preamble sets a number of questionable factors to substantiate a presumption of safety in respect of those countries. In particular the general reference to the number of condemnations before the European Court of Human Rights, without further specification as to how many of those relate to that country's own nationals, or the country's status as an accession country, misleadingly suggesting that they meet the Copenhagen criteria where this is clearly not the case, are of little relevance to the assessment of those countries' presumed safety. Also low EU wide recognition rates as such may not necessarily be considered as a reliable indicator in light of the sometimes significant recognition rates for some of the nationalities concerned in specific Member States.¹⁸¹ In this regard, the developments in Turkey and the response of the authorities in particular to the failed coup d'état in that country have rendered the proposed designation of Turkey as a safe country of origin even more unsustainable than at the time of the submission of the September 2015 proposal.

ECRE recommends deleting **Article 47, Recitals 55-62** and **Annex I**.

4.4. Designation, suspension and removal of safe countries at EU and national level

In light of the widely divergent practices in EU Member States, the Commission proposal aims at harmonising the application of the safe third country and safe country of origin concepts through EU-level designation of countries as such, combined with the phasing out of national safe country lists over a period of five years from entry into force of the Regulation. Sudden changes in the countries designated as safe third countries or safe countries of origin at EU-level may trigger suspension from the list through a delegated act by the Commission, while removal from the EU common list of safe countries of origin or EU safe third country designation, requires an amendment of the Regulation in accordance with the legislative procedure. In ECRE's view, the mechanism for designating countries

of how the country concerned complies with its obligations under the Refugee Convention, is strictly speaking not relevant.

¹⁷⁹ For further details, see ECRE, *Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, July 2016, 9-11.

¹⁸⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, COM(2015) 452, 9 September 2015.

¹⁸¹ In the first half of 2016, the EU average recognition rate for Turkey was 23%, and as high as 82.8% in **Italy** and 30.7% in **Austria**; Eurostat, *First instance decisions Quarterly data*, migr_asydcfstq. Moreover, according to EASO, recognition rates for all six Western Balkan countries combined in 2015 were as high as 55% in **Italy**, 24% in **Switzerland** and 18% in the **UK**. See EASO, *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, 54.

as safe and for withdrawing such designation, envisaged in Articles 46, 48, 49 and 50, raise various concerns from a human rights perspective, as set out below.

The effects of centralised designation of safe countries of origin and safe third countries

ECRE already opposed, in principle, the adoption of a common list of safe countries of origin as proposed by the Commission in September 2015,¹⁸² which already included the same countries contained in the Commission proposal for an Asylum Procedures Regulation.¹⁸³ The adoption of such list at EU level through a Regulation, which is directly applicable, seems evident from a harmonisation viewpoint. However, the choice of the instrument is also likely to create an important gap in the judicial scrutiny of the legality of the designation of countries as safe. This is because the CJEU would become exclusively competent to assess such legality and annul such designation where necessary. National courts would no longer be able to directly rule on the safety presumption and criteria used with respect to individual countries or annul such designation, as this would entail a review of the legality of an EU legislative act, which is the exclusive competence of the CJEU. However, in many cases the inclusion of a country in a national safe country list has been successfully challenged through direct court actions initiated by individual applicants or NGOs.¹⁸⁴ As the latter would not meet the highly onerous criteria to have locus standi before the CJEU to directly challenge the designation of a country as safe at EU level, applicants and their representative would be deprived from an important tool of fundamental rights protection. In light of the modest relevance of the safe country concepts in general in Member States' decision-practice, this raises questions as to the proportionality of the measure proposed.

Co-existence of EU designation and national lists

ECRE seriously questions the added value of the mechanism for EU designation of safe countries of origin and safe third countries from a **harmonisation perspective**. Combining EU designation and the introduction or retention of national lists of safe countries of origin or safe third countries for five years means that the Regulation is likely to have very little impact on the current disparities in the treatment of applicants from those countries in EU Member States during that period. At the same time, measures to mitigate the discrepancies resulting from such co-existence are insufficient and ambiguously phrased. In case a country is suspended from EU level designation, Member States are precluded from designating a country as safe at the national level or to apply the safe third country concept on an ad hoc basis. However, it is unclear from the wording in **Article 50(2)** whether or not this includes an obligation to withdraw such country from a national list, where such designation occurred before the adoption of the Commission delegated act suspending the country concerned.

Moreover, where a country has been removed from EU designation through a legislative amendment, Member States may at any time notify the Commission that, following changes in the situation of that country, it considers that it again qualifies as a safe third country or a safe country of origin. They must provide their *own* substantial assessment of the relevant criteria and as long as the Commission does not object, they can again designate that third country as a safe third country or a safe country of origin.

