

UNHCR COMMENTS

on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM (2016) 465

August 2017

These comments set out UNHCR views on specific aspects of the EC’s proposal for a recast of the Reception Conditions Directive (33/2013/EU). They complement UNHCR’s overarching proposals outlined in “Better Protecting Refugees in the EU and Globally”, aiming to rebuild trust through better management, partnership and solidarity, of 5 December 2016.¹ The events of 2015 highlighted the need for a revitalized asylum system in the EU. Building in part on the proposed CEAS reforms, the proposals focus on four elements: engagement beyond European Union (EU) borders, preparedness, a well-managed asylum system and greater emphasis on integration.

In its overarching proposals UNHCR recommends that, in addition to ensuring access to territory is guaranteed and new arrivals are registered and received properly, a new asylum system would also allocate responsibility for asylum seekers fairly among EU Member States, and ensure that EU Member States are equipped to meet the task.

Relevant in the context of reception conditions is UNHCR’s proposal that coordinated contingency planning by the EU and its Member States be put in place for the EU to respond effectively to possible future arrivals in significant numbers. An EU system for contingency planning should include assessment and planning, standby capacity at the national and EU levels, and coordination mechanisms.

UNHCR also calls for a common approach to unaccompanied and separated children aiming to put into practice standards for their protection including on early identification, immediate provision of safe and age appropriate care arrangements, a best interests assessment to identify protection needs, appointment of a guardian without delay, family tracing, legal representation and case management systems.

UNHCR’s proposals in “Better Protecting Refugees” suggested incentives to better promote compliance with national procedures and lead to a reduction in irregular onward movements, including through the promotion of integration prospects.

In addition to linking to UNHCR’s proposals, where relevant, these comments also refer to detailed UNHCR commentaries on the other legislative proposals put forward by the Commission to reform the CEAS instruments.

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

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EXECUTIVE SUMMARY

The proposal² to amend the 2013/33/EU Reception Conditions Directive (proposal or recast proposal) comes at a critical time when the events of 2015 highlighted the need for a revitalized asylum system in the EU. The capacity of EU Member States and the Common European Asylum System (CEAS) was severely tested, including in terms of their reception conditions. Specifically affected were unaccompanied and separated children and other persons with specific needs. Women, children and other persons with specific needs comprised a significant portion of all these new arrivals (at one point exceeding 42%).³

In its explanatory note to the proposal to recast the Reception Conditions Directive, the European Commission stated the aim of amending the current directive is to further harmonise reception conditions in the EU, to reduce incentives for irregular onward movements and to increase applicants' self-reliance and possible integration prospects.

The proposal could be seen to build on the aims of the current Directive. However, the proposal makes the provision of material and other reception conditions explicitly subject to the obligation on the applicant to remain in the relevant country. This is reflected in Recital 3, which refers to the fact that applicants do not have a right to choose the Member State in which they lodge their application for international protection. UNHCR acknowledges that asylum-seekers do not have an unfettered right to choose their country of asylum.⁴ Equal standards of treatment and measures to encourage stay, and ensure that applicants do not feel compelled to move onward irregularly, may prove more effective in achieving that aim than punitive measures.⁵ Social scientific literature seeking to understand when and why individuals comply with the law in other fields demonstrates that compliance is more likely to occur in response to persuasion and measures to encourage cooperation rather than through harsh treatment.⁶ UNHCR's profiling of Afghan and Syrian refugees in Greece and Sweden further indicates that irregular onward movement is the result of a variety of factors. Such movement may occur at different stages of the asylum procedure and is primarily driven by the conditions in the country where protection was sought, and to a lesser extent by perceptions of the final destination country.⁷ UNHCR's Dublin Study⁸ further suggests a correlation between irregular onward movement and lengthy family reunion procedures under the current Dublin Regulation. Irregular onward movement, or rather the preference for a certain destination country, is further influenced by smugglers, family and peers, the presence of family and social networks, historical ties between countries and also by educational and economic prospects.

² European Commission, *Proposal for a Directive of the European parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, 13 July 2016, COM(2016) 465 final, available at: <http://www.refworld.org/docid/4fe30f9a2.html>

³ Refugees/Migrants Emergency Response – Mediterranean, available at: <http://data2.unhcr.org/en/situations/mediterranean?page=1&view=grid&Search=%2523mediterranean+sea+arrivals%2523>

⁴ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, available at: <http://www.refworld.org/pdfid/51af82794.pdf>, para. 3.1. See too, UNHCR, *Onward movement of asylum seekers and refugees; Discussion paper prepared for the Expert Roundtable on Onward Movement*, 25 September 2015, available at: <http://www.refworld.org/pdfid/563080eb4.pdf>

⁵ Rather than adopting a punitive approach, UNHCR's proposals focus on incentives for compliance. In addition to family links, other connections with a Member State would be taken into account in order to reduce onward movement and improve asylum-seekers' prospects for integration. See UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>

⁶ UNHCR, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, June 2013, PPLA/2013/02, available at: <http://www.refworld.org/pdfid/51a6fec84.pdf>. See too, V. Braithwaite, *Compliance with Migration Law*, Report for the Department of Immigration and Citizenship, Australia, July 2010, available at: <https://goo.gl/ES4s9z>, and, T. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006), both referenced in Costello's study. See too, UNHCR, *Second Global Roundtable on Reception and Alternatives to Detention: Summary of deliberations*, August 2015, para 21, available at: <http://www.refworld.org/docid/55e8079f4.html>.

⁷ UNHCR, *Refugees/Migrants Emergency Response – Mediterranean, profiles of Afghan and Syrians arriving in Greece*, available at: <https://data2.unhcr.org/en/documents/download/49751> and <https://data2.unhcr.org/en/documents/download/49752>. See too, UNHCR, *This Is Who We Are – A study of the profile, experiences and reasons for flight of unaccompanied and separated children from Afghanistan seeking asylum in Sweden in 2015*, October 2016, available at: <http://www.refworld.org/docid/581b4b684.html>

⁸ Forthcoming.

The recast proposal attempts to offset some of the newly proposed punitive measures for irregular onward movement with improved safeguards. It is worth recalling that the current text interchangeably uses the notions “dignified” and “adequate” standard of living. The question arises whether the desired effect will be achieved, i.e. reducing irregular onward movement whilst at the same time ensuring an adequate standard of living in line with international human rights law. The effectiveness of the proposed measures will depend on a variety of factors, including timely transposition and proper implementation in practice including of the standards and indicators for reception developed by EASO.⁹ This may also require monitoring and proper implementation and support by the foreseen European Union Asylum Agency (EUAA) and prioritization of Asylum, Migration and Integration Fund (AMIF) funding to strengthen reception conditions where gaps emerge.

