



**COMMENTS FROM THE EUROPEAN COUNCIL  
ON REFUGEES AND EXILES**

**on the**

**Amended Commission Proposal to recast the  
Asylum Procedures Directive (COM(2011) 319 final)**

**SEPTEMBER 2011**

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## Introduction

In the Stockholm Programme, the European Council has set the ambitious goal of establishing a Common European Asylum System (CEAS) by 2012, which should be based on “high standards of protection” while “due regard should also be given to fair and effective procedures capable of preventing abuse”. Asylum seekers should, regardless of the Member State in which their application is lodged, be offered “an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination”.<sup>1</sup> As Article 78 of the Treaty on the Functioning of the European Union (TFEU) now requires the adoption of “common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status” an advanced level of harmonisation is needed in the area of asylum procedures.

ECRE and many other observers have labelled the existing Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>2</sup> as the most problematic of all the pieces of legislation that have been adopted so far in the area of asylum by the EU.<sup>3</sup> It falls short of standards conducive to a fair and efficient examination of asylum applications, is unnecessarily overcomplicated and allows for substantial derogations by Member States from the minimum standards the directive was supposed to set at the time. ECRE had largely welcomed the 2009 Commission proposal recasting the Asylum Procedures Directive.<sup>4</sup> In ECRE's view, it presented a fundamental review of most of the Directive's substantive provisions and considerably strengthened procedural safeguards for asylum seekers while reducing the number of possible derogations from those safeguards.<sup>5</sup> The proposal incorporated general principles of EU law that have been established by the jurisprudence of the Court of Justice of the European Union (CJEU) and promoted the application of the EU Charter of Fundamental Rights which must be respected by Member States when implementing EU law but also by EU institutions when drafting and adopting EU legislation. The proposal also reflected procedural standards developed through the jurisprudence of the European Court of Human Rights (ECtHR) on, in particular, Articles 3, 5, 8 and 13 ECHR.

Unlike the Commission proposal recasting the Qualification Directive<sup>6</sup> that was adopted on the same day, the Commission proposal recasting the Asylum Procedures Directive never reached the stage of “trilogue-discussions” between the Council, the European Parliament and the Commission. It was only discussed at technical level in the Council during the Spanish Presidency in the first half of 2010. This had not resulted in any significant progress towards finding a common position but rather an extremely long list of scrutiny reservations from Member States.

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<sup>1</sup> European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens* (hereinafter ‘Stockholm Programme’), par. 6.2., OJ 2010 C 115/1.

<sup>2</sup> See Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter ‘Asylum Procedures Directive’), OJ 2005 L 326/13.

<sup>3</sup> See ECRE, [ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status](#), October 2006, p. 4.

<sup>4</sup> COM(2009) 554 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)* (hereinafter ‘2009 Commission recast proposal’), Brussels, 21 October 2009.

<sup>5</sup> ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Asylum Procedures Directive* (hereinafter ‘[ECRE Comments on the 2009 APD recast proposal](#)’), May 2010.

<sup>6</sup> See COM(2009)551 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals and stateless persons as beneficiaries of international protection and the content of the protection granted*, Brussels, 21 October 2009. A political agreement on a compromise text was reached in first reading between the European Parliament and the Council in June 2011, but is awaiting formal adoption. For the text of the political compromise see Council of the European Union, Doc 12337/1/11 REV 1, *Proposal for a Directive 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, a uniform status for refugees or for persons eligible for subsidiary protection and the content of the protection granted*, Brussels, 6 July 2011.

Confronted with the deadlock within the Council, the Commission announced already in November that it would start working on amended recast proposals to provide new impetus to the discussions in view of the 2012 deadline for establishing the legislative framework for the CEAS, as laid down in the Stockholm Programme.<sup>7</sup>

Nevertheless, the European Parliament adopted its report on the 2009 Commission recast proposal in its plenary session of 6 April 2011. The report largely supported the Recast Proposal and even strengthened a number of procedural safeguards for asylum seekers. It also called for a revision of the “safe country” concepts in the Asylum Procedures Directive, including the abolition of the European Safe Third Country concept as well as the possibility for Member States to maintain national lists of safe countries of origin and safe third countries.<sup>8</sup>

According to the Commission, the main aim of the modified proposal is to “simplify and clarify rules” while the overall objective remains establishing procedures that are efficient and fair. It should render the standards in the Commission proposal “more compatible with the variety of national legal systems” and permit to apply the EU procedural rules “in a way that is more cost-effective in their particular situations”.<sup>9</sup> Nevertheless, as Member States were mainly concerned with the supposed imbalance between the increased procedural safeguards for asylum seekers and the reduced procedural tools for asylum authorities to prevent abuse in the initial Commission proposal, it is clear that the emphasis of the amended recast proposal is much more on efficiency than on fairness. More flexibility is built in for Member States, in particular when confronted with large numbers of asylum applications and the procedural tools to deal with real or perceived “abuse” of the asylum procedure have been strengthened. At the same time, the provisions on legal assistance and representation have been restructured in order to better accommodate Member States’ legal frameworks. Moreover, a number of safeguards in the initial Commission recast proposal which ECRE considers as essential components of a fair asylum procedure have been significantly weakened.<sup>10</sup> In general, the 2009 Commission recast proposal generally provided for the level of harmonisation required to achieve common standards as laid down in Article 78 TFEU. Unfortunately, Member States’ wide margin of discretion to derogate from procedural standards has been reintroduced in some of the provisions in the amended Commission recast proposal. Such an approach may result in a recast Asylum Procedures Directive that will not address the issue of widely diverging procedural standards in the EU Member States sufficiently enough to ensure that “applications will be treated similarly in all Member States”.<sup>11</sup>

## Summary of views

ECRE notes that the amended Commission proposal recasting the Asylum Procedures Directive continues to promote the principle of frontloading and robust decision-making in the first instance but at the same time includes a number of provisions that, if adopted, would go against such an approach. ECRE has long advocated for a policy of financing asylum determination systems with the requisite resources and expertise to make accurate and properly considered decisions in the first instance stage of the asylum procedure.<sup>12</sup>

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<sup>7</sup> Background Note, Justice and Home Affairs Council, Brussels 2 and 3 December 2010, Brussels, 30 November 2010. Available at <http://www.consilium.europa.eu>.

<sup>8</sup> European Parliament, *European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)(Com(2009)0554 – C7-0248/2009 – 2009/0165(COD))* (hereinafter European Parliament Resolution of 6 April 2011), P7\_TA(2011)0136.

<sup>9</sup> See COM(2011) 319 final, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast)*, Brussels, 1 June 2011, at p. 4 (hereinafter Amended Recast Proposal).

<sup>10</sup> See also S. Peers, “Revised EU asylum proposals: “Lipstick on a pig””, Statewatch Analysis, June 2011.

<sup>11</sup> Amended Recast Proposal, Explanatory Memorandum, p. 2.

<sup>12</sup> See ECRE, *The Way Forward. Towards Fair and Efficient Asylum Systems in Europe* (hereinafter ‘*The Way Forward – Asylum Systems*’), September 2005, p. 38-39.

Importantly, however, frontloading is not about the acceleration of procedures for its own sake and requires having all necessary safeguards from the very start of the asylum procedure as this reduces the number of unnecessary appeals and is therefore cost-effective in the long term.

Therefore, ECRE regrets to see that the amended Commission recast proposal contains a watering-down of some of the crucial elements of the 2009 Commission recast proposal apparently justified by the need for efficiency, including:

- General increased flexibility for Member States in case of large numbers of third country nationals or stateless persons applying for international protection simultaneously to derogate from procedural standards with regard to (1) registration of applications within maximum 72 hours (amended recast Article (6)(4)); (2) the authority responsible for conducting personal interviews (amended recast Article 14(1); conclusion in principle within six months of an asylum procedure (amended recast Article 31(3))
- Weaker safeguards as regards interpretation requirements at the border or in detention facilities and access of non-governmental organisations to detention facilities at the border (amended recast Article 8)
- The deletion of mandatory transcripts of the personal interview in favour of less detailed “thorough reports” (amended recast Article 17)
- Reduced safeguards with regards to free legal assistance including the possibility for legal assistance and representation to be provided by actors lacking the necessary autonomy such as government officials or specialised services of the State and the reintroduction of a merits test at the appeal stage (amended recast Articles 20 and 21)
- Extension of the list of procedural reasons for which the examination of an asylum procedure may be accelerated and possibility of systematically processing asylum applications at the border in certain cases (amended recast Article 31(6)).