¹⁸² For a detailed analysis and recommendations, see ECRE, *Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin and amending the recast Asylum Procedures Directive*, October 2015.

¹⁸³ These are the six Western Balkan Countries (Albania, Montenegro, FYROM, Bosnia and Herzegovina, Kosovo, Serbia) and Turkey.

¹⁸⁴ A recent example is **Belgium**, where the Conseil d'Etat issued a judgment on 23 June 2016 ordering the annulment of Albania's inclusion in the national list of safe countries of origin. The Conseil d'Etat had already ordered its removal from the list in a Judgment of 7 May 2015, but the country was reinserted by the Belgian government shortly after: Belgian Conseil d'Etat, Judgment No 235.211 of 23 June 2016.

As far as safe third countries are concerned, the potential of EU-level designation resulting in harmonisation is even reduced to zero as Member States maintain the possibility of applying the safe third country concept not only where the third country has been nationally or at EU level designated as such but also “in individual cases in relation to a specific applicant”.¹⁸⁵

This leaves considerable room for discretion for Member States in designating countries as safe beyond those designated as such at EU level and constitutes a potentially powerful tool for Member States to steer and influence the EU’s policy on safe countries, based on national political considerations rather than protection considerations. Such discretion goes against the key objective of the Commission’s proposal to “facilitate convergence in the application of procedures and thereby also deter secondary movements of applicants for international protection.”¹⁸⁶

Finally, whereas the designation of third countries as safe countries of origin is formalised in an EU common list, this is not the case with safe third countries as both **Article 46** on the designation of safe third countries at Union level and **Article 49** on the suspension and removal of such designation do not define the form it should take.¹⁸⁷ The Commission proposal does not provide any justification why this is the case, whereas the preamble explicitly refers in the same recital to the necessity of establishing an “EU common list for safe third countries” and the “establishment of such common designation or list”.¹⁸⁸ Nonetheless, nothing excludes that this is the subject of a separate legislative proposal after adoption of the Regulation on the common procedure. From a political perspective and given the disparities between EU Member States as regards the application of the safe third country concept, the establishment of such a list at EU level seems particularly sensitive and challenging, while the added value from an administrative perspective may be extremely limited. As a result, the feasibility of such list being ever adopted can be seriously questioned.

Moreover, the relevant provisions in the Commission proposal on a common procedure exclusively deal with the possible amendment of the EU common list or designation as the last step of an incremental process initiated by the suspension of that country through a Commission delegated act first. This seems to imply that removal of a country from the EU common list of safe countries of origin would in all circumstances require first a delegated act suspending that country from the list, which creates a procedural anomaly. While adding a country to the EU Common list could be possible at any time as soon as the Commission considers the criteria in **Articles 45 or 47** are fulfilled on the basis of the Commission’s overall right of initiative, removing a country from the list would be conditional on such country being suspended first, even though this implies that the conditions set out in Articles 45 or 47 are no longer met.

ECRE considers that the EU designation of countries as safe countries of origin or as safe third countries is undesirable in light of its adverse effects it has on the individual applicant’s possibilities to challenge the legality of a country’s inclusion in an EU list in addition to the general human rights concerns raised by the application of both concepts. Moreover, the added value of having such EU designation would be extremely limited as long as the possibility is maintained for EU Member States to designate other countries as safe. The approach of phasing out such co-existence over a period of five years may well be a double-edged sword as it may trigger a push from Member States to have as many countries as possible designated as such at the EU level before expiry of the transition period.

ECRE recommends deleting **Articles 46, 48, 49 and 50**.

¹⁸⁵ See **Article 45(2)(c)** of the Commission proposal.

¹⁸⁶ See **Recital 48** of the Commission proposal.

¹⁸⁷ **Article 46** only explicitly mentions the adoption of a delegated act by the Commission for the suspension of the designation of a third country as a safe third country, not with respect to that country’s initial designation.

¹⁸⁸ See **Recital 48** of the Commission proposal.

Chapter IV. Appeal procedure

The right to an effective remedy is a fundamental safeguard to ensuring protection from *refoulement* and therefore an inherent part of a fair and efficient asylum procedure. The Commission proposal includes some improvements to the current standards of the recast Asylum Procedures Directive on appeal procedures, such as the obligation to translate documents relevant for the appeal procedure if this is not already done.¹⁸⁹ Furthermore, the Regulation continues to ensure that an appeal should provide for a full and *ex nunc* examination of both facts and law,¹⁹⁰ a core element of the right to an effective remedy, and the right for beneficiaries of subsidiary protection to challenge the decision refusing refugee status. The importance of the latter has recently been witnessed in the case of Syrian nationals receiving subsidiary protection in **Germany**.¹⁹¹ Nevertheless, other aspects of **Chapter V** of the Commission proposal are of concern and of questionable legality and appropriateness. These concern the new provisions on the submission of new elements at the appeal stage, the time limits for lodging appeals and the suspensive effect of appeals.