Proposed provisions welcomed by UNHCR

The proposal contains some welcome provisions. These include strengthened safeguards for unaccompanied children, notably the appointment of a guardian as soon as possible or at least within five working days following the making of the application of international protection. Also welcome are the more detailed rules for systematically assessing, determining, documenting and addressing applicants’ specific reception needs as soon as possible and throughout the reception period. The proposed reduction of the timeline for access to the labour market for asylum-seekers from the current nine to six months when, due to no fault of the applicant, no decision on the asylum application has been made, could also enhance compliance with asylum and related procedures.¹⁰ As UNHCR has reiterated in previous commentaries, early access to the labour market will increase asylum-seekers’ self-reliance and future integration in the host society. This feature will also enhance reintegration prospects for those returning home following a rejection of their asylum claim.¹¹

Equally positive is the deletion in Article 16 of the requirement that applicants may be expected to contribute to costs related to healthcare, if they have sufficient means. This deletion constitutes an important distinction between the provisions of health care and that of material reception conditions (the latter of which can still be subjected to a means test though).

UNHCR also welcomes the proposed requirement for contingency planning and preparedness given that the lack of such measures proved to be a major deficit during the refugee emergency in 2015 and early 2016. Reduced timelines for evaluation of the implementation of the Directive by the European Commission would also represent a positive development.

Proposed provisions on which UNHCR expresses concerns

UNHCR takes the view that children should not be detained for immigration-related purposes, irrespective of their legal/migratory status or that of their parents, as detention is not in their best interests.¹² Instead, appropriate care arrangements and alternatives to detention, including arrangements which may involve restrictions on movement in an appropriate child protection compliant setting, need to be in place.¹³

UNHCR is concerned by some of the proposed changes which restrict the freedom of movement of asylum-seekers. UNHCR recalls that under Article 26 and 31(2) of the 1951, Convention asylum-seekers shall be allowed to move freely within the territory of their host State, subject only to restrictions that are necessary and proportionate to achieve a legitimate aim.

Further, UNHCR cautions against using detention as a punitive measure for non-compliance with restrictions on freedom of movement as proposed in Article 8(3)(c). UNHCR recalls that detention is normally to be avoided and only used following an individual assessment of the necessity and reasonableness of detention, its proportionality to a legitimate purpose and

⁹ European Asylum Support Office (EASO), *EASO guidance on reception conditions: operational standards and indicators*, September 2016, available at: <http://www.refworld.org/docid/586cab3d4.html>

¹⁰ This reduction is in line in line with Article 31 of the current Asylum Procedures Directive and the newly proposed article 34 (2) of the Asylum Procedures Regulation.

¹¹ UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>

¹² UNHCR, *UNHCR’s position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>.

¹³ UNHCR acknowledges and welcomes the existing State practice in providing care arrangements and alternatives to detention for children and families and has compiled a number of examples in its Options Paper 1. See UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html>

consideration of less coercive or intrusive means to achieve the intended end.¹⁴ Punishment for failure to comply with requirements to reside in a specified area is not among the limited grounds that could justify the use of detention as set out in UNHCR's Detention Guidelines.

UNHCR notes that the newly-proposed and existing restrictions on freedom of movement could lead to the imposition of multiple penalties for the same act or instance of non-compliance with residence requirements. Those restrictions include: the withholding of reception conditions in any Member State other than the one in which the applicant is required to stay; the replacement of material reception conditions provided in the form of financial allowances or vouchers or the reduction; or the withdrawal of daily allowances as proposed in Articles 7, 17(a) and 19(1) respectively.

UNHCR is concerned by the absence of a clear prohibition of applying all these measures, in combination with restrictions on freedom of movement and frequent reporting requirements.

A combination of all these measures could have negative effects on an applicant's ability to effectively present his or her claim for international protection. A significant reduction in basic reception conditions, notably in levels of subsistence, may inhibit the scope for the applicant to seek advice, gather and present relevant information and focus on the provision of information relevant to his or her claim. UNHCR insists that an "adequate" standard of living and procedural safeguards should be respected at all times for all asylum applicants, in line with international human rights law.¹⁵

Finally, while applicants may appeal decisions relating to the replacement, reduction or withdrawal of benefits under the Directive, and decisions restricting their freedom of movement, in such cases free legal aid may not be granted if the appeal is considered by a competent authority to have no tangible prospect of success. UNHCR is concerned that the provision of free legal aid in such cases may be subject to a merits test. This may negatively affect applicants' access to an effective remedy.

Research commissioned by UNHCR¹⁶ shows that there are four key subjective factors influencing compliance with refugee status determination and other procedures, notably,

- a refugee's fear of persecution or serious harm which may arise if she or he were to be returned;
- prior inclination towards compliance with law;
- trust and perceptions of fairness of the host state, in particular in its refugee status determination process; and
- the desire to avoid irregular residence, in particular the attendant hardship and vulnerability.

Compliance can also effectively be promoted through individual coaching or case management.

¹⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.2, available at: <http://www.refworld.org/docid/503489533b8.html>

¹⁵ Pursuant to Article 11 (1) of the Covenant on Economic, Social and Cultural Rights, States Parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>. See too, UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII), 2002, available at: <http://www.refworld.org/docid/3dafdd344.html>

¹⁶ UNHCR, *Legal and Protection Policy Research Series, Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, June 2013, PPLA/2013/02, p. 11, section III, available at: <http://www.refworld.org/pdfid/51a6fec84.pdf>

1

INTRODUCTION

The proposal to recast 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 protection¹⁷ is part of the second package¹⁸ the Commission has proposed to reform of the Common European Asylum System (CEAS).

The stated objective of the Commission's proposal is to:

- 1. Further harmonise reception conditions in the EU.** According to the Commission, the proposal will ensure that applicants are treated with dignity across the EU, in accordance with fundamental rights, including rights of the child. The Commission aims at achieving this by requiring Member States to take into account operational standards and indicators on reception conditions developed at EU level. Member States should further be required to have contingency plans in place to ensure the adequate reception of applicants in cases where they are confronted with a disproportionate number.
- 2. Reduce incentives for irregular onward movements.** To ensure the orderly management of migration flows, facilitate the determination of the Member State responsible and to prevent onward movements, it is essential, according to the Commission, that applicants remain in the Member State which is responsible for them and do not abscond. This obligation for applicants is set out in the proposed reform of the Dublin Regulation. The introduction of more targeted restrictions upon applicants' freedom of movement and strict consequences when such restrictions are not observed will, according to the Commission, contribute to more effective monitoring of applicants' location at a given time.
- 3. Increase applicants' self-reliance and integration prospects.** Except for those whose applications are likely to be rejected, applicants should, according to the Commission, as quickly as possible, be allowed to work and support themselves, even whilst their applications are being processed. This helps to reduce their dependency and allows for better prospects for eventual integration of those who will ultimately be granted protection. Further limiting the current discrepancies between Member States' rules on access to the labour market is essential in order to reduce employment-related incentives for onward movements.