However, ECRE considers that, in practice, a number of these changes would create greater inefficiency as well as undermining essential procedural safeguards. Higher procedural safeguards are required not only to ensure the protection of rights but also to ensure that asylum procedures are capable of efficiently identifying those who are in need of international protection.

ECRE also regrets that the amended Commission recast proposal leaves the provisions regarding safe countries of origin, safe third countries and European safe third countries largely untouched thus ignoring their potentially devastating impact on access to protection for asylum seekers and on the objective of harmonisation of asylum procedures in the EU.

It is acknowledged that the amended Commission recast proposal usefully clarifies a number of provisions without fundamentally lowering procedural safeguards for asylum seekers such as with regard to subsequent applications (amended recast Articles 40 and 41) and identification in general of applicants in need of special procedural guarantees (amended recast Article 24).

### **Analysis of key articles**

In this document ECRE presents its views on the amended Commission recast proposal through an analysis of the key changes to the initial Commission recast proposal. These comments and recommendations should be read together with ECRE's extensive comments on the 2009 Commission recast proposal. The latter remain ECRE's position as regards those parts of the 2009 Commission recast proposal that were not modified by the amended recast proposal.

## 1. Responsible authorities and training (amended recast Article 4)

The proposed amendment modifies recast Article 4 of the 2009 Commission recast proposal in two ways. First, it reintroduces the possibility for Member States to allow for another authority than the specialised determining authority to grant or refuse permission to enter in the framework of border procedures as currently allowed under Article 4(2)(e) of the Asylum Procedures Directive. Although the personnel of this other authority must have the appropriate knowledge or receive the necessary training “to fulfil their obligations when implementing this Directive”, this is not to the same standard as the training requirements for personnel of the determining authorities.<sup>13</sup> Such a decision may prevent refugees from accessing protection and may eventually result in *refoulement* and therefore all safeguards should be in place to ensure that such a decision is only taken once a full assessment of the asylum application has been conducted. This is only partly remedied by the addition in amended recast Article 4(2)(b) that a decision granting or refusing permission to enter must be taken “on the basis of the opinion of the determining authority”. Although it seems to create an obligation for the border authority to wait for the opinion of the determining authority before a decision on entry can be taken, it does not specify whether such an opinion should be binding on the border authority and neither does it require access to a full determination procedure. This may be problematic as amended Article 43 relating to border procedures continues to allow for procedures at the border to decide on the substance of asylum applications in an accelerated procedure.<sup>14</sup> Therefore, ECRE prefers the deletion of amended recast Article 4(2)(b) as this would ensure that all decisions on asylum applications, including at the border, must be taken by the specialised determining authority and would provide the best guarantee that the right to asylum as enshrined in Article 18 of the Charter of Fundamental Rights of the European Union and the principle of *non refoulement* are respected in practice.

However, if this provision is to be maintained it should at a minimum require the personnel of such authority to receive the same training as the personnel of the determining authority as an important guarantee to ensure that the principle of *non refoulement* is complied with in practice. Moreover, it should be ensured that the opinion of the determining authority is with regard to the individual case and not merely as regards the situation in general in the country of origin. Therefore, if the amended recast Article 4(2) is to be maintained, ECRE recommends including in amended recast Article 4(3) an explicit reference to “personnel of authorities mentioned in Article 4(2)” and in amended recast Article 4(2)(b) an explicit requirement that the opinion of the determining authority must include an assessment of the individual circumstances of the applicant.

For the reasons explained in its 2010 Comments paper,<sup>15</sup> ECRE maintains its recommendation to delete amended recast Article 4(2)(a) to ensure that the determining authority is also competent to determine the responsible Member State for examining the application for international protection under the Dublin Regulation.<sup>16</sup> The necessity of ensuring that protection concerns, as well as the level of procedural guarantees and reception conditions in the responsible Member State are fully assessed in every individual case before transferring an asylum seeker to the latter country was unambiguously established by the European Court of Human Rights in the case of *M.S.S. v Belgium and Greece*.<sup>17</sup>

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<sup>13</sup> See amended recast Article 4(3) requiring that “the personnel of the determining authority are properly trained” through “initial and where relevant, follow-up training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation(EU) No 439/2010”.

<sup>14</sup> See amended recast Article 43(1)(b).

<sup>15</sup> ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 10-11.

<sup>16</sup> See also European Parliament, Directorate General for internal policies. Policy Department C: Citizens' Rights and Constitutional Affairs – Civil Liberties, Justice and Home Affairs, *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system. Study* (hereinafter ‘EP Study on setting up a CEAS’, Brussels, August 2010, p. 301.

<sup>17</sup> In this case concerning the transfer of an Afghan asylum seeker by Belgium to Greece under the Dublin Regulation, the Court found that Belgium had violated Article 3 ECHR by exposing the applicant to substandard conditions of detention and living conditions and to the risks arising from the deficiencies in the asylum procedures in Greece. The Court observed that “it was up to the Belgian authorities, faced with the situation described above, not

Secondly, the amended Commission recast proposal adjusts the requirements with regards to the training of personnel of the determining authority. The amended recast Article 4(3) now requires that personnel of the determining authority are properly trained instead of “personnel examining applications and taking decisions on international protection”, thereby broadening the scope of persons subject to training within the determining authority. However, at the same time, Member States must only provide for initial and, *where relevant*, follow-up training. ECRE regrets this weakening of the 2009 Commission recast proposal. As regional and international refugee law and human rights law is permanently evolving, it is of paramount importance that the staff of determining authorities receive advanced and refresher training on a recurring basis. Follow-up training is particularly necessary in view of the growing complexity of status determination and recent research by UNHCR showing serious shortcomings in the provision and quality of training in some Member States.<sup>18</sup> ECRE believes that high-quality training in Member States is an important tool for improving the quality of decision-making on asylum applications in EU Member States. Therefore, a strong obligation on initial and follow-up training in the recast Asylum Procedures Directive would provide an additional guarantee for improving the quality of decision-making throughout the EU. ECRE recommends to delete “where relevant” in amended recast Article 4(3).<sup>19</sup>

Whereas Article 4(2) of the 2009 Commission recast proposal included a detailed description of the content of the training that needs to be provided by Member States, this is replaced in the amended proposal by a general reference to the list of specific or thematic training activities in knowledge and skills regarding asylum matters in the Regulation establishing the European Asylum Support Office (EASO).<sup>20</sup> ECRE regrets that by including such a general reference, the specific requirement of providing training on evidence assessment, including the principle of the benefit of the doubt may be lost.<sup>21</sup> However, it is acknowledged that the amended Article 4(3) still provides for considerable detail with regard to the mandatory content of the training and encourages a more harmonised approach as it also imposes an obligation on Member States to “take into account the training established and developed by the European Asylum Support Office”.

However, in order to allow Member States to provide training which is as comprehensive as possible, ECRE recommends further amending recast Article 4(3) to clarify that the list of topics in Article 6(4) EASO Regulation is not exhaustive. Furthermore, ECRE would welcome explicit references to evidence assessment, the benefit of the doubt and gender issues as part of training programmes in recital 15. Assessing an applicant’s credibility in light of the evidence available is one of the most difficult aspects of the examination of an asylum application and recent UNHCR research has indicated that this remains an important cause of poor-quality decision-making.<sup>22</sup> Therefore, it is essential that evidence assessment is part of training programmes. As asylum seekers who have been subjected to torture should be identified as soon as possible in the asylum procedure in order to ensure that their special procedural needs are met, it is important for personnel of the determining authority to be trained in the identification of such victims so as to ensure their cases are being dealt with by the appropriate staff.

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merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to verify first how the Greek authorities applied their legislation on asylum in practice. See ECtHR, *M.S.S. v Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011, par. 359.

<sup>18</sup> UNHCR, *Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice, Detailed Research on Key Asylum Procedures Directive Provisions* (hereinafter ‘Asylum Procedures Study – Detailed Research’), March 2010, pp. 104-108.