1. New elements in an appeal: Article 53(3)

Article 53(3) provides that an effective remedy shall provide for a full and *ex nunc* examination of both facts and points of law. Nevertheless, it also provides that an applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been aware of at an earlier stage, or which relate to changes to his or her situation.

Many asylum seekers have gone through traumatic events before arriving in the EU. Due to their past persecution, they may be unable or unwilling to immediately discuss distressing events. This is particularly the case for torture victims¹⁹² or women who have suffered gender related violence. Many asylum seeking women have documented the fact that they feel shame in relation to past gender persecution and are unable to mention it at the initial interview.¹⁹³ The delicate nature of certain claims and the difficulties this may create for the applicant in disclosing certain facts is acknowledged in the decision-making practice of asylum authorities in EU Member States. For example, the UK Guidelines on Gender Issues in the asylum claim provide that given the sensitive nature of such claims, late disclosure of gender-specific violence at a later stage of the refugee status determination procedure should not be used to undermine credibility.¹⁹⁴

Similarly, in relation to LGBTI asylum claims, it is generally understood that some applicants do not feel comfortable revealing their sexuality directly upon arrival and therefore, may only disclose it later on in the procedure. For example, in **Germany**, the Federal Office for Migration and Refugees (BAMF) is aware that there may be genuine reasons and difficulties for a homosexual applicant to disclose his sexual orientation immediately. In response to a parliamentary question on this matter, the Ministry of Interior, on 18 January 2012, replied stating: “the BAMF does not reject asylum claims solely based on late disclosure. A comprehensive examination of all circumstances always takes

¹⁸⁹ See **Article 53(5)** of the Commission proposal.

¹⁹⁰ See **Article 53(3)** of the Commission proposal.

¹⁹¹ While until the end of 2015, Syrian applicants were predominantly granted refugee status in Germany, this shifted to a proportion of 65.4% refugee status and 34.3% subsidiary protection in the first nine months of 2016. See BAMF, *Asylum statistics – December 2015*, available in German at: <http://goo.gl/d5BE7X>. For an overview of German rulings challenging refusal of refugee status, see Informationsverbund Asyl und Migration, ‘Neue Gerichtsentscheidungen zum Schutzstatus Asylsuchender aus Syrien’, 25 August 2016, available in German at: <http://goo.gl/4t4JFi>.

¹⁹² See e.g. Freedom from Torture, ‘Part 2 in ‘Body of Evidence’, January 2011.

¹⁹³ See e.g. Asylum Aid, ‘Unsustainable, the quality of initial decision-making in women’s asylum claims’, January 2011.

¹⁹⁴ Home Office, *Asylum Instruction, ‘Gender Issues in the Asylum Claim’*, March 2004, revised September 2010, par. 7.2, 18.-19.

place.”¹⁹⁵ This line of reasoning is also found in other Member States such as the Netherlands, Sweden and the UK.¹⁹⁶

By only allowing new elements of a claim to be introduced where they could not have been known at an earlier stage, the proposal undermines the effectiveness of the right to asylum as enshrined in Article 18 of the EU Charter, the prohibition of *refoulement* in Article 19 and the right to an effective remedy in Article 47. The CJEU in *Orfanopoulos and Oliveiri*,¹⁹⁷ and *Byankov*,¹⁹⁸ found that national rules that restrict the possibility to invoke new facts or circumstances that emerged after an initial decision, may undermine the effectiveness of rights granted by EU law. Furthermore, the ECtHR found that evidence submitted at a late stage cannot be ignored only for the fact it was submitted at a late stage of the procedure.¹⁹⁹ In the case of *Singh v. Belgium*, the ECtHR found a violation of Article 13 in conjunction with Article 3 ECHR because the Council of Alien Law Litigation (the appeal Court in asylum cases) refused to examine new evidence submitted by the Afghan applicants after the first instance decision on their asylum application was taken by the Commissioner-General for Refugees and Stateless Persons. According to the ECtHR, this was in violation of the obligation on states under Article 13 ECHR to ensure a thorough and rigorous scrutiny of the applicant’s risk of being subjected to treatment contrary to Article 3 ECHR.²⁰⁰ Finally, in the case of *Yoh-Ekale Mwanje*, the Court held that the appeal body could not artificially place itself at the moment the decision challenged was taken by the administration when assessing its compatibility with Article 3 ECHR and hence absolve itself from its obligation to rigorously scrutinise the individual circumstances of the applicant.²⁰¹

ECRE recommends deleting Article 53(3) second paragraph.