UNHCR notes, that despite attempts at reaching greater harmonization through a recast of the 2003 Reception Conditions Directive in 2013, reception conditions across EU Member States continue to vary considerably both in terms of how the reception system is organised and also concerning the standards of reception provided. These discrepancies became painfully visible during 2015 and early 2016 when large numbers of applicants arrived in the EU and when limits on some Member States' responses and capacity meant that basic needs were barely met. These varying conditions have contributed to irregular onward movements and this has added to a disproportionate strain on reception and asylum processing systems in some Member States in particular.

UNHCR has consistently advocated for further harmonisation across the EU of reception conditions. Harmonisation enables applicants to enjoy an adequate standard of living in line with international human rights law and to effectively present their claims for international protection, at the same time reducing incentives for irregular onward movement.¹⁹ The standards and indicators on reception developed by EASO²⁰ will be an important step to ensure further harmonisation in reception conditions and at the same time allow for meaningful monitoring of reception conditions in line with the Agency's foreseen revised mandate.

¹⁷ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, 13 July 2016, COM(2016) 465 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection_en.pdf

¹⁸ The first package issued on 4 May consisting of a proposed reform of the Dublin III Regulation, the Eurodac Regulation and the EASO Regulation, available at: http://europa.eu/rapid/press-release_IP-16-1620_en.htm

¹⁹ UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>

²⁰ European Asylum Support Office (EASO), *EASO guidance on reception conditions: operational standards and indicators*, September 2016, available at: <http://www.refworld.org/docid/586cab3d4.html>

2

UNHCR'S MANDATE

UNHCR provides these comments as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions for refugees.²¹ According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [.]”²²

This supervisory responsibility is reiterated in the preamble of the 1951 Convention Relating to the Status of Refugees (1951 Convention).²³ Article 35(1) of the 1951 Convention and Article II(1) of the 1967 Protocol relating to the Status of Refugees²⁴ (1967 Protocol) oblige State Parties to cooperate with UNHCR in the exercise of its functions, in particular its supervisory responsibility.

UNHCR's supervisory responsibility is also reflected in EU law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)²⁵; in Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (EU Charter)²⁶; as well as Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.²⁷

UNHCR issued comments on the recast Reception Conditions Directive 2013/33/EU in 2015.²⁸ As the main focus of the present commentary is on the newly proposed provisions, it is recommended that they be read in conjunction with the aforementioned 2015 commentary.

As this is the second part of the package of a broad reform of the Common European Asylum System, announced in April 2016²⁹, where relevant, these comments will refer to provisions in the proposals recasting the other instruments, notably the proposal for a new Dublin Regulation³⁰ and Asylum Procedures Regulation³¹ and UNHCR's respective comments.³²

²¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

²² *Ibid.*, para. 8(a).

²³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

²⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

²⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>

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

²⁷ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html>

²⁸ UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>.

²⁹ European Union: European Commission, *Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe*, 6 April 2016, available at: www.refworld.org/docid/576024d04.html

³⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, COM(2016) 270 final, 4 May 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_for_a_common_procedure_for_international_protection_in_the_union_en.pdf

³¹ European Commission, *Proposal for Regulation of the European Parliament and the Council a establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf

³² UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 271*, 22 December 2016, available at: <http://www.refworld.org/docid/585cdb094.html>. UNHCR, *UNHCR Comments on the European Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast) – COM (2016) 272*, May 2017, available at: <http://www.refworld.org/docid/59536ec64.html>. UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271*, December 2016, available at: <http://www.refworld.org/docid/585cde7a4.html>.

3

UNHCR'S VIEWS ON THE PROPOSED AMENDMENTS

Definitions

Family members

The recast proposal refers, in Article 2(3), to the definition of “family members” contained in the proposal for a Qualification Regulation.³³ This definition constitutes an extension in that it refers not only to families that already existed in the country of origin, but also to families that were formed after leaving the country of origin but before arrival on the territory of the Member State.

UNHCR welcomes the proposed extension to include families formed after one or more members have left the country of origin. This reflects the circumstances of forced displacement whereby applicants may have stayed for a protracted period of time outside the country of origin and before reaching the EU. However, UNHCR is concerned that other close family relations,³⁴ such as adult children or the parents of an adult, and same sex couples, are not included in the definition. Contrary to the proposal to recast the Dublin Regulation, siblings are not included. The proposal to recast the Dublin Regulation states that “the enlargement of the definition including siblings is of particular importance for improving the chances of integration of applicants and hence reduce secondary movements” (proposed recast Recital (19)).³⁵ Allowing close family members to be accommodated would restore a sense of normalcy and reduce anxiety while applicants await the outcome of the asylum procedure. It may also lead to enhanced compliance, e.g. with restrictions on freedom of movement, when close family members are allowed to stay together in one place.

RECOMMENDATION:

- While the inclusion of family formed after leaving the country of origin is welcome, the definition of family members should be aligned with the proposal to recast the Dublin Regulation and further extended to also include other close family members, such as dependent adult children or the dependent parents of an adult, as well as siblings. Same sex couples should also be considered favourably in line with the principle of family unity.

(Risk of) absconding

The proposal introduces definitions in Article 2(10) and (11) on “absconding” and the “risk of absconding” respectively, similar to the definitions provided in Article 3 (7) of the Dublin III Regulation and Article 2(11) of the Return Directive. According to proposed Article 2(10), “absconding” means the action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present in accordance with the Dublin Regulation, or does not remain available to the competent authorities or to the court or tribunal. A “risk of absconding” is defined as the existence of reasons in an individual case, which are based on objective criteria defined by national law, to believe that an applicant may abscond. UNHCR is concerned that in the absence of clear criteria in the proposal to determine the risk of absconding, Member States will have broad discretion to restrict freedom of movement under Article 7 (2) (d), or to detain an applicant based on Article 8 (3) (b) and 8 (3) (c) of the

³³ European Union: European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/ec of 25 November 2003 Concerning the Status of Third-country Nationals Who Are Long-term Residents*, 13 July 2016, COM(2016) 466 final; 2016/0223 (COD), available at: <http://www.refworld.org/docid/58ac43474.html>

³⁴ UNHCR uses the term “close” family members in lieu of “nuclear” family members as it more neutrally and accurately reflects the categories of family members for whom a relationship of social, emotional or economic dependency is presumed. See UNHCR, *UNHCR RSD Procedural Standards – Processing Claims Based on the Right to Family Unity*, 2016, para. 5.2.3, available at: <http://www.refworld.org/docid/577e17944.html>.