<sup>19</sup> The European Parliament emphasised the need for personnel examining applications and taking decisions to have completed initial and follow-up training. See European Parliament Resolution of 6 April 2011, Amendment 28.

<sup>20</sup> Regulation EU No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter ‘EASO Regulation’), OJ 2010 L 132/11.

<sup>21</sup> While identification and documentation of torture is not explicitly mentioned in Article 6(4) EASO Regulation, this is covered by amended recast Article 18(5) requiring persons interviewing applicants to receive training with regard to the awareness of symptoms of torture and of medical problems potentially adversely affecting the applicant’s ability to be interviewed.

<sup>22</sup> See UNHCR, *Safe at last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, July 2011, pp. 75-77.



ECRE recommends deleting amended recast Article 4(2) to ensure that the specialised determining authority is also competent to determine the responsible Member States for examining the application for international protection under the Dublin Regulation and to decide on asylum applications processed in border procedures.

If amended recast Article 4(2) is maintained, ECRE recommends adding to Article 4(2)(b): “...on the basis of the opinion of the determining authority *with regard to the applicant’s need for international protection in his/her individual circumstances.*”

If amended recast Article 4(2) is maintained, ECRE recommends further amendment of recast Article 4(3), first sentence, as follows: Member States shall ensure that the personnel of the determining authority *and, where applicable, the personnel of the authority referred to in Article 4(2),* are properly trained.

ECRE recommends deleting *where relevant* in amended recast Article 4(3) second sentence to ensure that both initial and follow-up training is mandatory for the personnel of the determining authority while adding that such training shall include *but not be limited to* the elements listed in Article 6(4) (a) to (e) of Regulation (EU) No 439/2010.

ECRE recommends adding to recital 15: *This should include specific training on evidence assessment, the benefit of the doubt and gender-issues within the asylum procedure.*

## **2. Access to the asylum procedure**

### **2.1. Access to the procedure and applications on behalf of dependants and minors (Amended recast Articles 6 and 7)**

The provisions in the 2009 Commission recast proposal relating to access to the procedure are modified by creating a separate provision relating to applications made on behalf of dependants or minors (new amended recast Article 7). At the same time guarantees with respect to access to the asylum procedure at the border or in detention facilities are weakened in amended recast Article 6.

#### *Making/lodging an application*

Amended recast Article 6 distinguishes between “making an application” and “lodging an application”. An application is deemed to be “made” as soon as a person makes a request for international protection from a Member State as defined in the Qualification Directive.<sup>23</sup> This is different from “lodging” the application which requires the accomplishment of “relevant administrative formalities”.<sup>24</sup> A person who wishes to make an application must be registered as an applicant as soon as possible and not later than 72 hours after such declaration. Member States must furthermore ensure that such a person has “an effective opportunity to lodge the application as soon as possible”. In some Member States, there may be a considerable period of time between the moment an asylum seeker makes an application for asylum and the moment the application is lodged. Therefore, ECRE welcomes the obligation for Member States to, in principle, register the asylum application within 72 hours.<sup>25</sup> While this

<sup>23</sup> See amended recast Article 2(b).

<sup>24</sup> COM(2011) 319 ANNEX, *Detailed Explanation of the Amended Proposal Accompanying the document Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)* (hereinafter ‘Detailed Explanation’), Brussels, 1 June 2011, p. 2.

<sup>25</sup> However, ECRE is concerned that amended recast Article 6(4) may seriously undermine this important safeguard. See below.



should normally have no impact on the asylum seeker's access to material reception conditions,<sup>26</sup> it should be noted that certain rights under the Reception Conditions Directive, such as access to the labour market, information and documentation depend on the asylum application being formally lodged.

#### *Role of border guards, police, immigration authorities and personnel of detention facilities*

Amended recast Article 6 is less precise on the obligations of border guards, police and immigration authorities and personnel of detention facilities when confronted with a person wishing to apply for international protection. The obligation in the 2009 Commission recast proposal to register in some circumstances or to forward the application to the competent authority is replaced with a vaguer obligation to “ensure that the personnel of authorities likely to receive such declarations has relevant instructions and receives the necessary training”. ECRE strongly recommends identifying more clearly the nature and purpose of these instructions and training, in particular where it concerns personnel of authorities other than the specialised determining authority. The provision should clearly reflect the role of such non-specialised authorities in the asylum procedure, that is to ensure that the person can make his/her application at the earliest possible time and to forward the application to the responsible authority and refer the applicants themselves to the relevant authority. Therefore, ECRE suggests to further amend Article 6(3) second sentence accordingly.

ECRE recommends further amending Article 6(3), second sentence as follows: “Member States shall ensure that the personnel of authorities likely to receive such declaration has relevant training, including the necessary training on their role in facilitating the receipt and registration of applications for international protection”.

#### *Registration of asylum applications in case of large numbers applying simultaneously*

Amended recast Article 6(4) adds considerable room for Member States to derogate from their obligations with regards to the registration of asylum applicants. In case of large numbers of third country nationals applying simultaneously for international protection making it impossible in practice to respect the above-mentioned 72-hour time limit for registration of the asylum applicant, the time limit can be extended to seven working days. If adopted, this provision would seriously undermine the additional guarantees with respect to access to the asylum procedure and to ensuring an effective opportunity to make an asylum application as soon as possible, which is what the recast proposal seeks to introduce. In particular, at the border, asylum seekers may be prevented from having their asylum application registered due to the accelerated implementation of formal or informal readmission agreements.<sup>27</sup> If Member States are given the flexibility to extend the time limit for registration of the asylum applicant up to seven working days on the basis of vaguely defined criteria, such as the fact that a large number of third country nationals request international protection simultaneously, this increases the risk of potential asylum seekers being returned before being registered as applicants at all.<sup>28</sup> ECRE considers that the 72 hours margin provided for in amended Article 6(3) should in any case be sufficient to allow Member States to ensure registration as an applicant, in particular as the provision now distinguishes more clearly between lodging and

<sup>26</sup> See Article 17 Amended Recast Proposal on Reception Conditions Directive according to which material reception conditions must be available to applicants “when they make their application for international protection”.

<sup>27</sup> This is explicitly acknowledged by the Commission in its recent evaluation of EU readmission agreements: “Although the safeguards under the EU acquis (such as access to asylum procedure and respect of *non-refoulement* principle) are by no means waived by the accelerated procedure, there is a potential for deficiencies in practice”. See COM(2011) 76 final, *Communication from the Commission to the European Parliament and the Council. Evaluation of EU Readmission Agreements*, Brussels, 23 February 2011, p. 12. .

<sup>28</sup> See on this issue also Human Rights Watch, *Buffeted in the Borderland. The Treatment of Migrants and Asylum Seekers in the Ukraine*, December 2010. pp. 21-24.

making the application. Therefore, ECRE strongly recommends deleting amended Article 6(4) as it would unnecessarily undermine asylum seeker's right to have his or her claim registered as soon as possible under the recast Asylum Procedures Directive.

ECRE recommends deleting amended Article 6(4) as it would unnecessarily undermine asylum seekers' right to have their application registered as soon as possible under the recast Asylum Procedures Directive.

#### *Applications made on behalf of dependants and minors*

The new amended recast Article 7 clarifies the legal obligations of Member States with respect to applications made on behalf of dependants or minors. ECRE had welcomed the requirement that adults be informed in private of the possibility to make a separate application for international protection and the relevant procedural consequences.<sup>29</sup> For instance, women may have a well-founded fear of persecution or risk serious harm separately from their husbands and in such cases they should have an opportunity to lodge an application on their own behalf and have their protection needs assessed separately from their husband. ECRE also welcomes the fact that the new amended recast Article 7 continues to ensure the right of a minor to make an application for international protection either on his/her own behalf or through his/her parents or other adult family members. However, unlike the 2009 Commission recast proposal,<sup>30</sup> new amended recast Article 7(3) further qualifies such right by making an application for international protection by the minor concerned conditional on the latter's "legal capacity to act in procedures according to the national law of the Member State concerned". This relates to the possibility for Member States that already exists under the current Directive to determine the cases in national legislation in which a minor can make an application on his/her own behalf.<sup>31</sup> ECRE believes it is important that the new Article 7(3), in accordance with the UN Convention on the Rights of the Child, continues to assert the right of children to apply for asylum either on their own or through their families. However, as children are particularly vulnerable in the asylum process this guarantee could be further strengthened by including a specific reference to Article 22 of the UN Convention on the Rights of the Child in the preamble.