1.1. The right to an oral hearing at first level appeal: Article 53

The right to an effective remedy in the common asylum procedure must comply with Article 47 of the EU Charter, which must be interpreted in light of the ECtHR’s case law not only with respect to Article 13 ECHR but also Article 6 ECHR on the right to a fair trial. This provision, which provides for a right to a fair and public hearing has been interpreted by the ECtHR as including the right to an oral hearing before a court or tribunal.²⁰² According to the Strasbourg case-law on Article 6 ECHR, an oral hearing may only be exceptionally dispensed with, such as (1) in proceedings at the second or third appeal level, where the Court is not competent to review the facts, (2) cases which can be adequately resolved on the basis of the case-file and written observations, (3) where there are no issues of credibility or contested facts or (4) where it can be omitted because of demands of efficiency and

¹⁹⁵ German Parliament, *Reply to parliamentary question by The Left party*, 17/8357, 18 January 2012, available at: <https://goo.gl/YXWVft>, 10. The Minister’s reply also states at 8-9: “the BAMF, takes into consideration that due to their socio-cultural imprint or because privacy is concerned not all applicants can of their own motion speak about persecution based on sexual orientation. In cases where indications for such a persecution exist, questions are asked in this regard during the interview, even if the applicants don’t bring this up on their own, however with necessary sensitivity.”

¹⁹⁶ ECRE, *The implementation of CJEU judgments in selected Member States*, Forthcoming.

¹⁹⁷ CJEU, Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, Judgment of 24 April 2004, par. 82. This is particularly the case if a lengthy period has passed between the date of the expulsion order and that of the review that decision by the competent court.

¹⁹⁸ CJEU, Case C-249/11 *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, Judgment of 4 October 2012.

¹⁹⁹ See e.g. ECtHR, *I.K. v. Austria*, Application No 2964/12, Judgment of 28 March 2013; *Bahaddar v. the Netherlands*, Application No 25894/94, Judgment of 19 February 1998, par. 45; *Hilal v. United Kingdom*, Application No 45276/99, Judgment of 6 March 2001.

²⁰⁰ ECtHR, *Singh and Others v. Belgium*, Application No 33210/11, Judgment of 2 October 2012, par. 104-105.

²⁰¹ ECtHR, *Yoh-Ekale Mwanje v. Belgium*, Application No 10486/10, Judgment of 20 December 2011, par. 106.

²⁰² ECtHR, *Jussila v. Finland*, Application No 73053/01, Judgment of 23 November 2006, par. 40.

economy.²⁰³ Overall, it can be concluded from the case-law on Article 6 ECHR that where issues of credibility or facts raise at the appeal stage, an oral hearing is normally required according to the ECtHR. Neither the recast Asylum Procedures Directive, nor the Commission proposal explicitly include a right for the applicant to an oral hearing before a court or tribunal as part of the right to an effective remedy in asylum cases.²⁰⁴ In ECRE's view, in line with an appropriate reading of Article 47 of the EU Charter, **Article 53** should explicitly refer to the applicant's right to an oral hearing before a first instance appeal or tribunal against a negative decision on their application for international protection.

ECRE recommends inserting a paragraph 3a in Article 53:

Article 53(3a): *The applicant shall have a right to an oral hearing before a first level appeal court or tribunal.*

2. Time limits under which to lodge an asylum appeal: Article 53(6)

The Commission proposal sets strict time limits for the purpose of lodging an appeal decision. This differs from Article 46(4) of the recast Asylum Procedures Directive, according to which Member States need to provide "for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy." It further provides that the time limits "shall not render such an exercise impossible or excessively difficult."²⁰⁵

This Commission proposal's prescriptive approach must not undermine the right to a fair trial and to an effective remedy as guaranteed under Article 47 EU Charter. Reasonable time-limits for lodging an appeal are essential to ensure the effectiveness of the remedy that is at the disposal of the applicant.

The Regulation provides very short time limits for applicants in the following circumstances, namely;

- a) within one week in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded;
- b) within two weeks in the case of a decision rejecting an application as inadmissible or in the case of a decision rejecting an application as explicitly withdrawn or as abandoned, or in the case of a decision rejecting an application as unfounded or manifestly unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure or while the applicant is held in detention

In many instances, applicants have found it difficult to comply with strict time limits when they are subject to a detention order. One of the biggest barriers applicants in detention face is the lack of effective access to legal aid and interpretation. For example, in **Switzerland**, access to legal assistance can be difficult for persons in detention, as their means to contact and find a legal representative within the short time limits for appeal (especially in case of inadmissibility decisions) are limited.²⁰⁶ This is particularly the case if detention centres are in remote locations, making it difficult for legal representatives to access. In border proceedings in **France**, the inability to make a quality appeal

²⁰³ For an overview of the relevant case-law, see Marcelle Reneman, 'The right to a personal interview' in ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 82.