³⁵ UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* – COM (2016) 271, 22 December 2016, available at: <http://www.refworld.org/docid/585cdb094.html>

Directive. Further, the absence of clear criteria in the proposal to determine the risk of absconding will not contribute to a harmonized approach in the EU.

RECOMMENDATIONS:

- Clear criteria for defining (the risk of) absconding need to be stipulated in the Directive, given the significant consequences attached to these concepts. Factors to balance an overall assessment as to whether there is a risk of absconding could include, but are not limited to: past history of cooperation / compliance; family or community links or other support networks in the country of asylum; willingness or refusal to provide information about the basic elements of their claim; or whether the claim is considered manifestly unfounded or abusive.³⁶
- EASO could be tasked to draw up a list of common criteria for defining (the risk of) absconding which should then be added to the definitions in Article 2 (10) and (11) or pending the development of such a list, reference could be made in Article 2 (10) and 2(11) to the forthcoming list.

Provision of information

Article 5 introduces a new obligation on Member States to inform applicants of the consequences of irregular onward movement. This new obligation aims at enhancing compliance rates and by explaining sanctions for irregular onward movement proposed in Article 8 (3), Article 17 (a) and Article 19 (2) (g). Information on consequences of irregular onward movement should be provided as soon as applicants make an application and not deferred to the moment when they lodge an application. By that time they may have already moved on, unaware of the negative consequences. Timely information provision is crucial given the impact on applicants' entitlements under the Reception Conditions Directive and procedural rights under the proposed Asylum Procedures Regulation.

RECOMMENDATIONS:

- Information to applicants on consequences of absconding should be shared with applicants as soon as possible, i.e. when they make an application for international protection rather than when they lodge it.
- This information should be provided in a language and delivered in a format which that applicants understand, taking into consideration their age and other relevant circumstances.

Restrictive measures and sanctions, including detention for irregular onward movement and replacement, reduction or withdrawal of material reception conditions (articles 7 (2) (c) and (d), 7 (3); 8 (3) (c); 17a and 19 (2) (a) and (e)-(h))

Restrictions on freedom of movement and reporting requirements

Article 7(1) allows applicants to move freely within the territory of the host Member State or within an area assigned to them. In addition, Article 7(2) contains grounds, including new grounds in paragraph 2(c) and (d), requiring Member States, where necessary, to decide on a specific place of residence. Article 7(3) provides that Member States can impose, as frequently as necessary, reporting requirements on the applicant to effectively prevent absconding. Finally, Article 7(4) allows Member States to grant applicants temporary permission to leave their specific place of residence or assigned area. The text implies that applicants who have been designated an area or place of residence are not allowed to leave unless granted permission, save when they have appointments with authorities and courts.

³⁶ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.2, and Guideline 4.1.1, para. 22, available at: <http://www.refworld.org/docid/503489533b8.html>. A "well-founded suspicion that the person intends to evade deportation" as provided in section 62(3) of the German Residence Act does not satisfy the threshold of such a significant risk of absconding. Bundesgerichtshof, V ZB 31/14, 23. Juli 2014, available at: https://recht.nrw.de/lmi/owa/br_show_anlage?p_id=24781. Also, In *A v Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention: [T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released. *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, available at: <http://www.refworld.org/docid/3ae6b71a0.html>

UNHCR recalls that under Article 26 and Article 31(2) of the 1951 Convention, asylum-seekers shall be allowed to move freely in the territory of their host State subject to restrictions that are necessary and proportionate to protect a legitimate aim.³⁷ UNHCR is concerned that Article 7(1) does not stipulate the justification for restricting an applicant's freedom of movement by assigning an area in which he or she can move freely; nor does it recommend that Member States provide such reasons in national law. In addition, the Article does not contain a "necessity test", i.e. requiring Member States to assess whether assigning an area in which an applicant is free to move is necessary to achieve a legitimate aim. Moreover, there is no clear definition of the geographical scope of the "assigned area", leaving the meaning thereof ambiguous. Finally, it is unclear how the assignment of an area in which applicants are free to move relates to the obligation for Member States under Article 7(2) to, where necessary, decide on a specific place of residence for an applicant.

UNHCR notes that Articles 7(2) and (3) require a "necessity test" as well as, pursuant to Article 7(7), a proportionality test whereby the measures taken to restrict the applicant's freedom of movement must be proportionate to the aim. UNHCR is, however, concerned that an assigned area of movement or a specific place of residence, combined with frequent reporting requirements, could become intrusive and lead to arbitrary interference with the right to freedom of movement or liberty. This could be the case in particular where such measures are not proportionate or fail to properly take into account individual circumstances.³⁸ The fact that Article 7(4) appears to accept restrictions on an applicant's freedom of movement as the default position and allows Member States to withhold temporary permission for applicants to leave their place of residence reinforces this assessment.

RECOMMENDATIONS:

- Article 7 (1) should specify that applicants may move freely within the territory of a Member State in line with applicable human rights and refugee law standards. Restricting an applicant's freedom of movement where it is necessary and proportionate by designating a specific place of residence is regulated by Article 7(2). Therefore, to avoid confusion, reference to an assigned area within which an applicant may move should be deleted from Article 7(1).
- Article 7 (4) should be amended to require Member States to grant applicants temporary permission to leave their place of residence under Article 7(2) wherever there is no overwhelming reason to withhold that permission.

New ground for detention (Article 8 (3) (c))

Under new Article 8(3)(c) Member States may detain an applicant to ensure compliance with restrictions on freedom of movement under Article 7(2) where the applicant has not complied with these restrictions and where there is a risk of absconding. Where there are clearly-established grounds for believing an applicant will not cooperate and that there is a risk of absconding, detention may be exceptionally justified, provided this is necessary in the individual case.³⁹ UNHCR however cautions against the use of detention, in particular as a punitive measure for non-compliance, and calls upon Member States to only use detention as a means of last resort where there is a *significant* risk of absconding, rather than a *mere* risk of absconding. This is in line with Article 29 (2) of the proposal for a Dublin Regulation.

³⁷ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 13, available at: <http://www.refworld.org/docid/503489533b8.html>.

³⁸ *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, p. 33, para. 93, available at: <http://www.refworld.org/docid/502d42952.html>, states that: "The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends". See also *Amuur v France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, para. 42, available at: <http://www.refworld.org/cases,ECHR,3ae6b76710.html>

³⁹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 22, available at: <http://www.refworld.org/docid/503489533b8.html>

Article 11(2) and (3) detention of children

UNHCR takes the view that children should not be detained for immigration-related purposes, irrespective of their legal or migratory status or that of their parents.⁴⁰ Instead, appropriate care arrangements and alternatives to detention, including arrangements which may involve restrictions on movement in an appropriate child protection setting, need to be in place.⁴¹

UNHCR further wishes to emphasize the importance of appropriate screening for specific needs, to prevent unnecessary or arbitrary instances of detention.