Moreover, new amended recast Article 7(3) also extends the category of persons through which a minor may make an application for international protection. Whereas this was limited in recast Article 6(5) to the minor's parents or other adult family members, this is now also possible through "an adult responsible for him/her, whether by law or by national practice of the Member States concerned or a representative". Whereas in principle the extension of categories of persons that may make an application for international protection on behalf of a child is to be welcomed, ECRE is concerned that the explicit reference to a representative in new amended recast Article 7(3) as it stands may in reality undermine the right for a child to make an asylum application. This is because the amended recast proposal no longer requires the representative of an unaccompanied minor to be "impartial"<sup>32</sup> and allows for governmental bodies to assume this role. In order to avoid any "conflict of interest" with regard to the child's right to apply for asylum and to ensure that the representative truly acts in the child's best interest, it is essential that the recast Asylum Procedures Directive includes sufficient guarantees as to the impartiality and independence of the representative of the unaccompanied child. As will be discussed below, ECRE strongly recommends further modifying amended recast Article 25(1)(a) in order to reinsert the explicit requirement for the representative of an unaccompanied child to be "impartial and independent". The latter amendment is essential to ensure that the child's right to make an application for asylum

<sup>29</sup> ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 13.

<sup>30</sup> See Article 6(5) 2009 Commission recast proposal.

<sup>31</sup> See Article 6(4)(a) Asylum Procedures Directive.

<sup>32</sup> As was explicitly required in Article 21(1)(a) of the 2009 Commission recast proposal.

under new Article 7 is fully guaranteed in practice in case such application can only be made through a representative.

ECRE recommends adding an explicit reference to Article 22 UN Convention on the Right of the Child in recital 26.

## **2.2. Safeguards at border crossing points and detention facilities (Amended recast Article 8)**

Provision of full and reliable information to asylum seekers regarding the asylum procedure is a basic but essential aspect of a fair and efficient asylum system. Asylum seekers at the border or in detention facilities are particularly vulnerable as they often have limited access to information on their rights, legal advice and counselling because of the location of these facilities. Article 7 of the 2009 Commission recast proposal introduced strong guarantees in this regard by imposing a clear obligation on Member States to make information available on procedures to be followed in order to make an application for international protection at border crossing points, including transit zones, at external borders and in detention facilities. At the same time, it included an obligation to provide for interpretation arrangements to “ensure communication between asylum seekers and border guards and personnel of detention facilities” as well as access of organisations providing advice and counselling to asylum seekers to these locations. This is now replaced with a new amended recast Article 8 containing weaker safeguards with regard to access of organisations and weaker wording with regard to interpretation. Interpretation arrangements must now only be provided “to the extent necessary to facilitate access to procedure in these areas”. ECRE considers that, from a quality perspective, this sets a lower standard than ensuring communication and leaves too much discretion for Member States as to the assessment of whether the interpretation arrangement “facilitates” access or not. ECRE would prefer new amended recast Article 8(1) to reflect a clear obligation for Member States to provide interpretation arrangements that are sufficient to ensure access to the procedure for those who wish to apply for international protection.

Secondly, new amended recast Article 8(2) no longer ensures access of organisations providing advice and counselling to applicants for international protection to detention facilities but limits such access to border crossing points, including transit zones. While access of legal advisors or counsellors and persons representing non-governmental organisations recognised by the Member States is guaranteed under amended proposal recasting the Reception Conditions Directive,<sup>33</sup> ECRE would prefer an explicit reference to the right of organisations providing legal advice, information on the procedure and representation to access detention facilities in the recast Asylum Procedures Directive.<sup>34</sup> The presence of such organisations in detention facilities is often essential for asylum seekers to be properly informed and to ensure that they are able to make an asylum application. An explicit reference to the right of such organisations to access detention facilities in the recast Asylum Procedures Directive would acknowledge and preserve their key role in ensuring that those in need of international protection have effective access to an asylum procedure. Therefore ECRE recommends amending new amended recast Article 8(2) accordingly.

<sup>33</sup> COM(2011) 320 final, *Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers*, Brussels, 1 June 2011 (hereinafter ‘Amended Commission Proposal recasting the Reception Conditions Directive’). See Article 10(4).

<sup>34</sup> ECRE reiterates its position that the reference to organisations providing counselling is vague and should be clarified to include organisations with a specific mandate and expertise to represent asylum seekers in the asylum procedure. See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 14. The added reference to “information on the procedure” corresponds to the new Article 19 in the Amended Recast Proposal redefining free legal assistance at the first instance in terms of “legal and procedural information”.

ECRE recommends amending new recast Article 8(1) second sentence to read: “Member States shall provide for interpretation arrangements in order to *ensure that persons wishing to apply for international protection are able to make such an application and to ensure communication between those persons and border guards or personnel of detention facilities*”.

ECRE recommends amending new recast Article 8(2) as follows: “Member State shall ensure that organisations providing *legal advice, information and representation* and counselling to applicants for international protection have access to the border crossing points, including transit zones, at external borders *and to detention facilities*”.

### 3. Guarantees for applicants of international protection (Amended recast Article 12)

Amended recast Article 12 modifies the guarantees for asylum seekers during first instance procedures in two ways. First, in order to accommodate the European Parliament’s position, Member States are now required to inform asylum seekers in a “language which they understand or are reasonably supposed to understand” of the procedure, their rights and obligations, the consequences of not complying with their obligations and not cooperating with the authorities and the result of the decision of the determining authority when they are not assisted or represented by a legal adviser or other counsellor.<sup>35</sup> Secondly, the right of asylum seekers and if applicable, their legal advisers, to have access to country of origin information where such information is taken into consideration by the determining authority for the purpose of taking a decision on the asylum application is now included in the list of guarantees for asylum seekers.<sup>36</sup> The latter was already included in Article 9(3)(b) of the 2009 Commission recast proposal on requirements for the examination of applications and as such does not constitute an additional guarantee but is nevertheless a welcome clarification of the guarantees for asylum seekers under the recast Asylum Procedures Directive.

ECRE reiterates that asylum seekers have the right to information about asylum procedures, their rights and obligations and decisions on their asylum applications in a *language they understand* and not in a *language they are reasonably supposed to understand*. Allowing authorities to provide information in a language asylum seekers are reasonably supposed to understand grants these authorities a margin of discretion that is not allowed, for instance, in criminal law proceedings.<sup>37</sup> Although the amended recast Commission proposal contains improved wording by including the double standard of a “language that they understand” or are “reasonably supposed to understand”, it still leaves Member States considerable flexibility to apply the less protective standard. ECRE fears that such standard will not lead to improved practice and therefore recommends deleting any reference to a “language they are reasonably supposed to understand” throughout the Article.<sup>38</sup> This will also contribute to improving quality of decision-making as it is essential that applicants for international protection can communicate properly with the determining authority to ensure that all the relevant information is taken into account in assessing the need for international protection.

<sup>35</sup> Amended recast Article 12(1)(a) and (e).

<sup>36</sup> Amended recast Article 12(1)(d).

<sup>37</sup> According to Article 5(2) and 6(3)(a) ECHR anyone arrested or charged with a criminal offence must be informed of the charges and the reasons for those charges in “a language he understands”.

<sup>38</sup> Recent research conducted by the Fundamental Rights Agency on the provision of information on the asylum procedure from the asylum seeker’s perspective has revealed that in many Member States today the information is not always understood or does not lead to asylum seekers becoming aware of their rights and obligations. One of the obstacles identified was that asylum seekers received information in a language different from their own, under the assumption that they would understand it, whereas in reality they could not understand it sufficiently enough to fully understand their rights and obligations. As a result FRA is of opinion that “[t]o be meaningful, oral as well as written information should be provided in a language the asylum seeker understands, which should become the European Union standard.” See European Union Agency for Fundamental Rights, *The duty to inform applicants about asylum procedures: The asylum-seeker perspective*, 2011, pp. 9, 23-25.

ECRE recommends to delete the words “or are reasonably supposed to understand” in amended Article 12(1)(a) and (f) relating to language in which asylum seekers must be informed.