²⁰⁴ However, the question whether Article 46 of the recast Asylum Procedures Directive entails a right of an applicant, whose application for international protection was rejected as manifestly unfounded by the first instance authority after a full examination including an interview, to an oral hearing before the Administrative Tribunal deciding on the appeal against the negative decision, is the subject of a preliminary question to the CJEU by the Administrative Tribunal of Milan: CJEU, Case C-348/16 *Sacko Moussa*, Reference of 22 June 2016.

²⁰⁵ Article 46(4) of the recast Asylum Procedures Directive.

²⁰⁶ AIDA, *Country Report Switzerland*, First Update, October 2015.

are well documented,²⁰⁷ particularly if there is ineffective access to an interpreter and legal aid, which is, more often than not, the case.

Given the extensive number of categories of asylum applicants the very short time frames to lodge an appeal will likely apply to,²⁰⁸ these short time limits may be too onerous, particularly when there is no flexibility to take into account the complexities and the individual circumstances of the individual.

The ECHR provides that the applicant must be afforded a hearing “within a reasonable period of time”. When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant’s conduct and the conduct of the relevant administrative and judicial authorities.²⁰⁹ Furthermore, while the Court accepts that time-limits should be established, it considered that the speed of the proceeding should not undermine the effectiveness of the procedural guarantees that aim to protect the applicant against *refoulement*.²¹⁰

The CJEU considered in *Samba Diouf* that the time-limit for lodging an appeal against a negative asylum decision ‘must be sufficient in practical terms to enable the applicant to prepare and bring an effective action’. While it found that a fifteen-day time limit to appeal a first instance decision under the accelerated procedure to be sufficient, it considered that the national court should determine whether this time-limit is sufficient in light of the individual circumstances of the case. If the national courts deems the time-limit insufficient, they should order that the application is examined under the ordinary procedure.²¹¹

Member States must have the flexibility to extend time periods depending on the individual circumstances of the particular case. In *Pontin*, the CJEU considered a fifteen-day time-limit for a dismissed pregnant woman to bring an action for reinstatement. In this case, one of the main factors that the CJEU took into account was the particular situation in which pregnant women find themselves. It also took into account that some of the days included in that fifteen-day period could expire before the applicant was even notified of her dismissal.²¹²

In light of the particular vulnerabilities of applicants, particularly those in border procedures and in detention, coupled with a potential lack of access to proper interpretation and quality legal assistance and representation, ECRE considers that the proposed time limits in **Article 53(6)(a) and (b)** may infringe Article 47 of the EU Charter. In any event, in line with the jurisprudence of the CJEU discussed above, Member States must always have the ability to set longer time periods or extend the time limits in light of the particular circumstances of the applicant. If the Asylum Procedures Regulation is to set specific time limits under which appeals may be lodged, these must meet the standards of reasonableness. A reasonable time period for lodging appeals contributes to better informed proceedings before the courts and tribunals and may eventually result in more efficient appeal proceedings. As the right to an effective remedy requires a rigorous examination in fact and in law, this also implies an effective possibility for the applicant to submit factual and legal argumentation challenging the refusal decision.

ECRE strongly urges co-legislators to provide for at least a two-week time-limit for appeals against decisions rejecting a subsequent application as the proposed one week time limit would not meet requirements of reasonableness and proportionality or when the applicant is held in detention. In the

²⁰⁷ AIDA, *Country Report France*, Fourth Update, December 2015.

²⁰⁸ **Article 53(6)(a), (b) and (c)** of the Commission proposal.

²⁰⁹ See e.g. ECtHR, *Pedersen and Baadsgaard v Denmark*, Application No 49017/99, Judgment of 17 December 2004.

²¹⁰ ECtHR, *I.M. v France*, Application No 9152/09, Judgment of 2 February 2012, par. 147.

²¹¹ CJEU, Case C-69/10 *Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, Judgment of 28 July 2011, par. 66-68.

²¹² CJEU, Case C-63/08 *Pontin v. T-Comalux SA*, Judgment of 29 October 2009.

latter case, a shorter time-period for lodging an appeal contributes to the objective of ensuring that detention is for a short a period as possible. At the same time, in such case the need to keep the period of detention as short as possible must be balanced against the applicant's right to an effective remedy. However, in all other cases, a minimum 30-day time limit should be established in the interest of ensuring applicants' access to an effective remedy, including in cases rejected as inadmissible, explicitly withdrawn or abandoned or following an accelerated or border procedure. In such cases, there seems to be little objective justification for providing applicants with lower procedural safeguards. In light of the abovementioned requirement of a full and *ex nunc* examination in fact and in law incumbent on the Courts and Tribunals, applicants should have an effective opportunity to analyse and submit all available evidence, in particular where no examination on the merits of their application has been carried out by applying inadmissibility grounds.

