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European Council  
on Refugees and Exiles

**ECRE Comments on  
Regulation (EU) No 604/2013 of the European Parliament  
and of the Council of 26 June 2013 establishing the criteria  
and mechanisms for determining the Member State responsible  
for examining an application for international protection  
lodged in one of the Member States by a third-country national  
or a stateless person (recast).**

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## Introduction<sup>1</sup>

The Dublin system was created to meet three main objectives: (1) to ensure that only one Member State is responsible for the examination of an application for international protection, (2) to deter multiple asylum claims in various Member States and (3) to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure. In 2008 the European Commission, in light of the Hague Programme's recommendation for an evaluation and reform of the then existing EU asylum *acquis*, issued a recast proposal of the Dublin II Regulation with the aim of remedying the deficiencies in the Regulation.<sup>2</sup> The Commission recast proposal aimed at enhancing the efficiency of the system as well as increasing the level of protection afforded to applicants for international protection subject to the Dublin system.<sup>3</sup> Furthermore, the Commission recast proposal also aimed at 'addressing situations of particular pressure on Member States' reception capacities and asylum systems, as well as situations where there is an inadequate level of protection for applicants for international protection.<sup>4</sup> Following lengthy negotiations, the final text of the recast Dublin Regulation was adopted and published in the official journal of the European Union on 29 June 2013 and entered into force on 19 July 2013.

As a Regulation the recast Dublin Regulation has binding legal force on Member States since its entry into force.<sup>5</sup> The Dublin III Regulation applies to all EU Member States, Norway, Iceland, Liechtenstein and Switzerland. However, the UK, Ireland and Denmark have opted out of many other elements of the EU asylum *acquis*, namely the recast Asylum Procedures Directive, the recast Reception Conditions Directive and the recast Qualification Directive.<sup>6</sup> This asymmetry as well as the application of the recast Dublin Regulation in non-EU States by way of Associate Agreements is a complicating factor in terms of its convergence and application with other elements of the EU asylum *acquis*.<sup>7</sup>

The Dublin system as a whole consists of a number of legal instruments namely the recast Dublin Regulation, Regulation (EU) No. 603/2013 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the recast Dublin Regulation<sup>8</sup> and Regulation (EU) No. 118/2014 which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation.<sup>9</sup> This commentary should be read in light of ECRE's comments on the Commission recast proposal of the Dublin II Regulation and the recommendations arising from the Dublin Transnational Network Project, *The Dublin II Regulation, Lives on Hold* report.<sup>10</sup>

1 This Information Note was written with the support of EPIM (European Programme for Integration and Migration), The Sigrid Rausing Trust, Atlantic Philanthropies and UNHCR. The views expressed in this document are those of ECRE and do not necessarily reflect the views of the organisations mentioned. ECRE would like to thank the members of its Asylum Systems Core Group for their input and Professor Francesco Maiani, Associate Professor of Public and European Law at UNIL - Université de Lausanne for his comments.

2 The European Council's Hague Programme invited the Commission to conclude the evaluation of the first-phase legal instruments and to submit second-phase instruments to the Council and the European Parliament. For further information see European Council, the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 2005 C 53/01.

3 COM (2008) 820 final, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, 3 December 2008.

4 Ibid.

5 The provisions of Regulations have directive effect in national legal systems of EU Member States without it being necessary for the national authorities to adopt measures of application (Article 288 of the Treaty on the Functioning of the EU (TFEU)). See Article 49 of this Regulation for further information on its applicability; See also ECRE, *Guidance Note on the transposition and implementation of the EU asylum acquis*, February 2014.

6 Council 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) (hereinafter "recast Asylum Procedures Directive") OJ 2013 L180/60; Council 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) (hereinafter "recast Qualification Directive"), OJ 2011 L337/9; Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter "recast Reception Conditions Directive"), OJ 2013 L180/96. In the interests of consistency and coherence and to truly achieve the overall objective of a CEAS, ECRE recommends that these Member States opt in to the other legal instruments of the EU asylum *acquis*.

7 For further information on the legal position of Associate States and the Dublin system see Francesco Maiani, *Fitting EU asylum standards in the Dublin equation: recent case law, legislative reforms and the position of 'Dublin Associates'* (2010), ASYL 2/10.

8 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 64/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ 2013 L 180/1.

9 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2014 L 39/1. Furthermore the Commission has been empowered within this Regulation to adopt delegated acts and implementing rules where indicated. In addition in June 2014 in light of jurisprudence from the Court of Justice of the European Union (hereinafter CJEU) the Commission published a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, See COM(2014) 382 final, 26 June 2014.

10 ECRE, *Comments on the European Commission Proposal to recast the Dublin Regulation*, April 2009; The Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold*, European Comparative Report, February 2013.

When applying the Dublin III Regulation it is essential that national authorities take an integrated human rights based approach and ensure an assessment of the personal circumstances of each individual subject to the recast Dublin Regulation in accordance with their obligations under other relevant EU legal instruments such as the EU Anti-Trafficking Directive and the Charter of Fundamental Rights of the European Union.<sup>11</sup> The purpose of this information note is to provide commentary and guidance on applying the recast Dublin Regulation from the perspective of the fundamental rights of the applicant subject to the Dublin procedure. Nevertheless in the longer term ECRE continues to call for the fundamental overhaul of the Dublin system and the development of an alternative system for assigning Member State responsibility for the examination of an application for international protection made in one of the EU Member States or Schengen Associated States. Such an alternative system should ensure genuine responsibility sharing and take into consideration meaningful connections between applicants for international protection and particular Member States.<sup>12</sup>

In this document ECRE's comments and recommendations are presented in boxes inserted after the relevant recitals and provisions in the text of the recast Dublin Regulation.

## The Regulation Text:

### **Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
 Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(e) thereof,  
 Having regard to the proposal from the European Commission,  
 Having regard to the opinion of the European Economic and Social Committee [1],  
 Having regard to the opinion of the Committee of the Regions [2],  
 Acting in accordance with the ordinary legislative procedure [3],

Whereas:

(1) A number of substantive changes are to be made to Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [4]. In the interests of clarity, that Regulation should be recast.

(2) A common policy on asylum, including a Common European Asylum System (CEAS), is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ("the Geneva Convention"), thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without the responsibility criteria laid down in this Regulation being affected, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

**ECRE Comment on Recitals 2-3:** ECRE welcomes and commends the aim of a CEAS based on the *full and inclusive* application of the 1951 Refugee Convention & 1967 Protocol. This reflects Article 78(1) TFEU whereby common asylum policy must be in accordance with the Refugee Convention and *other relevant Treaties* (own emphasis added). Therefore, Member States must remain cognizant of their broader legal obligations within the EU and the international legal framework as affirmed in Recital 32. It should also be noted that not all Member States may always be considered as safe countries for third-country nationals as reflected in jurisprudence of the

<sup>11</sup> For example if a person subject to the Dublin system is a potential victim of trafficking they may be subject to a different administrative procedure for trafficking victims in the hosting Member State such as a recovery and reflection period and in such a scenario a transfer may not be appropriate. For information on State practice concerning this see European Migration Network Study, *Identification of victims of trafficking in human beings in international protection and forced return procedures*, March 2014; See also Directive (EU) 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. 2011 L 101/1 and Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ 2004 L 261.

<sup>12</sup> For further information see ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008.

European Court of Human Rights (ECtHR)<sup>13</sup> and the Court of Justice of the European Union (CJEU).<sup>14</sup> This is further reflected by a large number of national Court rulings which have suspended transfers to other EU Member States based on a risk of human rights violations in the responsible Member State.

(4) The Tampere conclusions also stated that the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.

**ECRE Comment on Recital 5:** Effective access to the asylum procedure is the central point in reviewing the application of the Dublin III Regulation. This has been affirmed by the Court of Justice of the European Union in the case of *M.A. & Others v SSHD*.<sup>15</sup>

(6) The first phase in the creation of a CEAS that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted international protection, has now been completed. The European Council of 4 November 2004 adopted The Hague Programme which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, The Hague Programme invited the European Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments and measures to the European Parliament and to the Council with a view to their adoption before 2010.

(7) In the Stockholm Programme, the European Council reiterated its commitment to the objective of establishing a common area of protection and solidarity in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), for those granted international protection, by 2012 at the latest. Furthermore it emphasised that the Dublin system remains a cornerstone in building the CEAS, as it clearly allocates responsibility among Member States for the examination of applications for international protection.

(8) The resources of the European Asylum Support Office (EASO), established by Regulation (EU) No 439/2010 of the European Parliament and of the Council [5], should be available to provide adequate support to the relevant services of the Member States responsible for implementing this Regulation. In particular, EASO should provide solidarity measures, such as the Asylum Intervention Pool with asylum support teams, to assist those Member States which are faced with particular pressure and where applicants for international protection (“applicants”) cannot benefit from adequate standards, in particular as regards reception and protection.

**ECRE Comment on Recital 8:** ECRE welcomes the supporting role of EASO to assist Member States faced with particular pressure and where applicants cannot benefit from adequate standards. When a Member State is faced with a particular pressure other Member States can also demonstrate solidarity by utilising the discretionary provisions in this Regulation to take over responsibility of individual applicants for international protection with their consent.

(9) In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying Regulation (EC) No 343/2003, while making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that system. Given that a well-functioning Dublin system is essential for the CEAS, its principles and functioning should be reviewed as other components of the CEAS and Union solidarity tools are built up. A comprehensive “fitness check” should be foreseen by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights.

**ECRE Comment on Recital 9:** ECRE deplores the fact that the underlying principles of the Dublin system were not fundamentally changed in the recast procedure. Nevertheless, we welcome a comprehensive fitness check in the future which should involve wide consultation involving all stakeholders and review the legal, economic and social effects including the impact of the Dublin system on applicant’s fundamental rights.<sup>16</sup> As the CEAS is further developed the role of the Dublin system as a cornerstone in building the CEAS should be reviewed.

<sup>13</sup> See, for instance, ECtHR, *M.S.S. v Belgium & Greece*, Application no. 30696/09, Judgment of 21 January 2011 and *Tarakhel v. Switzerland*, Application no 29217/12, Judgment of 4 November 2014.

<sup>14</sup> See CJEU, Joined Cases, C-411/10, 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.

<sup>15</sup> CJEU, C-648/11 *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013, para. 54.

<sup>16</sup> For further information see COM(2011) 835 final, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, an EU agenda for better responsibility-sharing and more mutual trust*, Brussels, 2 December 2011.

(10) In order to ensure equal treatment for all applicants and beneficiaries of international protection, and consistency with the current Union asylum *acquis*, in particular with 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 [6], the scope of this Regulation encompasses applicants for subsidiary protection and persons eligible for subsidiary protection.

(11) Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [7] should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive.

(12) 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 [8] should apply in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation, subject to the limitations in the application of that Directive.

**ECRE Comments on Recitals 10-12:** Given that the recast Dublin Regulation is just one component of the CEAS, ECRE welcomes the explicit recognition of Member State's obligations under the recast Reception Conditions Directive and recast Asylum Procedures Directive to those persons subject to the Dublin system. This reflects the jurisprudence of the Court of Justice of the European Union in the case of *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*.<sup>17</sup> In addition, ECRE welcomes the widening of the scope to include applicants for subsidiary protection. This alignment with other elements of the EU asylum *acquis* reflects the principle of non-discrimination and is also inclusive in terms of the criteria where family members have subsidiary protection status in a Member State. Whilst ECRE overall calls for a complete overhaul of the Dublin system in the long term and its replacement with a fairer responsibility-sharing mechanism, ECRE acknowledges that such intermediate improvements of the Regulation are necessary to improve current practice.

(13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

(14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

(15) The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.

(16) In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.

**ECRE Comments on Recitals 13-16:** ECRE welcomes the explicit recognition that the best interest of the child is a primary consideration within the Dublin system and the requirement of additional procedural safeguards to respect that principle in practice. This reflects UN Committee on the Rights of the Child General Comment no. 14 which states that "*where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.*"<sup>18</sup> Moreover, the importance of ensuring family unity is

17 CJEU, Case C-179/11, *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Judgment of 27 September 2012. The Court held in para 42-35 that "*the provisions of Directive 2003/9 must also be interpreted in the light of the general scheme and purpose of the directive and, in accordance with recital 5 in the preamble to that directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter. According to that recital, the directive aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter. Thus, those requirements apply not only with regard to asylum seekers present in the territory of the Member State responsible pending that State's decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application.*"

18 Guidance can also be taken from the UNHCR publication '*Safe and Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children*', October 2014. The recent ECtHR ruling in *Tarakhel v Switzerland* reaffirms that this principle applies to both accompanied and unaccompanied children within the Dublin system. See ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

recognised in that ruling as well as in CJEU judgment of *Saciri & Others*.<sup>19</sup> ECRE reminds states that family links in the responsible Member State aids integration as well as ensuring support during the examination of the person's application for international protection.