RECOMMENDATIONS:

- Detention is an exceptional measure. UNHCR recommends that Article 8 explicitly provide that an applicant may only be detained in exceptional circumstances.
- The newly proposed ground for detention under Article 8(3) (c), namely to ensure compliance with restrictions on freedom of movement under Article 7(2) where the applicant has not complied with these restrictions and where there is a risk of absconding, should not be used as a punitive measure. Further, the text of Article 8(3)(c), should include reference to a significant risk of absconding for situations covered by Article 7(2)(c) and (d) which cover irregular onward movement in the Dublin context.
- UNHCR further recommends that a provision prohibiting the detention of children and instead providing for appropriate care arrangements and alternatives to detention be introduced in the text.
- Finally, UNHCR recommends that EASO be tasked to develop a tool to identify vulnerable applicants in detention as well as appropriate alternatives to detention to aid decision makers and the judiciary to improve the quality of decision making. This list could be included in the 'Definitions' section of Article 2 of the Directive. The UNHCR-IDC Vulnerability Screening Tool could form the basis for developing this tool.⁴²

Reception conditions in a Member State other than the one in which the applicant is required to be present (Article 17a and 18(1))

According to Article 17a(1) and Recital 8, an applicant shall not be entitled to the reception conditions set out in Articles 14 to 17 in any Member State other than the one he or she is required to stay in accordance with the proposal for amendment of the Dublin Regulation. Where an applicant is irregularly present in another Member State, material reception conditions,⁴³ including housing, access to education and access to the labour market do not need to be provided. However, according to Article 17a and Recital 32, at a minimum Member States "shall ensure a dignified standard of living". Further, the proposal clarifies in Article 18(1) that applicants are always entitled to receive necessary health care. In this regard, it is important to note that Recital 32 refers to the EU Charter of Fundamental Rights and the Convention on the Rights of the Child, specifying that the applicant's subsistence and basic needs should be provided for both in terms of physical safety, dignity and interpersonal relationships and considering their vulnerabilities and that of their family or caretaker.

⁴⁰ UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>

⁴¹ UNHCR acknowledges and welcomes the existing State practice in providing care arrangements and alternatives to detention for children and families and has compiled a number of examples in its Options Paper 1. See UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html>

⁴² UNHCR, UNHCR and IDC (2016), *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016, available at: <http://www.refworld.org/docid/57f21f6b4.html>. See too, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4, para. 19, available at: <http://www.refworld.org/docid/503489533b8.html> and UNHCR, *Second Global Roundtable on Reception and Alternatives to Detention: Summary of deliberations*, August 2015, paras. 509 and 58, available at: <http://www.refworld.org/docid/55e8079f4.html>.

⁴³ Article 2 (7) defines material reception conditions as reception conditions that include housing, food, and clothing and other essential non-food items matching the needs of the applicants in their specific reception conditions, such as sanitary items, provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance.

UNHCR is concerned that reference to a “dignified standard of living” as a minimum threshold is below an “adequate” standard of living as required under international human rights law and that such a standard of living cannot be ensured without access to material and other reception conditions.

UNHCR recalls the ruling of the CJEU in *Saciri v. Belgium* where the Court stated that “the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum-seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive.”⁴⁴ The Court in its ruling also referred to its ruling in *Cimade and GISTI*, in particular paragraph 56.⁴⁵

Moreover, in *CEC v. the Netherlands*, the European Committee of Social Rights recalled that “[a]ll persons without resources, whether or not legally present in the Netherlands, have a legally recognized right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency.”⁴⁶ The Committee held that “access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival are necessary for the basic subsistence of any human being.”⁴⁷ The Committee also specified that “shelters must meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting in order to ensure that the dignity of the persons sheltered is respect. Another basic requirement is the security of the immediate surroundings.” Moreover, the Committee considered the right to shelter to be closely connected to the right to life.

Finally, notwithstanding the obligation for Member States to provide children of applicants irregularly present in a Member State access to suitable educational activities, UNHCR is concerned that these children as a result of Article 17a(1) in conjunction with Article 14(1) do not have access to primary education under similar conditions as nationals. This is at variance with Article 22(1) of the 1951 Convention.⁴⁸

RECOMMENDATIONS:

- As a minimum, if it is proposed to reduce material and other reception conditions in certain situations, an “adequate” rather than “dignified” standard of living must be maintained, taking into account an individual’s personal circumstances including any special needs.
- Children shall be accorded the same treatment as nationals with regard to primary education. Access to primary education shall not be withheld, restricted or varied for the children of applicants irregularly present in another Member State.

Replacement of material reception conditions in kind or reduction or withdrawal of daily allowances

The amended Article 19(1)(a) would allow Member States to replace material reception conditions provided in the form of financial allowances or vouchers with material reception conditions provided in kind. Article 19(1)(b) would allow Member States to reduce or withdraw, in exceptional and duly justified cases, the daily allowances. Such circumstances may include where the applicant has seriously breached the rules of the accommodation centre or behaved in a seriously violent way; failed to comply with the obligation to apply for international protection in the Member State of first (irregular or regular) entry; has been sent back after having absconded to another Member State; or failed to undertake compulsory integration measures.

⁴⁴ *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others*, C-79/13, European Union: Court of Justice of the European Union, 27 February 2014, available at: <http://www.refworld.org/docid/5315f0a74.html>

⁴⁵ *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, European Union: Court of Justice of the European Union, 27 September 2012, para. 56, available at: <http://www.refworld.org/docid/506425c32.html>

⁴⁶ Council of Europe: European Committee of Social Rights, *Conference of European Churches (CEC) v. The Netherlands (complaint)*, Complaint No 90/2013, 21 January 2013, available at: <http://www.refworld.org/cases,COEECSR,513d96582.html>

⁴⁷ *Conference of European Churches (CEC) v. The Netherlands (complaint)*, Complaint No 90/2013, Council of Europe: European Committee of Social Rights, 21 January 2013, available at: <http://www.refworld.org/docid/513d96582.html>

⁴⁸ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 22.1, available at: <http://www.refworld.org/docid/3be01b964.html>

The proposal, in its explanatory memorandum, clarifies that accommodation, food, clothing and other essential non-food items i.e. material reception conditions according to the definition in Article 2(7), may not be reduced or withdrawn. Only daily allowances may, in certain circumstances, be reduced or, in exceptional and duly justified cases, be withdrawn. UNHCR cautions that any such reduction or withdrawal must nevertheless ensure an adequate standard of living for applicants in line with international human rights law.