ECRE recommends amending Article 53(6) as follows:

Article 53(6): Applicants shall lodge appeals against any decision referred to in paragraph 1:

[deleted text]

(a) within two weeks in the case of a decision rejecting **[deleted text]** a **subsequent** application as inadmissible **[deleted text]** or while the applicant is held in detention;

(b) within one month in the case of a decision rejecting an application as ***inadmissible, or as explicitly withdrawn or abandoned, or as unfounded in relation to refugee or subsidiary protection status following an accelerated examination procedure or border procedure, or unfounded in relation to the refugee or subsidiary protection status if the examination is not accelerated or in the case of a decision withdrawing international protection.***

Member States may set longer time periods or extend the time limits in light of the particular circumstances of the applicant.

For the purposes of point (b), Member States may provide for an *ex officio* review of decisions taken pursuant to a border procedure.

The time limits provided for in this paragraph shall start to run from the date when the decision of the determining authority is notified to the applicant **[deleted text]**. ***Where the applicant has introduced a request for free legal assistance and representation according to Article 15(1), after notification of such decision, these time limits shall start to run from the date when the legal advisor or counsellor is appointed.***

2.1. Notification triggering the time limit for lodging an appeal: Article 53(6) and 8(6)

Article 53(6) last sentence foresees that the time-limits referred to start to run from the date that the applicants is notified *or* from the moment the legal advisor is appointed if the applicant has introduced a request for free legal assistance and representation. This wording is extremely ambiguous and may seriously undermine legal certainty for the applicant. If read in combination with **Article 8(6)**, it is unclear whether this implies that the applicant would not necessarily even need to be notified so long as they have a legal representative. **Article 8(6)** contains an obligation for the determining authority to give applicants "notice within a reasonable time" but this may be replaced by giving notice only to a guardian, legal advisor or other counsellor legally representing the applicant. This constitutes a breach of the right to good administration which requires the applicant to be notified of a decision.

The right to an effective remedy needs to be read in light of Article 47 of the EU Charter, which incorporates the guarantees found in Article 6 of the ECHR.²¹³ Article 6(1) of the Convention requires the individual to be informed of any "charge" against them, so that they can be afforded a hearing within a "reasonable period of time". In *Deweert v. Belgium*, "charge" for the purposes of Article 6(1) was defined as "the official notification given to an individual by the competent authority of an

²¹³ See Explanations Relating to the Charter Of Fundamental Rights, OJ 2007 C303/2.

allegation that he has committed a criminal offence.”²¹⁴ By analogy, applying these guarantees to the applicant, they must be informed of the first instance decision, in order to be able to prepare an appeal. The State cannot only inform the legal representative.

Article 53(6) should therefore be clarified to ensure that the time limits for appeal can only start to run upon notification to the application of the first instance decision. In order to ensure the effectiveness of the appeal, it should be clarified that in case a request for free legal assistance and representation is made only after a first instance decision was notified, the time limit shall start to run as of the date of appointment of the legal advisor or counsellor

ECRE recommends amending Articles 8(6) and 53(6) as follows:

Article 8(6): The determining authority shall give applicants *[deleted text] notification of the decision taken on their application* within a reasonable time *[deleted text]*. Where a guardian, legal adviser or other counsellor is legally representing the applicant, the determining authority *[deleted text] shall also* give notice of the decision to him or her *[deleted text]*.

Article 53(6) end: The time limits provided for in this paragraph shall start to run from the date when the decision of the determining authority is notified to the applicant *[deleted text]*. *Where the applicant has introduced a request for free legal assistance and representation according to Article 15(1), after notification of such decision, these time limits shall start to run from the date when the legal advisor or counsellor is appointed.*

3. Suspensive effect of appeal: Article 54

The right to remain in the territory during the time necessary to lodge the appeal and pending the outcome of the appeal against a negative first instance decision is explicitly established under the Regulation. **Article 54(1)** includes the general principle of an automatic suspensive effect of the appeal in asylum cases, meaning that the lodging of the appeal within the time limit stipulated in the Regulation automatically entails a right to remain on the territory and await the outcome of the remedy.