(17) Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.

**ECRE Comment on Recital 17:** Research conducted by the Dublin Transnational Network Project showed that Member States rarely derogated from the responsibility criteria on humanitarian and compassionate grounds. ECRE recommends that Member States apply the humanitarian provision in a fair, humane and flexible manner. Furthermore Member States may be required to apply the humanitarian provision where failure to do so would be a breach of their international legal obligations.<sup>20</sup>

(18) A personal interview with the applicant should be organised in order to facilitate the determination of the Member State responsible for examining an application for international protection. As soon as the application for international protection is lodged, the applicant should be informed of the application of this Regulation and of the possibility, during the interview, of providing information regarding the presence of family members, relatives or any other family relations in the Member States, in order to facilitate the procedure for determining the Member State responsible.

**ECRE Comment on Recital 18:** The holding of a personal interview reflects the right to be heard. This right is a general principle of EU law which guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect his or her interests.<sup>21</sup>

(19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.

**ECRE Comment on Recital 19:** ECRE welcomes the explicit reference to the requirement to examine both the legal and factual situation in the responsible Member State. Given the possibility of violations of applicants' fundamental rights, such considerations should be carried out under close and rigorous scrutiny as required by the ECtHR jurisprudence relating to the right to an effective remedy under Article 13 ECHR. This also reflects the principle of effective judicial protection as a general principle of EU law.

(20) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.

(21) Deficiencies in, or the collapse of, asylum systems, often aggravated or contributed to by particular pressures on them, can jeopardise the smooth functioning of the system put in place under this Regulation, which could lead to a risk of a violation of the rights of applicants as set out in the Union asylum acquis and the Charter of Fundamental Rights of the European Union, other international human rights and refugee rights.

(22) A process for early warning, preparedness and management of asylum crises serving to prevent a deterioration in, or the collapse of, asylum systems, with EASO playing a key role using its powers under Regulation (EU) No 439/2010, should be established in order to ensure robust cooperation within the framework of this Regulation and to develop mutual trust among Member States with respect to asylum policy. Such a process should ensure that the Union is alerted as soon as possible when there is a concern that the smooth functioning of the system set up by this Regulation is being

<sup>19</sup> CJEU, Case C-73/13, *Federaal Agentschap voor de opvang van asielzoekers v. Selver Saciri, Danijela Dordevic, Danjel Saciri, Sanela Saciri, Denis Saciri, Openbaar Centrum voor Maatschappelijk Welzijn van Diest*, Judgment of 27 February 2014.

<sup>20</sup> The CJEU case of *K* highlights the fact that a broad interpretation of family must be taken and that all relevant facts and circumstances must be considered. See CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

<sup>21</sup> CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 22 November 2012, paras 85-89. See also CJEU, C-135/92, *Fiskano AB v. Commission*, [1994] ECR I-2885; CJEU, Case C-349/07, *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, Judgment of 18 December 2008.

jeopardised as a result of particular pressure on, and/or deficiencies in, the asylum systems of one or more Member States. Such a process would allow the Union to promote preventive measures at an early stage and pay the appropriate political attention to such situations. Solidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust. By enhancing such trust, the process for early warning, preparedness and management of asylum crises could improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States in general and the applicants in particular. In accordance with Article 80 TFEU, Union acts should, whenever necessary, contain appropriate measures to give effect to the principle of solidarity, and the process should be accompanied by such measures. The conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, adopted by the Council on 8 March 2012, provide for a “tool box” of existing and potential new measures, which should be taken into account in the context of a mechanism for early warning, preparedness and crisis management.

**ECRE Comment on Recital 22:** ECRE calls upon Member States to also demonstrate solidarity by utilising a broad definition of family under the recast Regulation and applying the discretionary provisions to take over responsibility of individual applicants for international protection with their consent.

(23) Member States should collaborate with EASO in the gathering of information concerning their ability to manage particular pressure on their asylum and reception systems, in particular within the framework of the application of this Regulation. EASO should regularly report on the information gathered in accordance with Regulation (EU) No 439/2010.

(24) In accordance with Commission Regulation (EC) No 1560/2003 [9], transfers to the Member State responsible for examining an application for international protection may be carried out on a voluntary basis, by supervised departure or under escort. Member States should promote voluntary transfers by providing adequate information to the applicant and should ensure that supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child and taking utmost account of developments in the relevant case law, in particular as regards transfers on humanitarian grounds.

**ECRE Comment on Recital 24:** ECRE welcomes the reference to transfers being conducted in a humane manner in line with the principle of human dignity. ECRE reminds Member States that they are obliged to apply the latest developments in recent case-law and therefore must take active steps to keep abreast of the jurisprudence of the Courts. This applies not only to transfers but with respect to all aspects of the Dublin system. Tools such as the European Database on Asylum Law (EDAL), the Asylum Information Database (AIDA) and the ELENA Weekly Legal Update as well as publications from the Council of Europe, Fundamental Rights Agency, European Asylum Support Office and others may be helpful in this regard.

(25) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the TFEU and the establishment of Union policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

**ECRE Comment on Recital 25:** ECRE recalls Article 80 TFEU which requires asylum, border and migration policies of the Union and their implementation to be governed by the principle of solidarity and fair sharing of responsibility among Member States.

(26) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [10] applies to the processing of personal data by the Member States under this Regulation.

(27) The exchange of an applicant’s personal data, including sensitive data on his or her health, prior to a transfer, will ensure that the competent asylum authorities are in a position to provide applicants with adequate assistance and to ensure continuity in the protection and rights afforded to them. Special provisions should be made to ensure the protection of data relating to applicants involved in that situation, in accordance with Directive 95/46/EC.

(28) The application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communication between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers.

(29) Continuity between the system for determining the Member State responsible established by Regulation (EC) No 343/2003 and the system established by this Regulation should be ensured. Similarly, consistency should be ensured between this Regulation and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of “Eurodac” for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes [11].

(30) The operation of the Eurodac system, as established by Regulation (EU) No 603/2013, should facilitate the application of this Regulation.

(31) The operation of the Visa Information System, as established by Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [12], and in particular the implementation of Articles 21 and 22 thereof, should facilitate the application of this Regulation.

(32) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.

(33) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers [13].

(34) The examination procedure should be used for the adoption of a common leaflet on Dublin/Eurodac, as well as a specific leaflet for unaccompanied minors; of a standard form for the exchange of relevant information on unaccompanied minors; of uniform conditions for the consultation and exchange of information on minors and dependent persons; of uniform conditions on the preparation and submission of take charge and take back requests; of two lists of relevant elements of proof and circumstantial evidence, and the periodical revision thereof; of a *laissez passer*; of uniform conditions for the consultation and exchange of information regarding transfers; of a standard form for the exchange of data before a transfer; of a common health certificate; of uniform conditions and practical arrangements for the exchange of information on a person's health data before a transfer, and of secure electronic transmission channels for the transmission of requests.

**ECRE Comment on Recital 34:** ECRE welcomes the development of supporting tools and detailed information to improve and ensure the correct application of the recast Dublin Regulation. The publication of the Commission Implementing Regulation (EU) No 118/2014 in February 2014 should assist Member States in this regard.<sup>22</sup> The format and content of the information leaflet should be revised in light of further developments and if concerns are raised on the ability of applicants for international protection, including unaccompanied children, to understand them. Other methods of delivering such information including by way of audio and video material should also be explored.

(35) In order to provide for supplementary rules, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of the identification of family members, siblings or relatives of an unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of an unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State; the elements for assessing a dependency link; the criteria for assessing the capacity of a person to take care of a dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 6(3) of this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(36) In the application of this Regulation, including the preparation of delegated acts, the Commission should consult experts from, among others, all relevant national authorities.

**ECRE Comment on Recital 36:** ECRE welcomes this recital and calls upon the Commission to adopt these rules as soon as possible whilst ensuring that there is a wide stakeholder consultation during this process including all relevant actors within the Dublin procedure including legal aid providers, non-governmental organisations and guardians and legal representatives.

(37) Detailed rules for the application of Regulation (EC) No 343/2003 have been laid down by Regulation (EC) No 1560/2003. Certain provisions of Regulation (EC) No 1560/2003 should be incorporated into this Regulation, either for

<sup>22</sup> Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, *OJ* 2014 L39/1.



reasons of clarity or because they can serve a general objective. In particular, it is important, both for the Member States and the applicants concerned, that there should be a general mechanism for finding a solution in cases where Member States differ over the application of a provision of this Regulation. It is therefore justified to incorporate the mechanism provided for in Regulation (EC) No 1560/2003 for the settling of disputes on the humanitarian clause into this Regulation and to extend its scope to the entirety of this Regulation.

(38) The effective monitoring of the application of this Regulation requires that it be evaluated at regular intervals.

(39) This Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly.

(40) Since the objective of this Regulation, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(41) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, those Member States have notified their wish to take part in the adoption and application of this Regulation.

(42) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### SUBJECT MATTER AND DEFINITIONS

#### Article 1

##### Subject matter

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“the Member State responsible”).

#### Article 2

##### Definitions

For the purposes of this Regulation:

- (a) “third-country national” means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in this Regulation by virtue of an agreement with the European Union;
- (b) “application for international protection” means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU;
- (c) “applicant” means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

- (d) “examination of an application for international protection” means any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with Directive 2013/32/EU and Directive 2011/95/EU, except for procedures for determining the Member State responsible in accordance with this Regulation;
- (e) “withdrawal of an application for international protection” means the actions by which the applicant terminates the procedures initiated by the submission of his or her application for international protection, in accordance with Directive 2013/32/EU, either explicitly or tacitly;
- (f) “beneficiary of international protection” means a third-country national or a stateless person who has been granted international protection as defined in Article 2(a) of Directive 2011/95/EU;
- (g) “family members” means, insofar as the family already existed in the country of origin, the following members of the applicant’s family who are present on the territory of the Member States:
- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
  - the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
  - when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,
  - when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;
- (h) “relative” means the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law;
- (i) “minor” means a third-country national or a stateless person below the age of 18 years;
- (j) “unaccompanied minor” means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States;

**ECRE Comment on Article 2(g):** ECRE welcomes the fact that the Regulation brings more clarity to the definition of family and the introduction of the definition of relatives. Nevertheless ECRE remains concerned that these definitions are too restrictive and not entirely in accordance with the case law of the ECtHR which considers family life to be an autonomous concept which extends beyond blood ties.<sup>23</sup> Furthermore this definition overlooks the reality that many applicants for international protection establish families outside of their country of origin during flight. National authorities, in applying this provision, should assess whether the distinction drawn between ‘pre-flight’ and ‘post-flight’ families is not discriminatory within the meaning of Article 14 ECHR and Article 21 of the EU Charter of Fundamental Rights and if so take corrective action to remedy the situation.<sup>24</sup> In this regard, ECRE reminds Member States that they can utilise the discretionary clauses under Article 17 in order to prevent any violation of the principle of non-discrimination or the right to family life. With respect to same-sex couples, whether or not they fall into the definition of family member will depend on whether the national law of a Member State recognises same-sex couples. If such partnerships are not recognised in national law then such persons subject to this Regulation may be denied family life in violation of Article 8 ECHR and Article 7 EU Charter of Fundamental Rights.<sup>25</sup> ECRE also remains concerned that minor children only fall within the definition of family members if they are unmarried. This approach may not always be in the best interests of the child and it fails to take into consideration the fact that such children may have been subject to forced marriage. However, ECRE welcomes the deletion of the criterion to be unmarried in the definition of an unaccompanied minor given the fact that such children may have been subjected to forced marriage and are *de facto* unaccompanied in the territories of the Member States.