#### **4. The right to a personal interview and safeguards surrounding a personal interview (Amended recast Articles 14-18).**

The amended recast proposal includes significant changes to the provisions relating to the right to a personal interview, transcript and reporting of the personal interview and medico-legal reports in the 2009 proposal. The modifications concerned in general provide lower procedural guarantees for asylum seekers compared to the standards included in the 2009 proposal, while it is doubtful whether in practice they will contribute to more efficient and fair decision-making.

##### **Personal interview**

While the number of circumstances in which a personal interview can be omitted remains limited, amended recast Article 14 introduces more flexibility for Member States as to which authority must conduct the interview on the substance of the application in case of “large numbers of third country nationals or stateless persons requesting international protection simultaneously”. According to amended recast Article 14(1) in such situations, Member States may provide that the personnel of “another authority be temporarily involved in conducting such interviews”. Member States can only make use of this possibility when such large arrivals “makes it impossible in practice for the determining authority to conduct timely interviews on the substance of the application”. Furthermore, Member States must, when making use of this possibility, make sure that the personnel of that authority shall receive in advance the same training as the personnel of the determining authority, including with regard to awareness of symptoms of torture and of medical problems.

ECRE welcomes the fact that the Commission proposal confirms the centrality of the personal interview<sup>39</sup> in the asylum procedure by maintaining the principle that every applicant who is able and fit must be given the opportunity of a personal interview, unless a positive decision on his/her application can be taken without an interview.<sup>40</sup> The clarification in amended recast Article 14(2)(b) that only the determining authority – and no longer the competent authority – can decide to omit an interview in case the applicant is unfit or unable to be interviewed is a welcome and necessary correction to the recast proposal.<sup>41</sup> However, ECRE reiterates its recommendation to make the consultation of qualified medical experts mandatory for the determining authority as the latter does not have the medical expertise to assess the mental or physical condition of asylum seekers. Therefore, ECRE recommends deleting the words “when in doubt” in amended recast Article 14(2)(b).

However, ECRE is concerned that the newly introduced possibility in amended Article 14(1) for Member States to have interviews on the substance of the application conducted by personnel of any other authority than the determining authority is likely to negatively impact on the quality of the interviews and therefore also on the quality of the first instance decision.

<sup>39</sup> See also UNHCR EXCOM Conclusions No. 8 and 30. Case law of the ECtHR, the UN Human Rights Committee and the UNCAT Committee have all stressed the need for an individual, thorough examination of all the relevant facts in cases where there is a risk of *refoulement*. For example, see *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), *Mutumbo v. Switzerland*, Report of 27 April 1994, (CAT/C/12/D/3/1993); ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgement of 28 February 2008, paras. 128, 130. General principles of EU law include the right to a hearing and in some cases to an oral hearing while Article 41 of the EU Charter on Fundamental Rights guarantees the “right of every individual to be heard, before any individual measure which would affect him or her adversely is taken”.

<sup>40</sup> See also European Parliament, *EP Study on setting up a CEAS*, pp. 303-305.

<sup>41</sup> See Article 13(2)(b) 2009 recast proposal referring to the “competent authority”.



The requirement for such personnel to receive training in advance will do little to compensate for the loss of quality. By definition, personnel of other authorities will have to be involved in short notice, reducing the time necessary for proper training to the absolute minimum. Moreover, they will inevitably also lack practical experience in conducting asylum interviews making this in practice an almost unworkable option without supervision by a staff member of the determining authority. Substandard personal interviews will eventually cause more delay in the asylum procedure as it leads to poor quality of first instance decisions and lengthy and costly appeal procedures.

ECRE believes that Member States should in the first place invest in sufficient resources and planning to anticipate and manage sudden increases in numbers of asylum applications. Furthermore, while ECRE agrees that it is in the interest of both the asylum seeker and the determining authority to conduct the interview within a reasonable time after arrival, it remains ECRE's position that asylum seekers should be given a minimum rest period before the first interview in order for them to recover from their journey and be able to properly prepare for the interview.<sup>42</sup> The amended recast proposal's reference to the failure to conduct "timely" interviews on the substance of an application is in this respect rather vague and open to interpretation. ECRE questions the necessity and added value of such flexibility in the recast Asylum Procedures Directive in particular in situations which may fall within the scope of the Temporary Protection Directive, which provides for a mechanism to address situations of mass influx, defined as an "arrival in the Community of a large number of displaced persons, who come from a specific country or geographic area, whether their arrival was spontaneous or aided, for example through an evacuation programme". As displaced persons, according to the Temporary Protection Directive, may include persons falling within the scope of Article 1A of the 1951 Geneva Refugee Convention and thus persons applying for international protection, amended recast Article 14 potentially covers similar types of situations.<sup>43</sup>

However, if the provision is to be maintained in amended recast Article 14(1), in order to reduce the possible negative effect of the involvement of non-specialised personnel on the quality of personal interviews and eventually first instance decisions, ECRE recommends further amending this provision. Such amendments should aim to ensure that the personnel of "other authorities" that can be temporarily involved in conducting interviews, should only be selected from a list of persons who have successfully completed selected modules of the European Asylum Curriculum or comparable training programmes. Furthermore, in order to ensure coherence, the possibility to use personnel of another authority should be excluded in case the Council decides to activate the Temporary Protection Directive in order to ensure that those falling within its scope have access to the rights and guarantees under that directive.

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<sup>42</sup> See ECRE, [The Way Forward – Asylum Systems](#), p. 49-50.

<sup>43</sup> ECRE could see an added value in temporarily involving personnel of another authority with regard to the registration of asylum requests when large numbers of third country nationals and stateless persons simultaneously request international protection, rather than with regard to conducting interviews on the substance of the application. As the registration process is purely an administrative activity that does not require in-depth knowledge of refugee and human rights law, interview techniques and intercultural communication skills, the involvement of non-specialised personnel would alleviate the burden on the determining authority and would also be more realistic in practice. Therefore, if such a mechanism is to be maintained, ECRE's preference would be to remove the paragraph to Article 6(4) as an alternative to the questionable option for Member States to extend the time limit for registration of the asylum request up to seven working days.

ECRE recommends deleting the possibility in amended recast Article 14(1) for Member States to involve personnel of another authority to conduct interviews on the substance of an application in situations where large numbers of third country nationals or stateless persons simultaneously request international protection.

If such possibility is to be maintained with regard to conducting personal interviews on the substance of asylum applications, ECRE recommends further amending recast Article 14(1) to ensure that (1) only persons who have successfully completed selected modules of the European Asylum Curriculum or comparable training programmes can be selected and (2) Member States can only make use of this possibility without prejudice to the Temporary Protection Directive.

ECRE recommends deleting the words “when in doubt” in amended recast Article 14(2)(b) regarding the assessment of whether an applicant is fit to be interviewed.

### Requirements for a personal interview

Amended recast Article 15 is positively modified in two ways.<sup>44</sup> As suggested by ECRE, the person who conducts the interview is now required to be competent to take account of the personal *and* general circumstances surrounding the application,<sup>45</sup> which is explicitly required in the European Court of Human Rights’ jurisprudence on Article 3 ECHR.<sup>46</sup> It also suggests that – in the spirit of frontloading – the interviewing officer should include both aspects in the preparation of the interview.<sup>47</sup> Furthermore, the added explicit reference to sexual orientation and gender identity as elements to be taken into account by the person who conducts the interview is a welcome and important guarantee encouraging the development of sexual orientation and gender identity -sensitive practices.<sup>48</sup>

However, ECRE believes that there is further room for improvement of amended recast Article 15(3)(c) with respect to the language of communication during the interview. As asylum interviews are key tools for determining protection needs and can be complex processes, effective and accurate communication is of paramount importance. Therefore, ECRE reiterates its recommendation to rephrase amended recast Article 15(3)(c) so as to positively require interpretation in the language preferred by the applicant, and where this is not possible, in the language the applicant understands and in which he or she is able to communicate clearly. Initiatives developed between Member States aiming to create a pool of interpreters at the EU level can be used to address capacity concerns of states.<sup>49</sup> Moreover, research conducted by UNHCR has revealed serious problems in some Member States regarding the quality of interpretation and the conduct of interpreters during such interviews.<sup>50</sup> Therefore, ECRE believes that there could be added value in including, at a minimum, an

<sup>44</sup> Two other amendments to this provision concern the clarification that the person who conducts an interview shall not wear a military or law enforcement uniform and that interviews with minors are conducted in a child appropriate manner, rather than in a child-friendly manner. In ECRE’s view these modifications do not substantially alter the meaning of the provisions that were already included in the 2009 proposal.