As regards the possibility for Member States to reduce or withdraw daily allowances pursuant to Article 19(2)(f) where the applicant does not comply with mandatory integration measures, UNHCR notes that the EU Common Basic Principles on Integration define integration as a “dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.”⁴⁹ Whilst States need to ensure the enjoyment of rights, foster a welcoming environment, and address xenophobia, asylum-seekers need to participate in integration programmes and comply with the law of their host State. Where negative consequences are to be foreseen for not complying with integration measures, especially reducing or withdrawing daily allowances, the authorities must ensure that the facilities and means are made available to the applicant to enable him or her reasonably to take part in, for example, compulsory integration classes, language classes or vocational training. These must be readily available, accessible, and free of charge.

UNHCR welcomes the new requirement under Article 19(4) in conjunction with Article 19(3), that decisions on the replacement of material reception conditions provided in financial allowances or vouchers in kind, or the withdrawal or reduction of daily allowances, are to be taken on the merits, individually, objectively and impartially and taking into consideration the particular situation of the person concerned, especially applicants with special reception needs. UNHCR also welcomes that such decisions need to take into account the principle of proportionality and the possibility for applicants to seek independent review under Article 25 of the proposal. UNHCR recalls that applicants and, in particular, applicants with specific needs, need at all times to be treated in a humane and dignified manner and protected against inhumane and degrading treatment which could result from a reduction or withdrawal of material reception conditions.

UNHCR notes the inconsistent use of different terminology throughout Article 19. Article 19(1)(b), refers to “daily allowances”, which may be reduced or withdrawn, whereas Article 19(4) uses the term “material reception conditions” which may be replaced, reduced or withdrawn. Clarification is required in order to avoid any confusion as to the form or extent of material reception conditions or allowances Member States would be allowed to reduce or withdraw.

RECOMMENDATIONS:

- UNHCR recommends rectifying the apparent inconsistency in terminology between Article 19(1)(b) and 19(4).
- Any withdrawal or reduction of daily allowances or replacement in kind of material reception conditions provided in financial allowances or in vouchers would need to remain within the parameters of existing legal standards, must and ensure an adequate standard of living.
- It is therefore recommended to revise reference to a “dignified” standard of living in Article 19(3) to refer instead to an “adequate” standard of living in accordance with international human rights law.

Cumulative effect of sanctions

The application by Member States of restrictions and sanctions in the event of irregular onward movement in Articles 7, 17a and 19 lacks clarity. It is however clear that punitive measures in Articles 17a and 19 in case of irregular onward movement can be applied successively. Proposed punitive measures for irregular onward movement could lead to double punishment and destitution and thereby negatively affect the ability of applicants to present their claim effectively.

⁴⁹ Council of the European Union, *EU Common Basic Principles on Integration*, 19 November 2014, page 17, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/82745.pdf

RECOMMENDATION:

- In applying restrictions on freedom of movement and imposing punitive measures affecting applicants' reception conditions, the proposal should take into account the cumulative impact of potential overlap of the different restrictions, sanctions and punitive measures within the Reception Conditions Directive. Member States should avoid any undue hardship, especially for applicants with specific needs, when various measures are combined. Any combination of measures must be necessary and proportionate.

Access to the labour market

Article 15 (1) proposes a reduced time-limit for access to the labour market for asylum-seekers pending the determination of their application from the current nine months to six months. This is in line with the maximum duration for examining an application for international protection at first instance. UNHCR favours early access to the labour market for asylum-seekers and welcomes the reduction of the time-limit in line with Article 31(3) of the Asylum Procedures Directive and proposed Article 34(2) of the Asylum Procedures Regulation, as also recommended in earlier commentary by UNHCR.⁵⁰ Early access to the labour market can be beneficial to the State and the asylum-seeker.⁵¹ Moreover, in cases where an applicant is ultimately granted international protection, earlier access to the labour market can facilitate the integration process and his/her positive contribution to society. It promotes the social inclusion and self-reliance of applicants and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support and reduces illegal work. For applicants whose claims for international protection are rejected, the acquired knowledge and skills may facilitate their reintegration in their home country upon return.

Proposed Article 15 (1), 2nd paragraph, and the last sentence of recital 35 deny applicants whose claims are likely to be unfounded from accessing the labour market where the Member State has accelerated the examination of the asylum application in accordance with Article 40(1)(a) to (f) of the proposed Asylum Procedures Regulation. In order to increase integration prospects and self-sufficiency, recital 35 encourages Member States to enable access to the labour market within three months following the lodging of the application where the application is likely to be well-founded, including when its examination is prioritized.⁵² In UNHCR's view, access to a substantive right, i.e. access to the labour market, should not – in the absence of a decision on the application – be determined on the basis of criteria relevant for deciding what case processing modality to apply.

UNHCR further notes that access to vocational training is no longer a stand-alone provision and it has been moved to Article 15(3), under the rubric of employment. UNHCR is concerned that this may exclude persons who are not employed from benefitting benefit from such training.

UNHCR further notes that the proposal does not cover access to language classes for adults, although local language ability is a facilitator for ensuring applicants' access to the labour market.

RECOMMENDATIONS:

- UNHCR recommends access to the labour market no later than six months following the lodging of the application if a decision has not been taken, and if the delay cannot be attributed to the applicant. This should not entail differentiating between claims and should be facilitated irrespective of the case processing modality applied under the proposed Asylum Procedures Regulation.
- UNHCR further recommends maintaining Article 16 of the current Reception Conditions Directive to ensure vocational training is provided irrespective of whether applicants have access to the labour market and to add access to language classes.

⁵⁰ UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>

⁵¹ UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.refworld.org/docid/3bfa81864.html>

⁵² As is proposed under Article 33(5)(a) of the proposed Asylum Procedures Regulation.

Different modalities for reception conditions

Article 17(9) allows Member States to exceptionally grant different reception conditions in duly justified cases for a period as short as possible, when either an assessment of specific needs is required, or when housing capacities normally available are temporarily exhausted. At the same time, Member States need to ensure access to healthcare and an adequate standard of living. UNHCR welcomes the obligation for Member States to inform the European Commission when introducing such measures to ensure proper monitoring, including by EASO where necessary. UNHCR reiterates the need to refer to an “adequate” standard of living in accordance with international human rights law.

RECOMMENDATION:

- UNHCR recommends that Article 17(9) is amended to refer to an “adequate” standard of living.

Early and systematic assessment of special reception needs

The non-exhaustive list of categories of applicants with specific needs has been moved from Article 20 to Article 2(13). While the list is non-exhaustive, UNHCR notes the absence of important categories, including LGBTI persons; applicants who are mentally challenged; applicants with hearing or visibility or other impairments (e.g. dyslexia); so called “non-believers”; apostates; and religious minorities.