- (k) “representative” means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out its duties in respect of the minor, in accordance with this Regulation;
- (l) “residence document” means any authorisation issued by the authorities of a Member State authorising a third-

<sup>23</sup> See for example ECtHR, *K. and T. v. Finland*, Application no. 25702/94, Judgment of 12 July 2001.

<sup>24</sup> ECtHR, *Hode and Abdi v UK*, Application no. 22341/09, Judgment of 6 November 2012.

<sup>25</sup> ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04, Judgment of 24 June 2010.

country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit;

- (m) “visa” means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:
- “long-stay visa” means an authorisation or decision issued by one of the Member States in accordance with its national law or Union law required for entry for an intended stay in that Member State of more than three months,
  - “short-stay visa” means an authorisation or decision of a Member State with a view to transit through or an intended stay on the territory of one or more or all the Member States of a duration of no more than three months in any six-month period beginning on the date of first entry on the territory of the Member States,
  - “airport transit visa” means a visa valid for transit through the international transit areas of one or more airports of the Member States;
- (n) “risk of absconding” means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

**ECRE Comment on Article 2(n):** This provision should assist with ensuring there is legal certainty in the interpretation of absconding. However, the actual definition is left to the discretion of Member States, notwithstanding the fact that there is a fixed requirement to provide for a definition in national law with respect to the Dublin Regulation. It is insufficient to refer to a general immigration definition on absconding in national law.

## CHAPTER II

### GENERAL PRINCIPLES AND SAFEGUARDS

#### Article 3

Access to the procedure for examining an application for international protection

1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.
3. Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.
4. Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU.

**ECRE Comment on Article 3:** ECRE welcomes the clarification that the scope of the recast Dublin Regulation includes transit zones. Such an approach is consistent with the amendments under the recast Asylum Procedures Directive.<sup>26</sup> Whereas the explicit introduction of the CJEU judgment in *NS & ME* contributes to ensuring more legal clarity, it must be recalled that Member States are bound by all aspects of the judgments including the further operative part of it which stated the following: “*The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2).*” Furthermore, demonstration of systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State is sufficient but not obligatory for a finding of a breach of the applicant’s fundamental rights in being transferred there.<sup>27</sup> The assessment of potential violations of fundamental rights must take into account the individual circumstances of the case and the transfer must be stopped if there are substantial grounds for believing that the person concerned faces a risk of being subjected to torture, inhuman or degrading treatment, irrespective of whether it emanates from systemic flaws or not. When Article 3(2) recast Dublin Regulation applies, the overarching aim of effective access to the asylum procedure should be the central consideration and in light of the *N.S and M.E.* judgment if it takes too much time, the Member State where the applicant is present should be responsible for their application for international protection. In terms of the reference to the safe third country concept, ECRE welcomes the specific reference to the recast Asylum Procedures Directive and the procedural safeguards therein which by virtue of this provision is also applicable to Associated States and opt-out Member States within the Dublin system.<sup>28</sup>

## Article 4

### Right to information

1. As soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation, and in particular of:

- (a) the objectives of this Regulation and the consequences of making another application in a different Member State as well as the consequences of moving from one Member State to another during the phases in which the Member State responsible under this Regulation is being determined and the application for international protection is being examined;
- (b) the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible under this Regulation even if such responsibility is not based on those criteria;
- (c) the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information;
- (d) the possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer;
- (e) the fact that the competent authorities of Member States can exchange data on him or her for the sole purpose of implementing their obligations arising under this Regulation;
- (f) the right of access to data relating to him or her and the right to request that such data be corrected if inaccurate or be deleted if unlawfully processed, as well as the procedures for exercising those rights, including the contact details of the authorities referred to in Article 35 and of the national data protection authorities responsible for hearing claims concerning the protection of personal data.

2. The information referred to in paragraph 1 shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand. Member States shall use the common leaflet drawn up pursuant to paragraph 3 for that purpose. Where necessary for the proper understanding of the applicant, the information shall also be supplied orally, for example in connection with the personal interview as referred to in Article 5.

3. The Commission shall, by means of implementing acts, draw up a common leaflet, as well as a specific leaflet for unaccompanied minors, containing at least the information referred to in paragraph 1 of this Article. This common leaflet shall also include information regarding the application of Regulation (EU) No 603/2013 and, in particular, the purpose for which the data of an applicant may be processed within Eurodac. The common leaflet shall be established in such a

<sup>26</sup> For further information and analysis see ECRE, *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)* (hereinafter “Information Note recast Asylum Procedures Directive”), December 2014.

<sup>27</sup> ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014; For further information see AIRE Centre, European Council on Refugees and Exiles and Amnesty International, Third Party Intervention in *Tarakhel v. Switzerland* (Application No 29217/12), Date of Intervention: 12 January 2014.

<sup>28</sup> ECRE, *Information Note recast Asylum Procedures Directive*, pp. 40-46.

manner as to enable Member States to complete it with additional Member State-specific information. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2) of this Regulation.

**ECRE Comment on Article 4:** ECRE strongly welcomes the introduction of this provision within the recast Dublin Regulation. The right to information is central to procedural fairness. Various research and reports such as the Dublin II Regulation Lives on Hold report<sup>29</sup> demonstrated that the lack of clear, accurate and timely information had a severe impact on the ability of those subject to the Dublin system to understand the consequences of onward movement and assert their rights within the procedure.<sup>30</sup> The importance of information as part of the right to an effective remedy has also been emphasised by the European Court of Human Rights in several cases concerning asylum seekers including *M.S.S. v. Belgium and Greece*, *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece*.<sup>31</sup> Additionally, the JRS Protection Interrupted study clearly shows that the best method of ensuring that applicants for international protection fully understand the information is to provide it orally as well as in writing.<sup>32</sup> ECRE notes that under Article 4(2) where it is deemed necessary for the proper understanding of the applicant, then Member States are obliged to provide such information orally. The method, delivery and content of any information provided must be clear, concise, appropriate and accessible to applicants to enable them to fully understand the Dublin procedure and assert their rights where necessary. For example, the language employed must be clear and simple and translations must be available in the appropriate language(s) of the applicant concerned. In addition, the use of other potential information methods such as videos, particularly for illiterate persons should be further explored with the European Asylum Support Office. In light of the abovementioned research ECRE encourages Member States to systematically make use of the possibility of providing such information orally in addition to written information. In this respect it should be noted that according to Article 5(1) the interview “shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4”.

ECRE reminds Member States that the list of factors upon which information is provided under Article 4(1) is merely illustrative and non-exhaustive. ECRE recommends that Member States also provide further information such as the required time limits, the possibility of instructing a legal representative as part of legal aid for appeals as well as specific information tailored to detained applicants concerning the reduced time limits for transfer there and the possibility to be released from detention if such time limits are not respected in practice. Whilst acknowledging that many aspects of the Dublin Regulation are technical and complex to understand and explain, it is essential that those subject to the Dublin procedure are kept informed and enabled to assert their rights within this process in accordance with the general EU law principle of the right to good administration and the EU law principle of effectiveness.

The Commission published a number of information leaflets for adults whether as applicants for international protection or third country nationals or stateless persons subject to Dublin procedure in Annex X, XII and XIII to the Commission Implementing Regulation (EU) No. 118/2014 which are the standard leaflets to be used by all Member States.<sup>33</sup> Furthermore, Annex XI of the Commission Implementing Regulation includes an information leaflet specifically aimed at unaccompanied children within the Dublin procedure in accordance with Article 4(3) of the recast Dublin Regulation. Although these leaflets are a useful starting point for enabling applicants subject to the Dublin procedure to understand the consequences of that procedure, ECRE recommends that the content of these information leaflets are periodically reviewed with input received from various stakeholders including the target beneficiaries and applicants themselves.<sup>34</sup>

## Article 5

### Personal interview

1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4.

29 The Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold*, European Comparative Report, February 2013.

30 Ibid, section 6.1. pg. 54; See also JRS Europe, *Protection Interrupted, the Dublin Regulation's impact on asylum seekers' protection*, June 2013.

31 ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011; ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment of 23 February 2012, ECtHR, *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, Judgment of 21 October 2014.

32 JRS Europe, *Protection Interrupted, The Dublin Regulation's impact on asylum seekers' protection*, June 2013. The report found that ‘a person is more likely to understand Dublin procedures, as well as the appeals process and the discretionary clauses, if they are given both written documentation and repeated verbal explanations’ see p. 9.

33 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, O.J. L39/1.

34 This is in line with ECRE's recommendation as part of the Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold, European Comparative Report*, February 2013.

2. The personal interview may be omitted if:
  - (a) the applicant has absconded; or
  - (b) after having received the information referred to in Article 4, the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible before a decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).
3. The personal interview shall take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).
4. The personal interview shall be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she is able to communicate. Where necessary, Member States shall have recourse to an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview.
5. The personal interview shall take place under conditions which ensure appropriate confidentiality. It shall be conducted by a qualified person under national law.
6. The Member State conducting the personal interview shall make a written summary thereof which shall contain at least the main information supplied by the applicant at the interview. This summary may either take the form of a report or a standard form. The Member State shall ensure that the applicant and/or the legal advisor or other counsellor who is representing the applicant have timely access to the summary.

**ECRE Comment on Article 5:** ECRE welcomes the introduction of a personal interview. The right to a personal interview reflects the right to be heard under the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights which reflects a general principle of EU law.<sup>35</sup> The personal interview will provide applicants for international protection with an effective opportunity to present all the relevant facts to determine correctly the Member State responsible. Although the content of the personal interview will depend on the individual circumstances of the applicant concerned, generally the content should include, but not be limited to, the following:

- a) information on the Dublin procedure in accordance with Article 4 of the recast Dublin Regulation and the rights of the person concerned during that procedure;
- b) the gathering of relevant information to determine the responsible Member State such as the presence of family members or relatives in another Dublin Member State;
- c) the gathering of relevant information with respect to the potential risk of a violation of the applicant's human rights in the responsible Member State;
- d) the gathering of any other information such as information pertaining to a best interests of the child assessment for any children concerned and/or any information concerning any dependency issues or humanitarian reasons which may be applicable.

It is important that under Article 5(3) the interview is taken as early as possible in the process after receiving information on the Dublin procedure. ECRE recommends that the interview should be held prior to any transfer request sent to another Dublin Member State. Such an approach will enable the correct determination of the Member State responsible as early and efficiently as possible. In accordance with Article 1(7) of the Commission Implementing Regulation (EU) No. 118/2014 Member States must ensure that when an unaccompanied child is interviewed during the Dublin procedure that this is always done in the presence of their representative referred to in Article 6(2) of the recast Dublin Regulation.<sup>36</sup>

The possibilities to omit the interview must be interpreted and applied restrictively in light of the ramifications of an incorrect determination of a responsible Member State. As this is optional, ECRE recommends Member States not to make use of the possibility to omit a personal interview, except where it is possible for the Member State determining the responsible State to assume responsibility with the express consent of the applicant. Furthermore, if an applicant is unable or unfit to be interviewed the decision to omit such an interview must be on the basis

35 CJEU, Joined Cases C-141/12 and C-372/12, *Y.S. v Minister voor Immigratie, Integratie en Aziel, and Minister voor Immigratie, Integratie en Aziel v M.S.* Judgment of 17 July 2014; CJEU, Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 8 May 2014. In CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 22 November 2012 the Court affirmed at para. 87 that “the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.” See also M. 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.

36 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ 2014 L39/1.

of a consultation with an independent medical professional.<sup>37</sup> ECRE recommends that the reference to timely access under Article 5(6) to the summary report indicates access prior to any transfer request being issued so legal advisors can clarify any issues in the personal interview and early on in the process in order to correctly identify the Member State responsible. This would be to the mutual benefit of both Member States and applicants for international protection.

## Article 6

### Guarantees for minors

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minors.

3. This paragraph shall be without prejudice to the relevant provisions in Article 25 of Directive 2013/32/EU.

4. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor's well-being and social development;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor, in accordance with his or her age and maturity.

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.

To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations.

The staff of the competent authorities referred to in Article 35 who deal with requests concerning unaccompanied minors shall have received, and shall continue to receive, appropriate training concerning the specific needs of minors.

5. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of the unaccompanied minor living in the territory of another Member State pursuant to paragraph 4 of this Article, the Commission shall adopt implementing acts including a standard form for the exchange of relevant information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

<sup>37</sup> See by analogy Article 14 of Council 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), OJ 2013 L 180/60 (recast Asylum Procedures Directive); See also ECRE Information Note recast Asylum Procedures Directive .