<sup>45</sup> See amended recast Article 15(3)(a).

<sup>46</sup> See for instance ECtHR, *R.C. v Sweden*, Application No. 41827/07, Judgement of 9 March 2010, par. 51 (“In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to Iran, bearing in mind the general situation there and his personal circumstances”).

<sup>47</sup> See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 21.

<sup>48</sup> The European Parliament strengthened the wording of the 2009 recast proposal on these issues in several provisions. See European Parliament Resolution of 6 April 2011, Amendment 17, 29, 33, 43, 55.

<sup>49</sup> See, for instance, the ongoing project creating an ‘interpreters pool’ within the context of the General Directors’ Immigration Services Conference (GDISC). More information is available at <http://www.gdisc.org>. See also the list of interpreters to be set up by the EASO as part of the Asylum Intervention Pool. See Article 15 EASO Regulation.

<sup>50</sup> See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 36.



obligation for Member States to adopt a code of conduct for interpreters involved in asylum interviews.<sup>51</sup>

ECRE recommends amending recast Article 15(3)(c) as follows: "The communication shall take place in the language preferred by the applicant or *where this is not possible*, another language which he/she understands and in which he/she is able to communicate clearly.

ECRE recommends adding an obligation in amended recast Article 15(3)(c) for Member States to adopt a code of conduct for interpreters involved in asylum procedures.

### Report and recording of personal interview

The Commission's amended recast proposal includes significant changes to the provision relating to the recording of the applicant's statements during the personal interview. Whereas the 2009 proposal made a transcript of every personal interview mandatory and a written report containing the essential information regarding the application optional, this is now replaced with a mandatory "thorough report containing all substantial elements" and optional audio or audio-visual recording in new amended recast Article 17.

ECRE believes that adequate and accurate documentation of asylum seekers' statements during the interview is crucial for the conduct of a fair and efficient asylum procedure. It provides the very basis for the assessment of the protection needs of the asylum applicant, and therefore it is in the interest of both the applicant and the determining authority and appeal bodies to have a detailed and correct transcription of the content of the interview. ECRE's preferred option is the reintroduction of the mandatory verbatim transcript of every asylum application combined with audio-recording with the informed consent of the asylum seeker. The latter should be mandatory where free legal assistance and representation during the first instance is not available in practice.<sup>52</sup> ECRE notes that some Member States already have experience with audio-taping of interviews as back-up to the transcript of the interview.<sup>53</sup> The combination of both tools precludes any discussion or debate about what has been said during the interview and is beneficial for both the applicant and interviewing authority. This allows the determining authority to make a first instance decision based on a correct and full understanding of the applicant's statement.

On the other hand, ECRE questions the added value in the use of "audio-visual" recording of the personal interview in addition to a written verbatim report combined with the possibility of audio-taping with the informed consent of the applicant for international protection. It may be intimidating for applicants for international protection, in particular those who have been subjected to torture or other traumatising experiences such as rape, to speak about past

<sup>51</sup> This was also requested by the European Parliament. See European Parliament Resolution of 6 April 2011, Amendment 44. The UNHCR Study on Asylum Procedures identified Belgium, Finland, the Netherlands and the UK as countries with a code of conduct for interpreters adopted and imposed by the determining authority. Where interpreters are hired through external agencies providing interpretation and translation services, the service provider may have its own code of conduct such as in Italy. See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 40.

<sup>52</sup> This is, for instance, the case in the UK. In the *Dirshe* case, the Court of Appeal decided that "[t]here is, therefore, real procedural unfairness as a result if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant. A tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it. *Dirshe, R (on the application of) v. Secretary of State for the Home Department* [2005] EWCA Civ 421 (20 April 2005).

<sup>53</sup> For instance, Finland and Germany as well as the Netherlands (unaccompanied minors only) and Spain and the UK (in Early Legal Advice Pilot cases). See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 81.

persecution or their fear for persecution or serious harm in front of a camera.<sup>54</sup> Moreover, there is little practical experience with video-recording of asylum interviews, while in-depth research on the impact of such techniques is scarce. Therefore, ECRE's preferred option would be to delete the reference to audio-visual recording in amended recast Article 17(2). If the option of visual recording is to be maintained in the recast Asylum Procedures Directive, it is paramount that amended recast Article 17(2) requires the informed consent of the applicant.

Furthermore amended recast Article 17(5) includes a weaker guarantee with regard to the asylum seeker's access to the report compared to the 2009 recast proposal<sup>55</sup> as it only requires that "applicants shall not be denied access to the report". The latter allows Member States to ensure such access only upon request of the applicant for international protection. However, in practice asylum seekers may not even be aware of such possibility, in particular where they have no access to legal assistance at first instance. ECRE therefore recommends reintroducing the positive obligation for Member States to ensure that applicants have timely access to the report.

ECRE notes that amended recast Article 17(3) provides for improved guarantees for asylum seekers to make comments and provide clarifications with regard to mistranslations or misconceptions appearing in the report. Such an opportunity should now be provided to asylum seekers at the end of the personal interview or within a specified time limit before the authority takes a decision. The end of the personal interview is in many cases not the ideal moment for the asylum seeker to consider whether or not his/her statements have been correctly reflected in the report, in particular where the interview lasted for a long time or provoked strong emotions with the asylum seeker. ECRE therefore supports the proposed extension of such opportunity to a specified time limit before the determining authority takes a decision. At the same time, ECRE is concerned that the possibility for Member States not to request the applicant's approval on the content of the report in case the interview is recorded, may be against the spirit of frontloading. If the report contains a correctable mistake but is submitted to the applicant for approval, the only possibility to address this will be at the appeal stage whereas this could have been avoided.

ECRE recommends amending Article 17 (1) on report and recording of personal interview to read as follows: "Member States shall ensure that a verbatim transcript is made of every personal interview".

ECRE recommends amending Article 17(2) to read: "Member States may provide for audio-recording of the personal interview with the informed consent of the applicant".

ECRE recommends deleting the words "at the end of the personal interview or" in amended recast Article 17(3).

ECRE recommends further amending Article 17(5) to require Member States to ensure that *applicants have timely access* to the transcript and audio or audio-visual recording of the personal interview before the determining authority takes a decision.

## Medical reports

As indicated in the Commission's impact assessment, a considerable number of asylum seekers arriving in the EU have been subject to various forms of torture or widespread

<sup>54</sup> Video-recording potentially places an undue emphasis on the way an asylum seeker presents visually. This risks, at minimum, cultural misunderstandings, particularly in assessing credibility. See on this issue UKBA, *Considering the protection (asylum) claim and assessing credibility*, p. 15 available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing-credibility.pdf?view=Binary>.

<sup>55</sup> According to recast Article 16(5) "Member States shall ensure that the applicants *have timely access* to the transcript...(emphasis added).

violence.<sup>56</sup> As those experiences may have an impact on the coherence and consistency of their statements during interviews and eventually on their perceived credibility, it is important that this is taken into account as early as possible in the asylum procedure. Therefore, it is essential that the recast Asylum Procedures Directive includes strong safeguards with regard to the use of medical reports as it is an important tool to identify and document symptoms of torture and other violence.

Although the provision is no longer entitled medico-legal reports, amended recast Article 18 does not fundamentally alter the substance of Article 17 of the 2009 Commission recast proposal. Applicants must be allowed to have a medical examination carried out in support of their statements regarding past persecution or serious harm, be it within a reasonable time limit. Furthermore, those interviewing applicants shall receive the necessary training with regard to awareness of symptoms of torture and Member States shall provide for further rules and arrangements for identification and documentation of symptoms of torture and other forms of physical, sexual or psychological violence.