The provision that only applicants with specific vulnerabilities can receive treatment to address their special reception needs has been dropped. In addition to the explicit obligation under Article 20 for Member States to take into account the specific situation of applicants with special reception needs in implementing the Directive in national law, the notion of applicants with special needs is now systematically introduced throughout the proposal. UNHCR welcomes this approach. Certain people, such as children, are widely accepted as being in need of special care, support and protection because of their young age and immaturity. For other people their individual circumstances and context may determine their specific needs. Specific needs are shaped by personal (internal) factors and contextual (external) factors. These factors can be multiple and intersecting so as to exacerbate any special needs. Ensuring tailored reception conditions and adjusted procedures in a timely manner can help to alleviate the situation of persons with specific needs and help them to cope and engage effectively with asylum procedures.

UNHCR also welcomes the new requirement in Article 21(1) to “systematically” assess specific needs as early “as possible after the making” of the application instead of “within a reasonable period of time” under the current Directive. This requires Member States to adopt a systematic approach to identifying applicants with specific reception and/or procedural needs early on and throughout the procedure. This will be further supported by the welcome, additional requirement that personnel are trained to detect the first signs of possible special reception needs, to record these on file and to ensure onward referral to specialist services for further assessment. This new requirement is consistent with UNHCR’s past recommendations⁵³ and when properly implemented, should facilitate effective examination of asylum claims.⁵⁴ UNHCR’s screening tool for assessing vulnerability (i.e. specific needs)⁵⁵ and EASO’s tool on the identification of persons with special needs⁵⁶ could assist Member States in identifying applicants who require specific reception conditions and procedural safeguards.

RECOMMENDATION:

- UNHCR recommends that LGBTI persons; applicants who are mentally challenged, or with hearing or visibility or other impairments (e.g. dyslexia), so called “non-believers”, apostates and religious minorities be added to the non-exhaustive list of persons with specific reception needs in Article 2(13).

⁵³ UNHCR, *Response to Vulnerability in Asylum – Project Report*, December 2013, available at: <http://www.refworld.org/docid/56c444004.html>; and UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, available at: <http://www.refworld.org/docid/5541d4f24.html>

⁵⁴ Notably in Articles 17 (3), 18 (1), 23 (1) and (2) and 24 (1) of the proposal.

⁵⁵ UNHCR, *UNHCR and IDC (2016), Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016, available at: <http://www.refworld.org/docid/57f21f6b4.html>

⁵⁶ EASO, *EASO Tool on the identification of persons with special needs*, available at: <https://ipsn.easo.europa.eu/>

Strengthened safeguards for unaccompanied children

UNHCR welcomes the reinforced safeguards for accompanied and unaccompanied children in Articles 22 and 23 respectively, and welcomes in particular the replacement of the term “representative” with the term “guardian”. In practice, the term “representative” created confusion about the role and mandate of the guardian in relation to the role and mandate of the lawyer/legal counsel/aid provider. The lawyer represents the child in legal proceedings whereas the guardian acts *in loco parentis* where the child has no legal capacity to act on his or her own to ensure his or her best interests are respected.

UNHCR considers that the introduction of a maximum period of time for appointing a guardian as an enforceable obligation (no later than five working days from the moment an application is made) is a key improvement of the proposal.⁵⁷ However, UNHCR suggests that appointments should happen within three working days following the making of the application in line with Article 27(1) of the proposed Asylum Procedures Regulation. This would ensure that the guardian can advise the child during the procedure for registering the application and during age assessment procedures, given the latter may already have begun to take place at this stage. Worth mentioning in this regard is that the presence of guardians in age assessment procedures is implied in Article 24(2) and (4) of the proposed Asylum Procedures Regulation, which requires that guardians give consent for medical age assessment on behalf of the child. The proposal that the 10 day time limit for lodging asylum applications pursuant to Articles 27(1) and 28(1) of the proposed Asylum Procedures Regulation will only start running once a guardian is appointed and has met with the child, as proposed in Article 32(2) of the Asylum Procedures Regulation, acknowledges and further reinforces the role guardians play in looking after the best interests of the child from the moment they arrive and are identified. Good practice suggests that an independent guardian is instrumental in helping children navigate complex asylum and related procedures. A guardian can also help to establish trust and ensure compliance with those same procedures. This can positively limit the number of children who go missing soon after arrival. The new provision that guardians are assigned a reasonable number of children so as to enable them to effectively carry out their duty in the best interests of each child under their guardianship is also a welcome requirement. To strengthen this requirement, further indications as to the upper limit would be helpful. Examples may be derived from good practice⁵⁸ which suggests between 21 and 25 children per guardian, including guidance in authoritative sources.⁵⁹

The requirement of vetting guardians, establishing an independent monitoring mechanism/body to monitor the functioning of guardians and the introduction of a complaint mechanism are also welcome new safeguards. UNHCR also positively notes the specification of training on child rights and applicable child safeguarding standards for staff working with children in Article 22 (6) given that in the current Directive the content and scope of training is not further defined.

RECOMMENDATIONS:

- UNHCR suggests that guardians be appointed within three working days of the making of an application so that they can advise the child during the procedure for registering the application in line with the timeline provided for in Article 27 (1) of the proposal for an Asylum Procedures Regulation.
- UNHCR further recommends that an upper limit be provided for what a “reasonable” caseload for a guardian might be, taking into account more complex cases, and whether the guardian works full time or part time.

⁵⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 21, available at: <http://www.refworld.org/docid/42dd174b4.html>, which recommends an unaccompanied or separated child should only be referred to asylum procedures following the appointment of a guardian.

⁵⁸ Guardians from Nidos, the Dutch guardianship organization each have 21 children assigned to them, ECRE, AIDA Asylum Information database, *Country Report The Netherlands*, p. 45, available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_nl_update.iv_.pdf

⁵⁹ European Union: European Agency for Fundamental Rights, *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, ISBN 978-92-9239-464-6, p. 44, available at: <http://www.refworld.org/docid/53b14fd34.html>

Victims of torture and trauma

The addition of victims of gender-based harm to the list of persons considered as victims of torture and violence in Article 24 is a positive step forward. It recognises that gender-based harm calls for appropriate treatment, in particular access to appropriate medical and psychological treatment or care which would imply early identification and referral.⁶⁰

Appeals

Article 25(3) makes it possible for Member States to refrain from providing free legal assistance and representation if the appeal or review is considered by a competent authority to have no tangible prospect of success. It is, however, added that 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. UNHCR is nevertheless concerned that an applicant's access to an effective remedy could be hampered given that the decision to withhold free legal assistance and representation would be made at the national level, with no clarity as to the basis on which the assessment is to be made, who is competent to make the decision and whether such decision may be challenged and if so, how.