ECRE Comment on Article 6: ECRE welcomes the explicit reference and acknowledgement that the best interests of the child is a primary consideration within the Dublin system. This reflects the best interests of the child principle in Article 3 of the Convention on the Rights of the Child<sup>38</sup> which is affirmed by Article 24 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights (ECHR). It is applicable to all children subject to the Dublin system both accompanied and unaccompanied. The need for special measures to ensure protection and humanitarian assistance for asylum-seeking children under the Convention on the Rights of the Child is affirmed by the ECtHR.<sup>39</sup> Guidance as to the content of this principle can be taken from the UN Committee on the Rights of the Child which clarified in its General Comment No. 14 on Article 3 of the Convention on the Rights of the Child that it contains substantive, interpretative and procedural obligations.<sup>40</sup> ECRE recommends that Member States and EASO explore best practice with respect to best interest assessment and determination in consultation with relevant stakeholders. The best interest of the child assessment requires an individual examination of the specific circumstances of each child's case within the Dublin procedure and should be considered in the implementation and interpretation of other rights such as the right to be heard.<sup>41</sup> In practice this means that decisions taken by administrative authorities in applying the Dublin system must be assessed and guided by the best interests of the child principle.<sup>42</sup> The determination of a child's best interest should be a multi-disciplinary assessment involving relevant actors such as the child's legal representative and undertaken by specialists who have expertise with respect to children.<sup>43</sup> Article 6(3) provides a non-exhaustive list of factors which should be taken into account in assessing the best interests of the child. ECRE recommends that a best interest assessment is systematically conducted prior to any family tracing activities by the administrative authorities of the host Member State as well as a further best interest's assessment being conducted once family members are located.

ECRE also welcomes the requirement that a representative with the requisite qualifications and expertise represents and assists unaccompanied children subject to the Dublin procedure. ECRE recommends that such representatives have relevant qualifications and expertise not only with respect to the best interests of the child but also with respect to the Dublin procedure itself. These representatives should have timely access to the content of the applicant's file in accordance with Article 6(2) to ensure the child's rights are respected in practice.

In terms of family tracing for the purposes of determining the correct Member State responsible under the recast Dublin Regulation, this should be carried out in a proactive and expeditious manner whilst taking into account the safety of the child and the right to be heard by the individuals concerned including the unaccompanied child.<sup>44</sup> The individual child and/or their legal representative should be kept informed of any progress and action taken by the administrative authorities for the purposes of family tracing.<sup>45</sup> ECRE recommends that Member States take into account the consent of the child in this process to trace and be reunited with family members and/or other relatives.

## CHAPTER III

### CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

#### Article 7

##### Hierarchy of criteria

38 Article 3(1) of the UN Convention on the Rights of the Child 1989 provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." ECRE has previously recommended that the best interests of the child principle should inform the entire international protection determination procedure – See ECRE, *Position on Refugee Children*, November 1996; UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008.

39 ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

40 United Nations Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right the child to have his or her best interests taken as a primary consideration (Art. 3 para. 1)*, 29 May 2013; See also UNHCR and UNICEF, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014.

41 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, 1 July 2009. The views of the child must be taken into account in accordance with their age and/or maturity.

42 United Nations Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right the child to have his or her best interests taken as a primary consideration (Art. 3 para. 1)*, 29 May 2013; See also CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013.

43 Separated Children in Europe programme, *Statement of Good Practice* (4<sup>th</sup> revised edition), 2009.

44 See Red Cross EU Office and ECRE, *Disrupted Flight, The Realities of Separated Refugee Families in the EU*, November 2014; For further guidance see ICRC, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004. The Separated Children in Europe programme, *Statement of Good Practice*, (4<sup>th</sup> revised edition), November 2009 also states that tracing must only be undertaken on a confidential basis and with informed consent. It is noted that this refers to broader family tracing for the purposes of reunification beyond the Dublin system. However, ECRE believes that these principles are equally applicable in the context of the Dublin system.

45 Ibid.



1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.
2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.
3. In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

**ECRE Comment on Article 7:** Previous reports on practice surrounding the Dublin II Regulation showed that often the hierarchy of criteria was incorrectly applied by Member States.<sup>46</sup> ECRE reminds Member States that the hierarchy of criteria in determining the Member State responsible must be respected and utilized in order of priority set out in chapter III of this recast Regulation. The requirement with respect to the Articles 8, 10 and 16 that evidence pertaining to family members is only taken into consideration if it is produced before another Member State accepts a request to take charge or take back the person concerned may result in a violation of an applicant's right to family life depending on the individual circumstances of an applicant's case. ECRE reminds Member States that respect for family life is a primary consideration when applying this Regulation as declared under Recital 14. Furthermore, Member States are reminded to respect the principle of effectiveness, in that the exclusion of evidence pertaining to the presence of family members, relatives or other family may undermine the rights of the child under Article 24 of the EU Charter of Fundamental Rights and Article 7 on respect for private and family life and may be contrary to the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights.

## Article 8

### Minors

1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.
2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.
3. Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.
4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 45 concerning the identification of family members, siblings or relatives of the unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 6(3).
6. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and the exchange of information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

**ECRE Comment on Article 8:** ECRE welcomes the explicit recognition that the best interest of the child is the primary consideration when determining the Member State responsible under this provision. Member States must apply the CJEU judgment in *M.A. and Others v. Secretary of State for the Home Department* as it is in the interests of unaccompanied children "not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status"<sup>47</sup> Therefore, Member States are now prohibited from transferring unaccompanied children to other Member States other than those where family members and/or relatives are present unless exceptionally the child's best interest requires otherwise. ECRE recommends that the views and consent of the child should be taken into consideration in accordance with the child's age and maturity.<sup>48</sup> ECRE calls upon Member States to closely cooperate with one another in applying this provision and that Member State responsibility is determined by way of an individual examination and best interests of the child assessment, irrespective of whether the facts for determining responsibility concern a parent, sibling or relative. Under Article 1(7) of the Commission Implementing Regulation (EU) No 118/2014 guidance is provided on the exchange of information between Member States in determining the responsible Member State and in particular the cooperation required to determine the most appropriate person to whom the child is to be entrusted in situations where more than one family member, sibling or relative is present in a number of Member States. Further guidance on the application of this provision and the necessary evidence required is expected to be provided by the Commission by way of delegated acts in the future. ECRE recommends that the Commission undertakes a wide consultation with relevant stakeholders in drawing up such delegated acts as soon as possible. With regard to the reference to 'legally present' ECRE reminds Member States that this term is broader than the term 'legally resident' and includes all forms of legal presence in the Member States.

When this provision was being negotiated a specific declaration was made by the co-legislators to review Article 8(4) once the CJEU had issued the judgment in C-648/11 case *M.A. and Others v. Secretary of State for the Home Department*.<sup>49</sup> This has resulted in a Commission proposal to amend the recast Dublin Regulation as regards determining the Member State responsible for the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in another Member State which is currently being negotiated.<sup>50</sup> ECRE recommends that Member States approach these negotiations with a rights-based approach being the central focus given the important ramifications of any amendments for unaccompanied children subject to the Dublin system.

## Article 9

Family members who are beneficiaries of international protection

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

## Article 10

Family members who are applicants for international protection

If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

## Article 11

Family procedure

<sup>47</sup> CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013, par. 61.

<sup>48</sup> As indicated in the Separated Children in Europe programme, Statement of Good Practice (4<sup>th</sup> revised edition), November 2009, 'measures must be put in place to facilitate their meaningful participation in line with their age and maturity' at p. 8.

<sup>49</sup> CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013.

<sup>50</sup> See COM(2014) 382 final, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in another Member State, 26 June 2014.

Where several family members and/or minor unmarried siblings submit applications for international protection in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to their being separated, the Member State responsible shall be determined on the basis of the following provisions:

- (a) responsibility for examining the applications for international protection of all the family members and/or minor unmarried siblings shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of them;
- (b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

**ECRE Comments on Articles 9 -11:** ECRE recalls the obligation incumbent on Member States to respect the right to family life in accordance with Recitals 14 and 32, Article 7 ECHR and Article 8 of the EU Charter of Fundamental Rights. With respect to Article 10 in ECRE's view "a first decision on substance" must be interpreted as a decision issued only after a substantive examination of the applicant's (family member) protection needs and not a preliminary decision, for example on admissibility. Such an interpretation would be consistent with recital 43 of the recast Asylum Procedures Directive referring to the substance of an application of international protection as "assess whether the applicant in question qualifies for international protection in accordance with Directive 2011/95/EU". Where family members consent and where applications for international protection are linked it may be in the interest of quality decision-making for one Member State to assess the protection needs of different family members. Sometimes family members may have different residency statuses than those of applicants or beneficiaries of international protection. In such cases ECRE recommends Member States utilize the discretionary provisions under Chapter IV of this Regulation.<sup>51</sup> As previously mentioned such an approach assists integration of the persons concerned as well as providing a support network for applicants during the examination of their application for international protection.<sup>52</sup>

## Article 12

### Issue of residence documents or visas

1. Where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection.
2. Where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection, unless the visa was issued on behalf of another Member State under a representation arrangement as provided for in Article 8 of Regulation (EC) No 810/2009 of the European Parliament and of the Council, of 13 July 2009, establishing a Community Code on Visas [14]. In such a case, the represented Member State shall be responsible for examining the application for international protection.
3. Where the applicant is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for international protection shall be assumed by the Member States in the following order:
  - (a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;
  - (b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;
  - (c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.
4. Where the applicant is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him or her actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the applicant is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him or her actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application for international protection is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which

<sup>51</sup> See further commentary on this under Article 17 of the recast Dublin Regulation.

<sup>52</sup> See commentary on Recital 18 of this recast Dublin Regulation.

issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.

## Article 13

### Entry and/or stay

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1 of this Article and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3), that the applicant — who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established — has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where he or she has been living most recently shall be responsible for examining the application for international protection.

ECRE Comment on Article 13: ECRE notes that this was one of the most utilized criteria in the previous Dublin II Regulation.<sup>53</sup> Rigorous application of this provision can potentially have a disproportionate impact on Member States on the external borders of Europe due to their geographical position and can act against solidarity.<sup>54</sup> In the joined cases *N.S. and M.E.* the CJEU acknowledged that the principle of solidarity may be relevant when applying the Dublin Regulation and the Court affirmed that Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility.<sup>55</sup>

## Article 14

### Visa waived entry

1. If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection.

2. The principle set out in paragraph 1 shall not apply if the third-country national or the stateless person lodges his or her application for international protection in another Member State in which the need for him or her to have a visa for entry into the territory is also waived. In that case, that other Member State shall be responsible for examining the application for international protection.

## Article 15

### Application in an international transit area of an airport

Where the application for international protection is made in the international transit area of an airport of a Member State by a third-country national or a stateless person, that Member State shall be responsible for examining the application.

<sup>53</sup> Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold, European Comparative Report*, February 2013, pg. 41-42.

<sup>54</sup> Given this potential impact, some civil society organisations have called for the rescinding of this criterion as part of the recast Dublin Regulation. See Memorandum, *Allocation of Refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility*, March 2013.

<sup>55</sup> CJEU, Joined Cases, C-411/10, 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, para. 93.

## CHAPTER IV

### DEPENDENT PERSONS AND DISCRETIONARY CLAUSES

#### Article 16

##### Dependent persons

1. Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.

2. Where the child, sibling or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, sibling or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, sibling or parent of the applicant to its territory.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 45 concerning the elements to be taken into account in order to assess the dependency link, the criteria for establishing the existence of proven family links, the criteria for assessing the capacity of the person concerned to take care of the dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time.

4. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and exchange of information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

**ECRE Comment on Article 16:** ECRE welcomes this provision and the accompanying Recital 16 which indicates the binding nature of responsibility assigned under this provision. Past research indicated that the previous similar provision, Article 15(2) of the Dublin II Regulation was rarely applied in practice.<sup>56</sup> However, now there is a binding obligation to apply this provision in light of the CJEU judgment in the case of *K. v. Bundesasylamt*.<sup>57</sup> As a consequence of this judgment the wording 'shall normally keep or bring together' should be interpreted and applied as 'shall keep or bring together' unless exceptional situations arise.<sup>58</sup> The interpretation of the term 'legally resident' will depend upon the national law of the Member State concerned. However, ECRE recommends that Member States refrain from taking a restrictive interpretation of that term in light of the humanitarian purpose of this provision. Annex VII of the Commission Implementing Regulation (EU) No 118/2014 provides a standard form for exchange of information on the child, sibling or parent of an applicant in situations of dependency pursuant to Article 16(4) of the recast Dublin Regulation.<sup>59</sup> It should also be noted that, although this provision is formally not included in the hierarchy of criteria assigning responsibility, due to its binding nature it is at an equal footing with the formal allocation criteria in the process of determining the responsible Member State.<sup>60</sup>

Article 16(1) lists a number of grounds for dependency, namely pregnancy, a new-born child, serious illness, severe disability or old age. Applicants may be dependent on family members, relatives and broader family relations and vice-versa for many other reasons and accordingly when such cases arise, ECRE recommends that Member States use the discretionary provision under Article 17 to take over responsibility of the person concerned in light of the humanitarian objectives of these provisions. The relationships applicable in the context of dependency may also be wider than a relationship of child, sibling or parent and in accordance with the CJEU judgment in *K. v. Bundesasylamt*, ECRE reminds Member States that they are obliged to use a broader interpretation of family and relative beyond those listed in Article 2(g) and (h) given the humanitarian objective of this provision.<sup>61</sup>

56 Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold, European Comparative Report*, February 2013, pg. 49.

57 CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

58 Ibid, par. 46-47.

59 Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ 2014 L39/1.

60 CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

61 "Taking into account its humanitarian purpose, Article 15(2) of Regulation No 343/2003 delimits, on the basis of a criterion of dependence on account of, inter alia, an illness or serious handicap, a group of members of the family of the asylum seeker which is necessarily wider than that defined by Article 2(i) of that regulation" See CJEU, *K. v. Bundesasylamt*, par. 41. For example the case of *K. v. Bundesasylamt* concerned a relationship between mother-in-law and daughter-in-law.

## Article 17

### Discretionary clauses

1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the “DubliNet” electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.

The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.

2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the “DubliNet” electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.

Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.

**ECRE Comment on Article 17:** ECRE reminds Member States of the humanitarian objective of this provision and the fact that States are applying EU law including the EU Charter of Fundamental Rights when applying it in accordance with the CJEU ruling in the case of *N.S. and ME*.<sup>62</sup> Furthermore, Member States are precluded as a matter of law from transferring applicants under the recast Dublin Regulation to another Member State if this would create a risk of a violation of any of their obligations under the ECHR and the EU Charter of Fundamental Rights.<sup>63</sup> For example, it may be necessary to apply Article 17 to respect the principle of family unity in circumstances where spouses or other family members have different legal statuses to those under the fixed criteria in Articles 9, 10 and 11 in Chapter III of this recast Regulation. The CJEU in the cases of *Halaf* and *Puid* has confirmed that the exercise of the sovereignty clause is not subject to any condition.<sup>64</sup> ECRE also calls upon Member States to use these discretionary provisions as a solidarity measure with other Member States that may be facing particular pressures where appropriate and with the consent of the applicant concerned. It is also recommended that Member States take a broad interpretation of the concept of ‘humanitarian grounds’ under Article 17(2) given the hardship that the Dublin system may create for individual applicants and in accordance with the humanitarian purpose of this provision. The reference to the wording ‘family relations’ is not defined in the recast Dublin Regulation and should be given a wide interpretation in light of the CJEU judgment in *K*.<sup>65</sup>

ECRE welcomes the clarification under Article 17(1) for the Member State taking over responsibility to assume the obligations associated with that responsibility but recommends that this is done with the informed consent of the applicant.<sup>66</sup> In ECRE’s view the failure of the provision to take into account the applicant’s own views is contrary to the humanitarian purpose of this discretionary provision.

62 CJEU, Joined Cases, C-411/10, 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, paras. 64-69.

63 ECtHR, *M.S.S. v Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011; CJEU, Joined Cases, C-411/10, 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; ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

64 CJEU, Case C-528/11, *Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, Judgment of 30 May 2013; CJEU, Case C-4/11, *Bundesrepublik Deutschland v. Puid*, Judgment of 18 April 2013.

65 CJEU, Case C-245/11, *K. v. Bundesasylamt*, Judgment of 6 November 2012.

66 The Commission proposal required the applicant’s own consent. See COM (2008) 243 final, *Proposal for a Regulation of the European Parliament and of the Council establishing an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, 3 December 2008.

## CHAPTER V

### OBLIGATIONS OF THE MEMBER STATE RESPONSIBLE

#### Article 18

##### Obligations of the Member State responsible

1. The Member State responsible under this Regulation shall be obliged to:

- (a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State;
- (b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document;
- (c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;
- (d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

2. In the cases falling within the scope of paragraph 1(a) and (b), the Member State responsible shall examine or complete the examination of the application for international protection made by the applicant.

In the cases falling within the scope of paragraph 1(c), when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive 2013/32/EU. In such cases, Member States shall ensure that the examination of the application is completed.

In the cases falling within the scope of paragraph 1(d), where the application has been rejected at first instance only, the Member State responsible shall ensure that the person concerned has or has had the opportunity to seek an effective remedy pursuant to Article 46 of Directive 2013/32/EU.

**ECRE Comment on Article 18:** ECRE welcomes the clarification of Member States' obligations in ensuring that one Member State completes a full and substantive examination of the application for international protection. This is in compliance with the aim of ensuring effective access to an asylum procedure as part of the right to asylum under Article 18 of the EU Charter of Fundamental Rights.<sup>67</sup> Furthermore, ECRE welcomes the explicit recognition that applicants transferred to a Member State under the recast Dublin Regulation whose applications were previously withdrawn are not subject to the requirements for a subsequent application for international protection and that there is an opportunity to seek an effective remedy in circumstances where a first instance decision has been reached as provided for in the recast Asylum Procedures Directive.<sup>68</sup> Previous research indicates that reliance on the subsequent application concept hindered applicant's right to asylum in practice in a number of Member States.<sup>69</sup>

<sup>67</sup> See also recital 5 of this recast Dublin Regulation and CJEU, Case C-648/11, *The Queen on the application of M.A., B.T., D.A. v. Secretary of State for the Home Department*, Judgment of 6 June 2013.

<sup>68</sup> Article 40 of the recast Asylum Procedures Directive.

<sup>69</sup> Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold*, *European Comparative Report*, February 2013, p. 69.

## Article 19

### Cessation of responsibilities

1. Where a Member State issues a residence document to the applicant, the obligations specified in Article 18(1) shall be transferred to that Member State.

2. The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.

An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

3. The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States in compliance with a return decision or removal order issued following the withdrawal or rejection of the application.

An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

ECRE Comment on Article 19: ECRE reminds Member States of their obligations under the CJEU judgment *Kastrati* where the Court held that the withdrawal of an asylum application which occurs before the Member State responsible has agreed to take charge of the applicant, has the effect that the Regulation can no longer be applicable.<sup>70</sup> In such circumstances the responsibility of the Member State ceases as the recast Dublin Regulation is no longer applicable.

## CHAPTER VI

### PROCEDURES FOR TAKING CHARGE AND TAKING BACK

#### SECTION I

##### Start of the procedure

### Article 20

#### Start of the procedure

1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.

2. An application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

3. For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests. The same treatment shall be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

<sup>70</sup> CJEU, Case C-620/10, *Migrationsverket v. Nurije Kastrati, Valdrina Kastrati and Valdrin Kastrati*, Judgment of 3 May 2012. The equivalent definition of 'withdrawal of an application for international protection' is in Article 2(e) of the recast Dublin Regulation.



4. Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged.

The applicant shall be informed in writing of this change in the determining Member State and of the date on which it took place.

5. An applicant who is present in another Member State without a residence document or who there lodges an application for international protection after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was first lodged, with a view to completing the process of determining the Member State responsible.

That obligation shall cease where the Member State requested to complete the process of determining the Member State responsible can establish that the applicant has in the meantime left the territory of the Member States for a period of at least three months or has obtained a residence document from another Member State.

An application lodged after the period of absence referred to in the second subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

**ECRE Comment on Article 20:** In determining the start of the procedure ECRE reminds Member States of the need to provide rapid access to an effective asylum procedure in practice in accordance with the right to asylum under Article 18 of the Charter of Fundamental Rights.

## SECTION II

Procedures for take charge requests

### Article 21

Submitting a take charge request

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.

2. The requesting Member State may ask for an urgent reply in cases where the application for international protection was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order.

The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. That period shall be at least one week.

3. In the cases referred to in paragraphs 1 and 2, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The Commission shall, by means of implementing acts, adopt uniform conditions on the preparation and submission of

take charge requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

## Article 22

### Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.
2. In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used.
3. The Commission shall, by means of implementing acts, establish, and review periodically, two lists, indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in points (a) and (b) of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).
  - (a) Proof:
    - (i) this refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;
    - (ii) the Member States shall provide the Committee provided for in Article 44 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs;
  - (b) Circumstantial evidence:
    - (i) this refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;
    - (ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.
4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.
5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.
6. Where the requesting Member State has pleaded urgency in accordance with the provisions of Article 21(2), the requested Member State shall make every effort to comply with the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give its reply after the time limit requested, but in any event within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.
7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.

## SECTION III

### Procedures for take back requests

## Article 23

### Submitting a take back request when a new application has been lodged in the requesting Member State

1. Where a Member State with which a person as referred to in Article 18(1)(b), (c) or (d) has lodged a new application for international protection considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

2. A take back request shall be made as quickly as possible and in any event within two months of receiving the Eurodac hit, pursuant to Article 9(5) of Regulation (EU) No 603/2013.

If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged within the meaning of Article 20(2).

3. Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged.

4. A take back request shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the statements of the person concerned, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The Commission shall, by means of implementing acts, adopt uniform conditions for the preparation and submission of take back requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

## Article 24

Submitting a take back request when no new application has been lodged in the requesting Member State

1. Where a Member State on whose territory a person as referred to in Article 18(1)(b), (c) or (d) is staying without a residence document and with which no new application for international protection has been lodged considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person.

2. By way of derogation from Article 6(2) of 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 [15], where a Member State on whose territory a person is staying without a residence document decides to search the Eurodac system in accordance with Article 17 of Regulation (EU) No 603/2013, the request to take back a person as referred to in Article 18(1)(b) or (c) of this Regulation, or a person as referred to in its Article 18(1)(d) whose application for international protection has not been rejected by a final decision, shall be made as quickly as possible and in any event within two months of receipt of the Eurodac hit, pursuant to Article 17(5) of Regulation (EU) No 603/2013.

If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.

3. Where the take back request is not made within the periods laid down in paragraph 2, the Member State on whose territory the person concerned is staying without a residence document shall give that person the opportunity to lodge a new application.

4. Where a person as referred to in Article 18(1)(d) of this Regulation whose application for international protection has been rejected by a final decision in one Member State is on the territory of another Member State without a residence document, the latter Member State may either request the former Member State to take back the person concerned or carry out a return procedure in accordance with Directive 2008/115/EC.

When the latter Member State decides to request the former Member State to take back the person concerned, the rules laid down in Directive 2008/115/EC shall not apply.

5. The request for the person referred to in Article 18(1)(b), (c) or (d) to be taken back shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the person's statements, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The Commission shall, by means of implementing acts, establish and review periodically two lists indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in Article 22(3)(a) and (b), and shall adopt uniform conditions for the preparation and submission of take back requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

## Article 25

### Replying to a take back request

1. The requested Member State shall make the necessary checks and shall give a decision on the request to take back the person concerned as quickly as possible and in any event no later than one month from the date on which the request was received. When the request is based on data obtained from the Eurodac system, that time limit shall be reduced to two weeks.
2. Failure to act within the one month period or the two weeks period mentioned in paragraph 1 shall be tantamount to accepting the request, and shall entail the obligation to take back the person concerned, including the obligation to provide for proper arrangements for arrival.