However, contrary to the 2009 Commission recast proposal, that required a medical examination to be carried out in case of reasonable grounds to consider that the applicant suffers from post-traumatic stress disorder, a causal link is now required between the applicant's limited or non-existing ability to be interviewed and/or give accurate and coherent statements and post-traumatic stress disorder, past persecution or serious harm. On the one hand, this limits the scope of the obligation to ensure a medical examination to those situations where the applicant is unable to be interviewed or has limited ability to give coherent statements. On the other hand, it clarifies the purpose of this provision which is to ensure that medical examinations in the context of the Asylum Procedures Directive are carried out where this is necessary to ascertain the limited or non-existing capacity of applicants to be interviewed.<sup>57</sup> In this respect, the specific reference to training with regard to the awareness of symptoms of torture and of medical problems which could adversely affect the applicant's ability to be interviewed contributes to the internal coherence of the provision. The obligation for a Member State to ensure that a medical examination is carried out, as laid down in amended recast Article 18(2), is in line with jurisprudence of the European Court of Human Rights requiring the State to ensure that an expert opinion be obtained in a case where an asylum seeker had initially produced a medical certificate before the first instance asylum authority containing evidence of him having been tortured. In such circumstances "it was for the Migration Board to dispel any doubts that might have persisted as to the cause of such scarring" and "the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin".<sup>58</sup>

ECRE regrets that amended recast Article 18(6) no longer makes explicit reference to the need to take the results of medical examinations in particular into account when establishing whether the applicant's statements are credible. It is precisely the applicant's perceived credibility that is most likely affected by incoherent or inaccurate statements resulting from post-traumatic stress disorder or other mental illnesses or medical conditions.<sup>59</sup> Therefore, ECRE suggests reinserting such reference in amended recast Article 18(6).

Furthermore, ECRE welcomes the continued acknowledgement of the Istanbul Protocol's added value in recital 24 of the amended recast proposal stating that the national rules and arrangements for identification and documentation of symptoms of torture and other forms of

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<sup>56</sup> For a breakdown of the numbers of asylum seekers treated by European member organizations of the International Rehabilitation Centres for victims of torture see SEC(2009)1376 (part II), *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (hereinafter 'Impact Assessment 2009 Commission recast proposal'), pp. 112-119.

<sup>57</sup> Access to health care facilities, including to rehabilitation services for victims of torture or violence, is covered by Articles 19 and 25 of the Amended Commission Proposal recasting the Reception Conditions Directive.

<sup>58</sup> ECtHR, *R.C. v Sweden*, Application No. 41827/07, Judgement of 9 March 2010, par. 53.

<sup>59</sup> On the role of medico-legal reports in credibility assessment by immigration judges in the UK, see Freedom from Torture, *Body of Evidence: Treatment of Medico-Legal Reports for Survivors of Torture in the UK Asylum Tribunal*, May 2011.

physical, sexual or psychological violence in procedures covered by the Asylum Procedures Directive should, *inter alia*, be based on the Istanbul Protocol.<sup>60</sup> The latter provides a set of guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting such findings to the judiciary and any other investigative body which are useful not only within criminal proceedings but also within asylum procedures.<sup>61</sup>

ECRE recommends adding to amended recast Article 18(6) relating to medical reports: "They shall, in particular, be taken into account when establishing whether the applicant's statements are credible".

#### **5. Free legal and procedural information and free legal assistance and representation - scope of legal assistance and representation (Amended recast Articles 19-23)**

The provisions relating to legal assistance and representation in the 2009 Commission recast proposal are significantly revised in the amended recast proposal. Firstly, the amended proposal now distinguishes between the "provision of legal and procedural information free of charge in procedures at first instance" (new amended recast Article 19); free legal assistance and representation in appeals procedures (new amended recast Article 20) and the right to legal assistance and representation at all stages of the procedure (new amended recast Article 22). Secondly, the amended Commission recast proposal now deals with the conditions for the provision of both free legal and procedural information and free legal assistance and representation in a new amended recast Article 21. At the same time, amended recast Article 23 on the scope of legal assistance and representation contains changes with regard to access to information in proceedings that concern national security considerations.

#### *The importance of free legal assistance at all stages of the procedure*

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure fairness and efficiency. Due to the growing complexity of asylum procedures, professional legal advice and assistance during the procedure has become almost indispensable for asylum seekers in order to ensure that all aspects of their case are taken into account by asylum authorities<sup>62</sup>. ECRE believes that where asylum seekers have insufficient financial resources to consult a lawyer at their own cost, they should have access to free legal assistance and representation at all stages of the asylum procedure. This is also in line with the objective of frontloading. Many errors in first instance decisions result from miscommunications or from an applicant's misunderstanding of procedures and processes. Such errors are often difficult to correct at the appeal stage and may result in the failure to identify those in need of protection and thus potentially in *refoulement*. Ensuring asylum seekers' access to legal assistance from the start may help to avoid unnecessary complications at the appeal stage.

<sup>60</sup> See Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 1999, available at <http://www2.ohchr.org/english/about/publications/docs/8istprot.pdf>.

<sup>61</sup> Its usefulness is being illustrated in practice for instance through the MAPP project in the Netherlands. This project for asylum seekers with mental health problems, aims to assess the mental health conditions of asylum seekers by means of checklists and examinations and has developed a protocol on the basis of the Istanbul Protocol for extended psychological examination (for further information see [www.askv.nl](http://www.askv.nl)).

<sup>62</sup> ECRE, *The Way Forward – Asylum Systems*, p. 44.

Research conducted by ECRE/ELENA has shown that in a number of Member States asylum seekers are entitled to free legal assistance and representation from the start of the procedure, including during the personal interview at first instance. Such systems often operate through a mix of services provided by specialised NGOs as well as private lawyers compensated through the national legal aid schemes for their interventions.<sup>63</sup> A specific pilot project implemented in the UK, known as the Solihull Pilot, has shown that ensuring asylum seekers' access to quality information and advice from legal advisers from the earliest stage of the asylum process, as well as allowing the legal representative an active role at interviews, contributed to improving the quality of decision-making and resulted in faster, higher quality, and more sustainable asylum decisions.<sup>64</sup> However, in other EU Member States legal assistance and representation is almost non-existent in practice, in particular at the first instance.

In ECRE's view it is crucial for the recast Asylum Procedures Directive to unambiguously establish the principle that asylum seekers who lack the financial resources are entitled to free legal assistance and representation at all stages of the asylum procedure.<sup>65</sup> Otherwise, the recast Asylum Procedures Directive will provide little or no added value with respect to the 2005 Asylum Procedures Directive, even though legal assistance and representation have been identified by the Commission as important tools in the frontloading of asylum systems.<sup>66</sup> ECRE had recommended to further amend the relevant provision in the 2009 Commission recast proposal to properly reflect such guarantee in order to ensure that legal representatives, be it mandated NGO representatives or private independent lawyers, have the possibility not only to inform asylum seekers before and after, but also to assist them during the first instance interview.<sup>67</sup>

In this respect, the newly introduced distinction between legal and procedural information free of charge in procedures at first instance and free legal assistance and representation in appeals procedures may add to the clarity of the text but, it does not fundamentally alter the content of the minimum guarantee that was included in the 2009 Commission proposal.<sup>68</sup> In order to accommodate better existing legislation in a number of EU Member States, the new amended recast Article 19 now allows Member States to ensure the provision of "information on the procedure in light of the applicant's particular circumstances and explanations of reasons in fact and in law in the event of a negative decision" outside the context of legal assistance or representation. At the same time, it is explicitly stipulated that where Member States provide free legal assistance and/or representation in procedures at first instance,<sup>69</sup> new amended recast Article 19 shall not apply thus assuming that such information is included in free legal assistance and/or representation. This provides Member States with additional discretion as to the framework within which such information will be provided to asylum seekers.

New amended recast Article 20 on free legal assistance and representation in appeals procedures now provides that free legal assistance and representation must be granted on

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<sup>63</sup> ECRE/ELENA, *Survey on Legal Aid for Asylum Seekers in Europe* (hereinafter '[Legal Aid Survey](#)'), October 2010.

<sup>64</sup> See J. Aspden, *Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission*, March 2008, pp. 9-17.

<sup>65</sup> Recent research by the Fundamental Rights Agency on access to effective remedies from the asylum-seeker perspective illustrated again the importance of free legal assistance to ensure effective access to justice. According to the Fundamental Rights Agency "[t]he right to be assisted free of charge by a lawyer is a precondition to ensure effective access to justice, particularly in light of the complexity of asylum procedures". See European Union Agency for Fundamental Rights, *Access to effective remedies: The asylum-seeker perspective*, 2011, p. 9.