RECOMMENDATION:

- Article 25(3) should specify that clear criteria are to be laid down in national law, including the possibility to challenge a decision to withhold free legal assistance and representation.

Guidance, Monitoring and Control

UNHCR welcomes that Article 27 requires Member States to put in place a mechanism to monitor reception conditions taking into account EASO's guidance and standards, and the proposed EUAA's enhanced monitoring role in this regard, which would ensure that timely support and advice might be provided in the event of any shortcomings.

RECOMMENDATION:

- UNHCR would recommend that Article 27 include a possibility for UNHCR and other relevant national, international and non-governmental organisations and bodies to conduct independent monitoring in support of government efforts to meet reception standards laid down in this Directive and EASO's guidance on reception standards.

Contingency planning

Under Article 28, each Member State needs to draw up a contingency plan to be prepared for situations where they are confronted with a disproportionate number of applicants. Member States will need to draw up these plans after six months following the entry into force of the directive, and continue to update these at two year intervals. The plan should specify measures to be taken to ensure the adequate reception of applicants, taking into account the corrective mechanism outlined in the proposal for a recast Dublin Regulation.

In UNHCR's view, this is a positive step forward given the absence of effective contingency planning and emergency preparedness at EU level, which were serious weaknesses during the situation in 2015 and early 2016, with many asylum-seekers not having access to adequate and suitable reception conditions in a timely manner, including persons with specific needs. This resulted not only in more irregular onward movement, but also in an increase in tensions and violence and a rise in incidences of sexual and gender based violence, especially in the larger temporary reception facilities.

⁶⁰ UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, available at: <http://www.refworld.org/docid/4638aca62.html>. Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, available at: <http://www.refworld.org/docid/4ddb74f72.html>. UN Committee Against Torture (CAT), *General Comment No. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties*, in particular paragraphs 11-15, available at: http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf. European Union: Council of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, L 315/57, available at: <http://www.refworld.org/docid/52eb66354.html>.

Coordinated contingency planning by the EU and its Member States will be essential to respond effectively to possible future arrivals in significant numbers. Regional and national support plans would need to be tailored to each specific country situation, while at the same time be aligned with overarching objectives. The response to civil emergencies in the EU provides both good practices and capacities that could be integrated into contingency plans for refugee emergencies. A system for contingency planning developed by the Commission and EU agencies would include: assessment and planning; creating standby capacity at the national and EU levels; and setting up proper coordination mechanisms.⁶¹

Given the changeable nature of arrivals both in terms of numbers and routes, UNHCR believes that the proposal for contingency plans to be revised every two years would not be sufficient to ensure they are adequate. Based on experience in drawing up contingency plans in Europe and elsewhere, UNHCR suggests an update every six months or whenever circumstances so require.

In this respect, UNHCR welcomes the strengthened EUAA role in contingency planning and emergency response as set out in Article 13 (3) of the Commission's proposal for a EUAA.⁶² However, to ensure a common EU response and adequate EU-wide preparedness, Member States should also provide such notifications to relevant neighbouring Member States. Member States should also be encouraged to share contingency plans with neighbouring third countries which are not the countries of origin to avoid the circumstances which arose in 2015 and 2016.

RECOMMENDATIONS:

- National reception capacity should be flexible and adjusted to the needs of applicants. Such procedures should be informed by regular contingency planning exercises in case numbers of applications are expected to significantly increase in order to meet the requirements established in this Directive.
- Each Member State should draw up a contingency plan setting out the planned measures to be taken to ensure the adequate reception of applicants in cases where the Member State is confronted with a disproportionate number of applicants. Member States should be encouraged to notify their first contingency plan to neighbouring (third) countries.
- EASO should develop guidance on contingency planning in the reception context to assist Member States, and the envisaged EUAA should be tasked with a monitoring role in this regard.
- Each Member State should develop the necessary stand-by reception capacity to ensure swift implementation of planned measures.
- The European Commission should establish a coordination structure for the purpose of contingency planning between Member States, the European Union Agency for Asylum, Frontex, UNHCR and the European Commission. The European Commission should encourage participation of third countries in the coordination structure.
- The coordination structure should support information-sharing, analysis, scenario development and joint preparedness planning where possible and appropriate. As part of the coordination structure, Member States and participating third countries should be offered the possibility to request any financial and technical support necessary in order to implement the planned measures, and in order to develop the necessary stand-by capacity.

Training and capacity building

According to Article 29, Member States are required to integrate the EASO/EUAA curriculum into their national training curricula. This is a welcome provision as it may lead to further harmonisation of reception conditions across EU Member States, including improved identification and treatment of persons with specific needs.

RECOMMENDATION:

- UNHCR recommends that EASO/EUAA develop relevant training in close cooperation with Member States, where appropriate; Frontex; and the European Union Agency for Fundamental Rights. This should also involve cooperation with appropriate training entities in the Member States, including academic institutions and other relevant organizations, in particular UNHCR and relevant civil society experts.

⁶¹ UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>

⁶² UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271*, December 2016, available at: <http://www.refworld.org/docid/585cde7a4.html>

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CONCLUSION

UNHCR welcomes efforts at EU level to further harmonise reception conditions for applicants for international protection, and to meet international standards, including indicators developed by EASO. However, UNHCR cautions that the cumulative effect of punitive measures “suggested” within this proposed Directive and across the different proposals to recast the other CEAS instruments could be counterproductive. UNHCR is concerned certain measures could result in more irregular onward movement and destitution of asylum-seekers if the new proposals are not properly transposed and/or applied in practice.

Punitive measures, as long as they stay within the parameters of existing legal standards, could be permissible in individual cases in case of non-cooperation. If applied, these should follow a proportionality assessment, coupled with an effective remedy. However, these should preferably be combined with measures that restore trust in the system, including strengthened safeguards, especially for applicants with specific needs. These safeguards should be coupled with incentives, such as granting the right to legally move to another EU Member State after the grant of refugee status or subsidiary protection, where the applicant has tangible prospects to become self-reliant.

The effectiveness of the proposed measures will depend on a variety of factors. The timely transposition and proper implementation in practice, including of the standards and benchmarks for reception developed by EASO is essential. It will also be necessary to incorporate proper contingency planning as well as monitoring and support by the new EUAA. The prioritisation of AMIF funding is required to strengthen reception conditions where gaps emerge, including in times of pressure.

UNHCR stands ready to continue assisting with these efforts in the interests of Member States, the EU, and those who are in need of international protection, and refers to its proposals for Better Protecting Refugees in the EU and Globally, which could be of assistance in advancing such efforts.