Article 54(2) allows Member States to apply a system where a court or tribunal has the power to rule whether or not the applicant may remain on the territory either upon the applicant’s request or acting *ex officio*. **Article 54(2)(a), (b) and (c)** includes all the same types of decisions against which an appeal can have a non-automatic suspensive effect that are currently in the recast Asylum Procedures Directive.

Furthermore, under the recast Asylum Procedures Directive, Member States are allowed to apply non-suspensive appeals to applicants in border procedures, it was only if the conditions in **Article 46(7)** are met i.e. access to necessary interpretation, legal assistance, at least one week to submit the request for suspensive effect and the guarantee that the court examines both facts and points of law. **Article 54(3)** extends these conditions to all cases where such non-suspensive appeal applies, thus including appeals against inadmissibility decisions, rejections of decisions as implicitly withdrawn and all decisions taken in the accelerated examination procedure or border procedure.

However, this is with the important exception that instead of a minimum one week time limit for submitting such request only “sufficient time” is requested. This is at least inconsistent with the approach otherwise adopted throughout the proposal to set specific time limits with respect to all procedural steps. This is also potentially regressing from the standard currently applicable under the recast Asylum Procedures Directive to the extent that it may be interpreted as allowing for a time-limit of less than one week.

²¹⁴ ECtHR, *Deweert v. Belgium*, Application No 6903/75, Judgment of 27 February 1980.

While it is welcome that the safeguards with respect to the scope of review and access to interpretation and legal assistance would be applicable in a larger number of cases, ECRE maintains its position that such a system is highly problematic from the perspective of States' obligations to guarantee access to an effective remedy and that also efficiency is better served by ensuring access to an appeal with automatic suspensive effect.

The ECtHR in asylum cases requires a remedy to have automatic suspensive effect in order to be effective. In principle, both a system in which the appeal itself or a system in which the request for interim protection pending the outcome of the remedy has automatic suspensive effect, can be compatible with Article 13 ECHR. However, it can be derived from the case-law that the second option is increasingly considered by the ECHR as problematic as it may not provide sufficient guarantees to ensure compliance with the principle of non *refoulement*. In the case of *Conka v. Belgium* the ECtHR held that the extremely urgent procedure before the Conseil d'Etat did not comply with Article 13 ECHR because it was not guaranteed in fact and in law that this application for interim protection, pending the final outcome of the appeal before the Council of State, would suspend the enforcement of the expulsion measure.²¹⁵

In *S.J. v Belgium*, the ECtHR concluded that Belgian law failed to enable the applicants to appeal their deportation with 'automatic suspensive effect'. It found that the Belgian appeal process against a deportation was too complex and difficult to understand, even, with the benefit of specialist legal assistance. Given the complexity, coupled with the limited application of the 'extreme urgency procedure', the Court concluded that **Belgium** failed to comply with Article 13 ECHR, which requires the right to an effective remedy to be available and accessible in practice.²¹⁶

Finally, both in the case of *Conka v. Belgium* and the case of *M.A. v. Cyprus* the ECtHR stated that the requirements of Article 13 ECHR, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and has "pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis".²¹⁷ The Court held in particular that "it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13".²¹⁸

The CJEU in *Abdoulaye Amadou Tall* found that a remedy under Article 39 (the right to an effective remedy) of the 2005 Asylum Procedures Directive,²¹⁹ must be determined in a manner consistent with Article 47 of the EU Charter, which is derived from Article 13 of the ECHR.²²⁰ Moreover, in light of Article 19(2) of the EU Charter, who has its counterpart in Article 3 ECHR, an effective remedy requires that "a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to the applicant". The Court, emphasised that a decision taken on a subsequent application and its enforcement does not lead to the applicant's removal and so the lack of suspensive effect does not breach Article 19(2) and 47 of the EU Charter. In contrast, an appeal must have suspensory effect if brought against a return decision which if enforced, could expose the person

²¹⁵ ECtHR, *Conka v. Belgium*, Application No 51564/99, Judgment of 5 February 2002, par. 83.

²¹⁶ ECtHR, *S.J. v Belgium*, Application No 70055/10, Judgment of 19 March 2015.

²¹⁷ ECtHR, *M.A. v. Cyprus*, Application No 41872/10, Judgment of 23 July 2013, par. 137.

²¹⁸ ECtHR, *Conka v. Belgium*, par. 82.

²¹⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L326/13.

²²⁰ CJEU, Case C-239/14 *Abdoulaye Amadou Tall v CPAS de Huy*, Judgment of 17 December 2015.

concerned to a serious risk of being subjected to inhuman or degrading treatment, in view of the requirements of Articles 19(2) and 47 of the EU Charter, Article 13 ECHR, and case law from the European courts.