**ECRE Comments on Article 21-25:** Key to the efficiency of the Dublin procedure and the upholding of procedural safeguards for applicants within that procedure is clear concise communication between Member States in the process of sending and responding to take back and take charge requests. It is imperative that Member States provide accurate information in consultations with one another to enable the correct identification of the responsible Member State in the spirit of the EU law principle of sincere cooperation.<sup>71</sup> ECRE recommends that Member States provide applicants' legal representatives with full access to their client's Dublin case files including information on consultations between Member States in line with the right to good administration. This is important not only with respect to evidentiary requirements but also with respect to time limits, for example in take back cases where an application for international protection has not been lodged in the Member State where the person is present. ECRE welcomes the introduction of time limits for requests in take back cases under Article 23 and Article 24. This provides more clarity and is in line with the objective of guaranteeing swift access to an asylum procedure. ECRE also welcomes the obligation to provide for proper arrangements for arrival in accordance with Article 22(7) and Article 25(2). Such an approach ensures respect for the human dignity of the applicant being transferred under Article 1 of the Charter of Fundamental Rights and requires national authorities to establish proper facilities at designated points of arrival in the responsible Member State. ECRE reminds sending Member States that the obligation to provide reception conditions for the applicant concerned only ceases upon transfer in accordance with the CJEU judgment in *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*.<sup>72</sup>

## SECTION IV

### Procedural safeguards

## Article 26

### Notification of a transfer decision

1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.
2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means.

Member States shall ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the decision referred to in paragraph 1, when that information has not been already communicated.

<sup>71</sup> According to Article 4(3) Treaty on European Union (TEU) "pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties". See also Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold, European Comparative Report*, February 2013, pp. 101-108.

<sup>72</sup> CJEU, Case C-179/11, *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Judgment of 27 September 2012.

3. When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.

**ECRE Comment on Article 26:** The right to be properly notified by way of a reasoned decision is a general principle of EU law.<sup>73</sup> In order for remedies under the recast Dublin Regulation to be truly effective there needs to be strong procedural safeguards in place with access to legal aid and the right to information including timely notification of a transfer decision. ECRE welcomes the procedural safeguards in Article 26 such as the provision of information on legal remedies available. ECRE recommends that Member States provide information on legal assistance and advice at the time of notification of a decision irrespective of whether or not such information has already been communicated to the applicant concerned earlier in the process. Notification of the decision itself should also be done in writing and served to both the applicant concerned and their legal representative if applicable.

## Article 27

### Remedies

1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.
3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:
  - (a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or
  - (b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or
  - (c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.
4. Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.
5. Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.
6. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

In complying with the requirements set out in 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.

<sup>73</sup> CJEU, Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] 5 ECR 1651; CJEU, Case C-222/86, *UNECTEF v. Heylens*, Judgment of 15 October 1987; see further ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014.

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation.

Procedures for access to legal assistance shall be laid down in national law.

**ECRE Comment on Article 27 and Recital 19:** ECRE welcomes this provision and the corresponding Recital 19 as it reflects both the jurisprudence of the ECtHR and the CJEU, Article 13 ECHR, Article 47 of the EU Charter of Fundamental Rights and the principle of effective judicial protection. In ECRE's view, an effective remedy must be guaranteed not only with regard to a decision to transfer an applicant to another Member State on the basis of the criteria in the recast Dublin Regulation, but also with regard to a decision not to transfer an applicant, in particular where the latter would risk violating the applicant's fundamental right, such as the right to family life or the best interests of the child.<sup>74</sup> This is necessary to ensure compliance with Article 47 EU Charter of Fundamental Rights which requires that "[E]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

The right to an effective remedy is a central safeguard to guarantee protection from *refoulement* and protect against violations of the applicant's fundamental rights whilst in the Dublin procedure. In order to achieve that, the legal remedy must be effective in practice as well as in law and consist of a full and *ex nunc* examination of both facts and law.<sup>75</sup> Similarly, in terms of the scope of the appeal, Member States must carry out a thorough and individualised examination of the situation of the applicant concerned before transferring an applicant to a particular Member State to ensure that their fundamental rights will be respected.<sup>76</sup> Depending on the individual circumstances of the applicant concerned this may also require the transferring Member State to seek individual guarantees in the responsible Member State and verify whether they are respected in practice.<sup>77</sup> Furthermore, the ECtHR in *Tarakhel v. Switzerland* has affirmed that the source of the risk of a violation of an applicant's fundamental rights does not alter the ECHR obligations of the Member State ordering the Dublin transfer.<sup>78</sup> Such an approach accurately reflects Member States' obligations under the EU Charter of Fundamental Rights and the ECHR in contrast with the restrictive interpretation in the CJEU judgment in *Abdullahi*.<sup>79</sup> In this context, ECRE reminds Member States that the *Abdullahi* judgment should no longer be interpreted as the standard for the scope of appeal in Dublin procedures given the substantive amendments made under Article 27 and Recital 19 in the recast Dublin Regulation and the requirement to provide an effective remedy which respects the fundamental rights of applicants.<sup>80</sup> The requirement to provide a reasonable time period within which the person concerned may exercise their right to an appeal under Article 27(2) is essential to ensure the effectiveness of the remedy available for the applicant.<sup>81</sup>

Article 27 now requires that appeals are granted with suspensive effect *regardless* of whether or not fundamental rights are at stake in challenging transfers. For the purposes of appeals Member States are given a number of options under Article 27(3) in which to grant suspensive effect during that process. ECRE welcomes the explicit reference to the need for close and rigorous scrutiny of the individual circumstances of each case under Article 27(3) (b). Given this requirement and for the sake of clarity and in order to ease administrative burdens on the national Courts, ECRE recommends that Member States provide full and automatic suspensive effect for all Dublin appeals. Such an approach would be in accordance with the evolving jurisprudence of the ECtHR which requires a remedy to have automatic suspensive effect in order to be effective in practice.<sup>82</sup>

ECRE also welcomes the obligation to provide access to legal assistance during the appeal procedure, whilst noting that the concept of 'on request' under Article 27(6) must not be interpreted too restrictively to ensure that applicants have effective access to justice. Given the technical nature of the recast Dublin Regulation and Dublin appeals it is essential that applicants for international protection have the support of an independent legal representative who can provide quality legal assistance.<sup>83</sup>

74 See also Meijers Committee, Note on the proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation), 2 December 2014.

75 ECtHR, *Conka v. Belgium*, Application no. 51564/99, Judgment of 5 February 2002.

76 ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

77 ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, Judgment of 4 November 2014.

78 Ibid, para. 104. A similar approach was provided in the UK in *R (on the Application of EM(Eriteria)) v. Secretary of State for the Home Department*, [2014] UKSC 12.

79 CJEU, Case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, Judgment of 10 December 2013.

80 For further analysis on the non-applicability of the *Abdullahi* judgment see M. Hennessy, *The Dublin system and the Right to an Effective Remedy-The case of C-394/12 Abdullahi*, EDAL Blog, December 2013; S. Peers, *Tarakhel v. Switzerland: Another nail in the coffin of the Dublin system*, EU Law Analysis blog, 5 November 2014.

81 The CJEU has previously found that short time-limits may render an appeal inaccessible in practice; See CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011; ECtHR, *I.M. v France*, Application no. 9152/09, Judgment of 2 February 2012.

82 For further information see ECRE, *Information Note recast Asylum Procedures Directive*, pp. 50-55. Relevant ECtHR jurisprudence includes ECtHR, *Conka v. Belgium*, Application no. 51564/99, Judgment of 5 February 2002; ECtHR, *Abdolkani and Karimnia v. Turkey*, Application no. 30471/08, Judgment of 22 September 2008; ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

83 The importance of legal aid as part of the principle of effective judicial protection is affirmed by the CJEU in the case of *D.E.B.* See CJEU, Case C-279/09, *D.E.B. v. Bundesrepublik Deutschland*, Judgment of 22 December 2010.

## SECTION V

Detention for the purpose of transfer

### Article 28

Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.
2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.
3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.

Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival.

Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).

When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained. Articles 21, 23, 24 and 29 shall continue to apply accordingly.

4. As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.

**ECRE Comment on Article 28 and Recital 20:** ECRE welcomes the explicit reference to the fact that detention should not be applied for the sole reason that a person is applying for international protection under Recital 20. Furthermore, Article 28 (1) provides an additional ground by declaring that Member States are prohibited from detaining a person for the sole reason that he or she is subject to the Dublin procedure. Research undertaken by the Dublin Transnational Network Project in 2012 showed that persons in the Dublin procedure were frequently subjected to detention prior to transfers under the Dublin II Regulation so it is hoped that the grounds for detention under this provision will result in a more limited use of that coercive measure.<sup>84</sup> ECRE also welcomes the fact that detention should be for as short a period as possible and subject to the principles of necessity and proportionality based on an individual assessment as explicitly required under Article 28(3) and Recital 20.<sup>85</sup> As outlined in Guideline 4 of UNHCR Detention Guidelines “*As a fundamental right, decisions to detain are to be based on a detailed and individualised assessment of the necessity to detain in line with a legitimate purpose.*”<sup>86</sup> Furthermore Member States are required to execute the administrative procedures relevant to the grounds for detention with due diligence under this Article and Article 9(1) of the recast Reception Conditions Directive by virtue of Article 28(4).<sup>87</sup> Article 28(3) includes a number of requirements that need to be in place before a Member State can justify detention such as the requirement of establishing there is a significant risk of absconding as defined in national law depending on the individual circumstances of the case.<sup>88</sup> The burden of proof in establishing that these requirements for applying detention is on the Member State concerned and any decision to detain must be reasoned, in accordance with the right to receive a reasoned decision which is a general principle of EU law.<sup>89</sup>

<sup>84</sup> Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold*, *European Comparative Report*, February 2013, p. 82-84.

<sup>85</sup> Such an approach is in accordance with the jurisprudence of the ECtHR with respect to Article 5 ECHR.

<sup>86</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

<sup>87</sup> Recital 16 of the recast Reception Conditions Directive states: ‘With regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.’

<sup>88</sup> See Article 2(n) of this Regulation and ECRE’s comment above.

<sup>89</sup> See CJEU, Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] 5 ECR 1651 and Case C-222/86, *UNECTEF v. Heylens*, Judgment of 15 October 1987.

Although ECRE welcomes the shorter timeframes for detention under the Dublin procedure and the obligation to release a person once the authorities have failed to comply with those time limits under Article 28(3), ECRE is conscious of the fact that this provision still permits Member States to detain an applicant for approximately three months prior to their transfer to the responsible Member State. Various reports have demonstrated that individuals become vulnerable when detained and that detention can have a devastating impact on the physical and mental health of vulnerable groups.<sup>90</sup> ECRE urges Member States to refrain from detaining applicants for international protection under the recast Dublin Regulation in practice and to apply alternatives to detention. Furthermore, ECRE reminds Member States that they are prohibited from using detention under this provision as a mechanism to more quickly assign responsibility for the examination of an application for international protection by virtue of the requirement under Article 28(1) not to hold a person in detention for the sole purpose that he/she is subject to a Dublin procedure. This is all the more so relevant when the receiving Member State may be unable to respond within the two week deadline before tacit acceptance under Article 28(3). If applicants are detained their legal representatives must be promptly informed of that situation in light of the shorter timeframes for assigning Member State responsibility for detained applicants in the Dublin procedure. In the situation where a detained applicant submits an appeal which suspends time limits in the procedure as per the CJEU judgment in *Petrosian*, ECRE recommends that Member States review the applicability of the grounds for detention as in such situations the continuing use of detention may not be considered proportionate or necessary or there may no longer be grounds for determining that there is a significant risk of absconding in practice.<sup>91</sup>

ECRE welcomes the fact that the provisions relating to the detention conditions and guarantees under the recast Reception Conditions Directive apply to applicants detained under the Dublin procedure. This explicit recognition is important particularly with respect to Member States who have opted out of the Reception Conditions Directive but remain bound by it with respect to this specific provision under Article 28(4). ECRE notes that this provision does not apply to applicants who are detained in the responsible Member State once they have been transferred. However, such situations of detention fall within the scope of the recast Reception Conditions Directive and the equivalent provisions therein with respect to the grounds for detention apply accordingly.<sup>92</sup> If a person is detained for other grounds, immigration reasons or otherwise, for the purposes of legal clarity ECRE recommends that a new detention order is issued in line with this recast Dublin Regulation and therefore bound by the conditions therein.

## SECTION VI

### Transfers

## Article 29

### Modalities and time limits

1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity.