In ECRE's view, providing an asylum seeker with an automatic right to remain on the territory during the time limit within which the right to an effective remedy must be exercised and pending the outcome of the remedy in case the applicant exercises such a right, constitutes the best guarantee to ensure that their right to an effective remedy and the principle of *non refoulement* are respected in practice. This reduces not only the risk of violations of the principle of *non refoulement*, it also avoids additional burdens on the already stretched judicial systems as asylum seekers are not required to launch a separate request on their right to remain on the territory and Courts are not required to address this issue separately. Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice would depend less on factors that may be beyond the asylum seeker's control, such as access to and availability of adequate information and quality legal assistance.

Access to an appeal with automatic suspensive effect has become even more important as the Commission proposal sets extremely short procedural time limits to potentially greater numbers of cases than under the recast Asylum Procedures Directive as it makes the application of special procedures and safe country presumptions compulsory for Member States.²²¹ Given the scarcity of legal assistance in certain Member States in practice, requiring the submission of a separate appeal in order to secure the right to remain on the territory pending the examination of the appeal is highly onerous for both legal advisers and courts as it creates double scrutiny of the same material, burdening the already stretched judicial systems.

ECRE considers that such a system may be acceptable only in the case of an appeal against a decision taken on a second or further identical subsequent application made in a Member State following a final decision rejecting a previous subsequent application as inadmissible or unfounded, or in the case of an appeal against a decision which rejects an application as explicitly withdrawn, provided that a full examination of the merits of the first asylum application has taken place in accordance with the necessary procedural safeguards and no new elements have been submitted.

However, if the interim relief option described in **Article 54(2)** were to be maintained by co-legislators, ECRE recommends that such a system is only applied on the basis of the court or tribunal acting *ex officio* as this would at least avoid asylum applicants requiring to undertake a separate procedural step to ensure their right to remain in the territory pending the outcome of the appeal, which is a core aspect of the right to an effective remedy. Furthermore, in line with the jurisprudence of the ECtHR and the CJEU, such appeal procedures will only meet the requirements of an effective remedy if (1) sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter;²²² (2) the burden to prove the need to suspend the expulsion decision is not set too high;²²³ and (3) the court or tribunal deciding on the request performs a close and rigorous scrutiny of the risk of *refoulement*.

ECRE recommends amending Article 54(2) as follows:

Article 54(2): A court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State responsible acting *ex officio*, where the applicant's right to remain in the Member State is terminated as a consequence of **[deleted text] a decision which rejects a second or further subsequent application as inadmissible pursuant to Article 36(1)(c) or as explicitly withdrawn in accordance with Article 38.**

²²¹ See discussion above, sections on [Special Procedures](#) and [Safe Country Concepts](#).

²²² ECtHR, *I.M. v. France*, par. 150

²²³ ECtHR, *M.S.S. v. Belgium and Greece*, par. 389.

Conclusion

The Commission proposal for a Regulation establishing a common procedure for international protection in the Union marks a fundamental shift in the harmonisation of procedural rules and standards for processing asylum applications. The proposal's prescriptive approach with regards to every single detail of the procedure, including the duration of administrative and first level appeals procedures and time limits for lodging appeals, reveals a highly ambitious mind-set with considerable impact on Member States' practice. As its provisions will be directly applicable, the importance of the proposal for asylum authorities and applicants alike can hardly be overstated.

As highlighted throughout this paper, the proposal includes a number of improvements to the current standards in the recast Asylum Procedures Directive as well as provisions raising serious concerns. In particular, the mandatory provision of free legal assistance and representation at all stages of the asylum procedures constitutes an important safeguard. In designing a fair and efficient common procedure based on the principles of frontloading, free legal assistance from the start of the procedure is essential. However, this risks at the same time being undermined by allowing the application of a merits test to cases that are likely to be unfounded, a category that may cover a considerable number of applicants due to the increased possibilities for Member States to shift the processing of applications to third countries.

In this regard, ECRE is extremely concerned over the mainstreaming of mandatory safe country and admissibility concepts and the extremely short deadlines for applicants to comply with often onerous procedural requirements. This reflects a worrying trend at EU and national level to prioritise administrative efficiency and convenience over the need for a rigorous and careful examination of protection needs in a fair procedure. However, the creation of such procedural pitfalls is counterproductive in the long term as it is likely to result in more subsequent applications and increased litigation costs to remedy the consequences of an overly rigid and bureaucratic approach to the assessment of individuals' international protection needs.

Throughout this paper, ECRE has cautioned against such approach and has formulated concrete recommendations to ensure that the common procedure enables applicants to effectively exercise the right to asylum and have their request for international protection assessed in a fair and efficient manner. ECRE urges the co-legislators to take these recommendations into account in the interest of designing a CEAS that honours the promises of Tampere and Stockholm.