If necessary, the applicant shall be supplied by the requesting Member State with a *laissez passer*. The Commission shall, by means of implementing acts, establish the design of the *laissez passer*. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the person concerned or of the fact that he or she did not appear within the set time limit.

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned

<sup>90</sup> JRS Europe, *Becoming Vulnerable in Detention*, June 2010.

<sup>91</sup> CJEU, Case C-19/08, *Migrationsverket v. Petrosian*, Judgment of 29 January 2009.

<sup>92</sup> Article 8 of the recast Reception Conditions Directive.



absconds.

3. If a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back.

4. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and exchange of information between Member States, in particular in the event of postponed or delayed transfers, transfers following acceptance by default, transfers of minors or dependent persons, and supervised transfers. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

## Article 30

### Costs of transfer

1. The costs necessary to transfer an applicant or another person as referred to in Article 18(1)(c) or (d) to the Member State responsible shall be met by the transferring Member State.

2. Where the person concerned has to be transferred back to a Member State as a result of an erroneous transfer or of a transfer decision that has been overturned on appeal or review after the transfer has been carried out, the Member State which initially carried out the transfer shall be responsible for the costs of transferring the person concerned back to its territory.

3. Persons to be transferred pursuant to this Regulation shall not be required to meet the costs of such transfers.

ECRE Comment on Article 30: ECRE welcomes the clarification that applicants for international protection are not required to meet the cost of transfers under the recast Dublin Regulation. ECRE reminds Member States that the financial burden of reception conditions is borne by the transferring Member State until the applicant concerned is actually transferred to the responsible Member State as required in the CJEU judgment of *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*.<sup>93</sup>

## Article 31

### Exchange of relevant information before a transfer is carried out

1. The Member State carrying out the transfer of an applicant or of another person as referred to in Article 18(1)(c) or (d) shall communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities, in accordance with national law in the Member State responsible, are in a position to provide that person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments. Those data shall be communicated to the Member State responsible within a reasonable period of time before a transfer is carried out, in order to ensure that its competent authorities in accordance with national law have sufficient time to take the necessary measures.

2. The transferring Member State shall, in so far as such information is available to the competent authority in accordance with national law, transmit to the Member State responsible any information that is essential in order to safeguard the rights and immediate special needs of the person to be transferred, and in particular:

- (a) any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required;
- (b) contact details of family members, relatives or any other family relations in the receiving Member State, where applicable;
- (c) in the case of minors, information on their education;
- (d) an assessment of the age of an applicant.

3. The exchange of information under this Article shall only take place between the authorities notified to the Commission in accordance with Article 35 of this Regulation using the “DubliNet” electronic communication network set-up under

<sup>93</sup> CJEU, Case C-179/11, *Cimade, Gisti v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Judgment of 27 September 2012.

Article 18 of Regulation (EC) No 1560/2003. The information exchanged shall only be used for the purposes set out in paragraph 1 of this Article and shall not be further processed.

4. With a view to facilitating the exchange of information between Member States, the Commission shall, by means of implementing acts, draw up a standard form for the transfer of the data required pursuant to this Article. Those implementing acts shall be adopted in accordance with the examination procedure laid down in Article 44(2).

5. The rules laid down in Article 34(8) to (12) shall apply to the exchange of information pursuant to this Article.

## Article 32

Exchange of health data before a transfer is carried out

1. For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall, in so far as it is available to the competent authority in accordance with national law, transmit to the Member State responsible information on any special needs of the person to be transferred, which in specific cases may include information on that person's physical or mental health. That information shall be transferred in a common health certificate with the necessary documents attached. The Member State responsible shall ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required.

The Commission shall, by means of implementing acts, draw up the common health certificate. Those implementing acts shall be adopted in accordance with the examination procedure laid down in Article 44(2).

2. The transferring Member State shall only transmit the information referred to in paragraph 1 to the Member State responsible after having obtained the explicit consent of the applicant and/or of his or her representative or, if the applicant is physically or legally incapable of giving his or her consent, when such transmission is necessary to protect the vital interests of the applicant or of another person. The lack of consent, including a refusal to consent, shall not constitute an obstacle to the transfer.

3. The processing of personal health data referred to in paragraph 1 shall only be carried out by a health professional who is subject, under national law or rules established by national competent bodies, to the obligation of professional secrecy or by another person subject to an equivalent obligation of professional secrecy.

4. The exchange of information under this Article shall only take place between the health professionals or other persons referred to in paragraph 3. The information exchanged shall only be used for the purposes set out in paragraph 1 and shall not be further processed.

5. The Commission shall, by means of implementing acts, adopt uniform conditions and practical arrangements for exchanging the information referred to in paragraph 1 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure laid down in Article 44(2).

6. The rules laid down in Article 34(8) to (12) shall apply to the exchange of information pursuant to this Article.

**ECRE Comments on Articles 31-32:** In accordance with the right to respect for human dignity, it is necessary to ensure that there is a continuity of care in the Dublin procedure and during the examination of an applicant's claim for international protection irrespective of the Member State responsible. ECRE welcomes the obligation of the transferring Member State to transmit information as is required to safeguard the rights and special needs of the individual concerned to the responsible Member State under Article 31(2). ECRE reminds Member States that the list of relevant information that may be supplied under Article 31(2) is not exhaustive and recommends that any information concerning an assessment of age of the applicant in accordance with Article 31(2)(d) should include details on the method of age assessment used. ECRE also welcomes the explicit requirement to exchange health data for the purpose of the provision of medical care and treatment and the obligation of the Member State responsible to ensure those needs are addressed upon transfer. ECRE reminds Member States that the list of situations where medical care or treatment is required under Article 32(1) is only illustrative and not exhaustive. Given the risk of a potential violation of an applicant's fundamental rights and the fact that these are vulnerable persons within the Dublin procedure, Member States will need to verify whether such medical care and/or treatment is available and accessible in practice in the responsible Member State conducting any transfer and may require individual guarantees from that State in practice before transfer.<sup>94</sup> ECRE also reminds Member States of their obligations under the recast Reception Conditions Directive and recast Asylum Procedures Directive to identify the

<sup>94</sup> Such an approach is in line with ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014.

special reception needs and special procedural needs of applicants for international protection.<sup>95</sup> Those obligations are also applicable during the Dublin procedure. Under Article 1(9) of the Commission Implementing Regulation (EU) No 118/2014 Member States shall agree on the language of any health certificate used prior to its transmission and Annex VI and Annex IX of that Regulation provides the standard forms respectively for the exchange of data and health data prior to a Dublin transfer. ECRE reminds Member States that it may be necessary in certain situations for the discretionary provisions under Article 17 to be utilized on humanitarian grounds to take over responsibility for the examination of an applicant's claim depending on the health of the person concerned.

## Article 33

A mechanism for early warning, preparedness and crisis management

1. Where, on the basis of, in particular, the information gathered by EASO pursuant to Regulation (EU) No 439/2010, the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan.

The Member State concerned shall inform the Council and the Commission whether it intends to present a preventive action plan in order to overcome the pressure and/or problems in the functioning of its asylum system whilst ensuring the protection of the fundamental rights of applicants for international protection.

A Member State may, at its own discretion and initiative, draw up a preventive action plan and subsequent revisions thereof. When drawing up a preventive action plan, the Member State may call for the assistance of the Commission, other Member States, EASO and other relevant Union agencies.

2. Where a preventive action plan is drawn up, the Member State concerned shall submit it and shall regularly report on its implementation to the Council and to the Commission. The Commission shall subsequently inform the European Parliament of the key elements of the preventive action plan. The Commission shall submit reports on its implementation to the Council and transmit reports on its implementation to the European Parliament.

The Member State concerned shall take all appropriate measures to deal with the situation of particular pressure on its asylum system or to ensure that the deficiencies identified are addressed before the situation deteriorates. Where the preventive action plan includes measures aimed at addressing particular pressure on a Member State's asylum system which may jeopardise the application of this Regulation, the Commission shall seek the advice of EASO before reporting to the European Parliament and to the Council.

3. Where the Commission establishes, on the basis of EASO's analysis, that the implementation of the preventive action plan has not remedied the deficiencies identified or where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan, the Commission, in cooperation with EASO as applicable, may request the Member State concerned to draw up a crisis management action plan and, where necessary, revisions thereof. The crisis management action plan shall ensure, throughout the entire process, compliance with the asylum acquis of the Union, in particular with the fundamental rights of applicants for international protection.

Following the request to draw up a crisis management action plan, the Member State concerned shall, in cooperation with the Commission and EASO, do so promptly, and at the latest within three months of the request.

The Member State concerned shall submit its crisis management action plan and shall report, at least every three months, on its implementation to the Commission and other relevant stakeholders, such as EASO, as appropriate.

The Commission shall inform the European Parliament and the Council of the crisis management action plan, possible revisions and the implementation thereof. In those reports, the Member State concerned shall report on data to monitor compliance with the crisis management action plan, such as the length of the procedure, the detention conditions and the reception capacity in relation to the inflow of applicants.

4. Throughout the entire process for early warning, preparedness and crisis management established in this Article, the Council shall closely monitor the situation and may request further information and provide political guidance, in particular as regards the urgency and severity of the situation and thus the need for a Member State to draw up either a preventive action plan or, if necessary, a crisis management action plan. The European Parliament and the Council may, throughout

<sup>95</sup> See Article 22 of the recast Reception Conditions Directive and Article 24 of the recast Asylum Procedures Directive.

the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate.

**ECRE Comment on Article 33 and Recitals 21-23:** Although ECRE regrets the failure to incorporate a temporary suspension mechanism into the recast text as initially proposed by the Commission,<sup>96</sup> ECRE acknowledges the potential added value of the introduction of an early warning, preparedness and crisis management mechanism provided that the protection of fundamental rights of applicants for international protection is central to that mechanism.<sup>97</sup> When gathering information concerning the ability of Member States to manage particular pressures on their asylum and reception systems ECRE recommends that comprehensive, up-to-date, reliable qualitative and quantitative data is collected which includes information sourced from non-governmental organisations on the ground such as the Asylum Information Database (AIDA).<sup>98</sup> ECRE also recommends that there is transparency in the process and implementation of action plans both for early warning purposes and crisis management. Therefore, such plans should be published and regularly updated.

ECRE notes that thus far Article 33 has not been applied in some Member States where it could have been appropriate. In the case of Bulgaria, where UNHCR considered that the situation amounted to systemic deficiencies in the asylum procedure and reception conditions, this provision was still not invoked or applied.<sup>99</sup> Non-application of Article 33 should not be interpreted as being relevant as to whether or not a transfer may breach the fundamental rights of applicants in the Dublin procedure. Notwithstanding the implementation of this provision, ECRE reminds Member States of their obligations under relevant ECtHR and CJEU jurisprudence not to transfer a person to a Member State where there are substantial grounds for believing there is a risk of inhuman, degrading treatment or a violation of other fundamental rights in that Member State irrespective of the source of this risk.<sup>100</sup> ECRE also acknowledges the separate role and power of the Commission to take action at any time against the Member State concerned with respect to infringement proceedings irrespective of the application of Article 33.<sup>101</sup>

## CHAPTER VII

### ADMINISTRATIVE COOPERATION

#### Article 34

##### Information sharing

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the applicant as is appropriate, relevant and non-excessive for:

- (a) determining the Member State responsible;
- (b) examining the application for international protection;
- (c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

- (a) personal details of the applicant, and, where appropriate, his or her family members, relatives or any other family relations (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);
- (b) identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc.);
- (c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EU) No 603/2013;
- (d) places of residence and routes travelled;

<sup>96</sup> COM (2008) 820 final, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), Brussels, 3 December 2008. .

<sup>97</sup> For further information on ECRE's views on the Early Warning, Preparedness and Crisis Management mechanism see ECRE, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013.

<sup>98</sup> The Asylum Information Database (AIDA) is a project of the European Council on Refugees and Exiles (ECRE), in partnership with Forum Refugees-Cosi, the Hungarian Helsinki Committee and the Irish Refugee Council which provides independent up-to-date information with regard to asylum procedures, reception conditions and detention in 16 EU Member States and two non-EU neighbouring countries, Switzerland and Turkey.

<sup>99</sup> In such a situation of systemic deficiencies. Member States are bound by Article 3(2) of this recast Dublin Regulation and the CJEU ruling in Joined Cases, C-411/10, 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 not to transfers persons there.

<sup>100</sup> ECtHR, *M.S.S. v Belgium & Greece*, Application no. 30696/09, Judgment of 21 January 2011; ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014; CJEU, Joined Cases, C-411/10, 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.

<sup>101</sup> The Commission's power to issue infringement procedures is derived from Article 258 TFEU .

- (e) residence documents or visas issued by a Member State;
- (f) the place where the application was lodged;
- (g) the date on which any previous application for international protection was lodged, the date on which the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

3. Furthermore, provided it is necessary for the examination of the application for international protection, the Member State responsible may request another Member State to let it know on what grounds the applicant bases his or her application and, where applicable, the grounds for any decisions taken concerning the applicant. The other Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm its essential interests or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for international protection, obtained by the requesting Member State. In that case, the applicant must know for what specific information he or she is giving his or her approval.

4. Any request for information shall only be sent in the context of an individual application for international protection. It shall set out the grounds on which it is based and, where its purpose is to check whether there is a criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence, including relevant information from reliable sources on the ways and means by which applicants enter the territories of the Member States, or on what specific and verifiable part of the applicant's statements it is based. It is understood that such relevant information from reliable sources is not in itself sufficient to determine the responsibility and the competence of a Member State under this Regulation, but it may contribute to the evaluation of other indications relating to an individual applicant.

5. The requested Member State shall be obliged to reply within five weeks. Any delays in the reply shall be duly justified. Non-compliance with the five week time limit shall not relieve the requested Member State of the obligation to reply. If the research carried out by the requested Member State which did not respect the maximum time limit withholds information which shows that it is responsible, that Member State may not invoke the expiry of the time limits provided for in Articles 21, 23 and 24 as a reason for refusing to comply with a request to take charge or take back. In that case, the time limits provided for in Articles 21, 23 and 24 for submitting a request to take charge or take back shall be extended by a period of time which shall be equivalent to the delay in the reply by the requested Member State.

6. The exchange of information shall be effected at the request of a Member State and may only take place between authorities whose designation by each Member State has been communicated to the Commission in accordance with Article 35(1).

7. The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:

- (a) determining the Member State responsible;
- (b) examining the application for international protection;
- (c) implementing any obligation arising under this Regulation.

8. The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that it has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.

9. The applicant shall have the right to be informed, on request, of any data that is processed concerning him or her.

If the applicant finds that the data have been processed in breach of this Regulation or of Directive 95/46/EC, in particular because they are incomplete or inaccurate, he or she shall be entitled to have them corrected or erased.

The authority correcting or erasing the data shall inform, as appropriate, the Member State transmitting or receiving the information.

The applicant shall have the right to bring an action or a complaint before the competent authorities or courts or tribunals of the Member State which refused the right of access to or the right of correction or erasure of data relating to him or her.

10. In each Member State concerned, a record shall be kept, in the individual file for the person concerned and/or in a register, of the transmission and receipt of information exchanged.

11. The data exchanged shall be kept for a period not exceeding that which is necessary for the purposes for which they are exchanged.

12. Where the data are not processed automatically or are not contained, or intended to be entered, in a file, each Member State shall take appropriate measures to ensure compliance with this Article through effective checks.

## Article 35

### Competent authorities and resources

1. Each Member State shall notify the Commission without delay of the specific authorities responsible for fulfilling the obligations arising under this Regulation, and any amendments thereto. The Member States shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back applicants.
2. The Commission shall publish a consolidated list of the authorities referred to in paragraph 1 in the Official Journal of the European Union. Where there are amendments thereto, the Commission shall publish once a year an updated consolidated list.
3. The authorities referred to in paragraph 1 shall receive the necessary training with respect to the application of this Regulation.
4. The Commission shall, by means of implementing acts, establish secure electronic transmission channels between the authorities referred to in paragraph 1 for transmitting requests, replies and all written correspondence and for ensuring that senders automatically receive an electronic proof of delivery. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

**ECRE Comment on Article 35:** ECRE welcomes the explicit obligation of Member States to ensure the necessary resources for applying the recast Dublin Regulation in the spirit of the principle of effectiveness but emphasises that such resources must in the first place be used to ensure that the recast Dublin Regulation respects the fundamental rights of applicants for international protection. ECRE also welcomes the establishment, publication and periodic review of a consolidated list of responsible authorities.<sup>102</sup> ECRE calls upon Member States to ensure that the necessary training under Article 35(3) involves a comprehensive training programme in accordance with Article 4 of the recast Asylum Procedures Directive which covers not only the technical nature of the recast Dublin Regulation but also training on the protection of the applicant's fundamental rights during the Dublin procedure and how to analyse the asylum procedure and reception conditions in the responsible Member State.<sup>103</sup>

## Article 36

### Administrative arrangements

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:
  - (a) exchanges of liaison officers;
  - (b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants.
2. Member States may also maintain the administrative arrangements concluded under Regulation (EC) No 343/2003. To the extent that such arrangements are not compatible with this Regulation, the Member States concerned shall amend the arrangements in such a way as to eliminate any incompatibilities observed.
3. Before concluding or amending any arrangement referred to in paragraph 1(b), the Member States concerned shall consult the Commission as to the compatibility of the arrangement with this Regulation.
4. If the Commission considers the arrangements referred to in paragraph 1(b) to be incompatible with this Regulation, it shall, within a reasonable period, notify the Member States concerned. The Member States shall take all appropriate steps to amend the arrangement concerned within a reasonable time in such a way as to eliminate any incompatibilities observed.

<sup>102</sup> See Notices from Member States, Authorities responsible for fulfilling the obligations arising under Regulation (EU) No 604/2013, OJ 2015 C 55/5.

<sup>103</sup> For further information see ECRE, *Information Note recast Asylum Procedures Directive*, pp. 7-8.

5. Member States shall notify the Commission of all arrangements referred to in paragraph 1, and of any denunciation thereof, or amendment thereto.

**ECRE Comment on Article 36 and Recital 28:** ECRE reminds Member States that any bilateral arrangements must respect the procedural safeguards within this recast Regulation and enable sufficient time for the correct identification of the responsible Member State for the examination of an application for international protection. Any bilateral arrangement must also be fully compliant with fundamental rights.<sup>104</sup> ECRE reminds Member States that they have an obligation under Art. 36(3) to consult with the Commission as to the compatibility of any bilateral agreements with this recast Regulation. Furthermore, in the spirit of legal clarity and transparency ECRE recommends that such bilateral agreements are published so that all relevant stakeholders are aware of the content of these agreements.

## CHAPTER VIII

### CONCILIATION

#### Article 37

##### Conciliation

1. Where the Member States cannot resolve a dispute on any matter related to the application of this Regulation, they may have recourse to the conciliation procedure provided for in paragraph 2.
2. The conciliation procedure shall be initiated by a request from one of the Member States in dispute to the Chairman of the Committee set up by Article 44. By agreeing to use the conciliation procedure, the Member States concerned undertake to take the utmost account of the solution proposed.

The Chairman of the Committee shall appoint three members of the Committee representing three Member States not connected with the matter. They shall receive the arguments of the parties either in writing or orally and, after deliberation, shall propose a solution within one month, where necessary after a vote.

The Chairman of the Committee, or his or her deputy, shall chair the discussion. He or she may put forward his or her point of view but may not vote.

Whether it is adopted or rejected by the parties, the solution proposed shall be final and irrevocable.

**ECRE Comment on Article 37 and Recital 37:** ECRE welcomes the extension of the conciliation committee under Regulation (EC) No 1560/2003 to all aspects of the recast Dublin Regulation and recommends that Member States utilise this mechanism where appropriate. Although the committee was never used under the previous Regulation to resolve disputes concerning the humanitarian clause as noted by the Dublin Transnational Network Project research, ECRE calls upon Member States to take the opportunity to use this avenue for resolving disputes in the future and to take account of the best interests of the individual applicants concerned when resolving such disputes.<sup>105</sup> Furthermore, ECRE recommends more transparency in this process so that applicants' legal representatives are given access to information concerning the nature of the dispute and informed of any decisions made by the conciliation committee.

## CHAPTER IX

### TRANSITIONAL PROVISIONS AND FINAL PROVISIONS

#### Article 38

##### Data security and data protection

<sup>104</sup> ECtHR, *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, Judgment of 21 October 2014.

<sup>105</sup> Dublin Transnational Network Project, *The Dublin II Regulation Lives on Hold*, *European Comparative Report*, February 2013, p. 49.

Member States shall take all appropriate measures to ensure the security of transmitted personal data and in particular to avoid unlawful or unauthorised access or disclosure, alteration or loss of personal data processed.

Each Member State shall provide that the national supervisory authority or authorities designated pursuant to Article 28(1) of Directive 95/46/EC shall monitor independently, in accordance with its respective national law, the lawfulness of the processing, in accordance with this Regulation, of personal data by the Member State in question.

**ECRE Comments on Article 38 and Recitals 26-27:** ECRE reminds Member States of their obligations under Article 8 of the EU Charter of Fundamental Rights to protect personal data particularly given the sensitive nature of personal data of persons applying for international protection. ECRE recalls that the Commission is empowered to monitor Member State practice in this regard under Article 46 of the recast Dublin Regulation. Member States should also regularly report to the Commission on how they are introducing and implementing special provisions for the protection of data relating to applicants in accordance with their data protection obligations under Directive 95/46/EU.<sup>106</sup>

## Article 39

### Confidentiality

Member States shall ensure that the authorities referred to in Article 35 are bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

## Article 40

### Penalties

Member States shall take the necessary measures to ensure that any misuse of data processed in accordance with this Regulation is punishable by penalties, including administrative and/or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive.

## Article 41

### Transitional measures

Where an application has been lodged after the date mentioned in the second paragraph of Article 49, the events that are likely to entail the responsibility of a Member State under this Regulation shall be taken into consideration, even if they precede that date, with the exception of the events mentioned in Article 13(2).

## Article 42

### Calculation of time limits

Any period of time prescribed in this Regulation shall be calculated as follows:

- (a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;
- (b) a period expressed in weeks or months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;
- (c) time limits shall include Saturdays, Sundays and official holidays in any of the Member States concerned.

<sup>106</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.



## Article 43

### Territorial scope

As far as the French Republic is concerned, this Regulation shall apply only to its European territory.

## Article 44

### Committee

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

## Article 45

### Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Articles 8(5) and 16(3) shall be conferred on the Commission for a period of 5 years from the date of entry into force of this Regulation. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the 5-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in Articles 8(5) and 16(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Articles 8(5) and 16(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of four months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

## Article 46

### Monitoring and evaluation

By 21 July 2016, the Commission shall report to the European Parliament and to the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Member States shall forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.

After having submitted that report, the Commission shall report to the European Parliament and to the Council on the application of this Regulation at the same time as it submits reports on the implementation of the Eurodac system provided for by Article 40 of Regulation (EU) No 603/2013.

## Article 47

### Statistics

In accordance with Article 4(4) of Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection [16], Member States shall communicate to the Commission (Eurostat), statistics concerning the application of this Regulation and of Regulation (EC) No 1560/2003.

**ECRE Comments on Articles 46 and 47 and Recital 38:** ECRE calls upon Member States and the Commission to improve their methods of data collection and statistical evaluation when monitoring the application of the recast Dublin Regulation. In order to have effective monitoring ECRE recommends that the information gathered by non-governmental organisations operating at the national level and via other resources such as the Asylum Information Database (AIDA) are taken into account in such evaluations under Article 46.

## Article 48

### Repeal

Regulation (EC) No 343/2003 is repealed.

Articles 11(1), 13, 14 and 17 of Regulation (EC) No 1560/2003 are repealed.

References to the repealed Regulation or Articles shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

## Article 49

### Entry into force and applicability

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply to applications for international protection lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back applicants, irrespective of the date on which the application was made. The Member State responsible for the examination of an application for international protection submitted before that date shall be determined in accordance with the criteria set out in Regulation (EC) No 343/2003.

References in this Regulation to Regulation (EU) No 603/2013, Directive 2013/32/EU and Directive 2013/33/EU shall be construed, until the dates of their application, as references to Regulation (EC) No 2725/2000 [17], Directive 2003/9/EC [18] and Directive 2005/85/EC [19] respectively.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

*The*  
**A T L A N T I C**  
*Philanthropies*



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