<sup>66</sup> See COM(2011)319 ANNEX, *Detailed Explanation*, p. 6. It should also be noted that the European Commission indicates a possible link between the availability of free legal assistance at first instance and recognition rates because "indicatively, MS which make free legal assistance available to applicants in procedures at first instance are above or close to an EU average as regards first instance positive decisions on asylum applications, whilst MS which do not follow this approach, with a few exceptions, have lower rates". See European Commission, *Impact Assessment 2009 Commission recast proposal*, pp. 13-14.

<sup>67</sup> See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 26-27.

<sup>68</sup> See Article 18(2)(a) of the 2009 Commission proposal recasting the Asylum Procedures Directive.

<sup>69</sup> See new amended recast Article 20(2).

request in appeals procedures which must include at least the preparation of the required procedural documents and participation in the hearing before the court or tribunal of first instance on behalf of the applicant. ECRE welcomes the clarification in this provision that both legal assistance and representation must be provided in appeals procedures instead of the ambiguous reference to legal assistance *and/or* representation in Article 15 Asylum Procedures Directive. This affirms the obligation for Member States to provide proper legal representation in proceedings at the appeal stage. This is important, in particular in absence of a clear definition of the terms *legal assistance* and *legal representation* in the amended Commission recast proposal.

ECRE recommends further modifying new amended recast Articles 19 and 20 to ensure that free legal assistance and representation is provided at all stages of the asylum procedure to asylum seekers who lack sufficient resources. This should include the possibility for the provider of legal assistance and representation to be present during all interviews at the first instance.

#### *Merits-testing at appeal stage*

ECRE regrets the reintroduction of the possibility for Member States to refuse free legal assistance and representation “if the applicant’s appeal is considered by a Court or Tribunal to have no tangible prospect of success”.<sup>70</sup> This “merits-test” may function as a mechanism to discourage appeals in cases that have little or no substance, but may at the same time result in depriving asylum seekers from an essential procedural guarantee, access to justice.<sup>71</sup> Research has shown that practice in EU Member States on merits-testing differs widely. In a number of Member States such a mechanism is unknown, while there is also variety of practice as to what constitutes a reason for refusal in those Member States where a merits-test is applied.<sup>72</sup> In particular in light of the fact that asylum seekers are in a disadvantaged position in the asylum procedure as they are often unfamiliar with the laws of the host state and the complexity of the procedure, ECRE believes that a merits-test should in principle be avoided in asylum procedures. It constitutes an exercise in trying to predict the outcome of the examination of the need for international protection and in view of the increasingly crucial role of legal assistance and representation in asylum procedures, it may undermine equality of arms and result in appeals procedures being conducted less thoroughly and on the basis of incomplete files.<sup>73</sup> ECRE therefore recommends the deletion of new amended recast Article 20(3).

ECRE recommends deleting new amended recast Article 20(3) reintroducing the possibility of a merits test with regard to the applicant’s appeal.

#### *Providers of legal and procedural information, legal assistance and representation*

Amended recast Article 21 sets out the conditions for the provision of legal and procedural information free of charge and free legal assistance and representation. Whereas this new provision partly reproduces the content of Article 18(3), (4), (6) and (7) it includes a new

<sup>70</sup> See Amended recast Article 20(3).

<sup>71</sup> Research on merits-testing in the UK as part of an Asylum Appellate project which was geographically confined to Devon and Cornwall found that if a similar pattern was evident all across the UK it would “suggest that legal representatives are wrongly refusing Controlled Legal Representation in almost four out of every five cases”. See Devon Law Centre, *Asylum Appellate Project – Final Report*, March 2010, p. 7.

<sup>72</sup> ECRE/ELENA, [Legal Aid Survey](#), October 2010, pp. 29-30.

<sup>73</sup> See C. Costello, “The European asylum procedures directive in legal context”, *New issues in Refugee Research*, Research Paper No. 134, pp. 29- 32.



paragraph 1 which, if adopted, would set a highly questionable standard in EU legislation with regard to the nature and quality of the legal assistance and representation provided to asylum seekers in the EU. The objective of this new provision is to ensure wide discretion to the Member States as to how to comply with their obligations and is said to accommodate several Member States' existing systems.<sup>74</sup> It allows for a flexible system whereby such services may be provided by "non-governmental organisations, government officials, or specialised services of the State". In ECRE's view, legal and procedural information as well as legal assistance and representation is preferably provided by independent actors that are under no obligation to take any instructions whatsoever from governmental authorities. This is to avoid that the provider of the information or legal assistance and representation would be confronted with a conflict of interest or seen as under pressure not to prioritise the asylum seekers' best interests. It is hard to see how a relationship based on mutual trust can be established in practice between the asylum seeker and the person providing legal assistance or representation or information, if the latter is under the instruction of state authorities. Whereas new amended recast Article 21(1) usefully reminds Member States that procedural information and legal assistance and representation need not exclusively be provided through the services of private lawyers, but can also be provided through other actors such as specialised NGOs, it lacks any guarantee as to the independent nature and the quality of the services provided. ECRE's preferred option would be to delete the reference to "government officials or specialised services of the State" and to maintain the standard proposed in the 2009 Commission recast proposal which was to specify that legal assistance and representation can also be provided by non-governmental organisations at first instance and during appeals procedures.

However, if a reference to government officials or specialised services of the State is to be maintained in the recast Asylum Procedures Directive, ECRE strongly recommends introducing a specific requirement that such officials or services must have the power to act autonomously in the interest of their client and represent their client to the best of their ability. Such government officials or specialised services should be operationally independent from the determining authority and should not take instructions from that authority.

ECRE recommends deleting the words "government officials, or specialised services of the State" in amended recast Article 21(1).

#### *Scope of legal assistance and representation*

Amended recast Article 23 on the scope of legal assistance and representation lowers the standard with regard compared to that set in the 2009 Commission recast proposal with regard to access to the applicant's file. According to amended recast Article 23(1)(a) access to certain sensitive information should in any case be granted to either a legal adviser or counsellor who has undergone a security check or at least specialised services of the State allowed to represent the applicant for this specific purpose. ECRE fails to see the added value of the latter addition to the corresponding provision in the 2009 Commission recast proposal. As access to such information for legal advisers or counsellors is conditional on a security check, this already serves the purpose of ensuring that the information concerned is handled in an appropriate manner. At a minimum, legal advisers or counsellors who have undergone a security check and specialised services of the State should be on an equal footing in this regard in order to ensure effective access to justice and equality of arms. Should the proposed extension to specialised services in this provision be maintained, ECRE recommends to replace the words "or, at least," with "and".

ECRE also reiterates its recommendation to delete the reference to the ill-defined exception to access to the applicant's file such as the "investigative interests relating to the examination of applications" or the "international relations of the Member States" in amended recast Article 23(1). It is fundamental to a fair examination of the asylum application for the legal advisor or

<sup>74</sup> See COM(2011) 319 ANNEX, *Detailed Explanation*, p. 8.



representative to have full access to the information upon which a decision is based. Information should only be withheld in clearly defined, limited exceptional situations.

ECRE recommends deleting the words “or where the investigative...compromises” in amended recast Article 23(1).

ECRE recommends deleting the words “or, at least...purpose” in amended recast Article 23(1)(a).

## **6. Applicants in need of special procedural guarantees (Amended recast Articles 24 and 25)**

New amended recast Article 24 is entitled “applicants in need of special procedural guarantees” clarifying that special procedural needs and special reception needs may be different and may require different facilities, although the same mechanisms of identification may be used in order to recognize these respective special needs. In addition Member States must ensure that the provision also applies if the need for special procedural guarantees becomes apparent at a later stage in the procedure. The latter is an important safeguard. Victims of torture or extreme violence may not reveal particularly traumatising experiences immediately and therefore the recast Asylum Procedures Directive should provide for sufficient flexibility as to when special procedural guarantees are triggered to meet their specific needs at a later stage in the process.

### *Unaccompanied children*

The modifications proposed to the guarantees for unaccompanied minors in amended recast Article 25 both raise and lower the level of procedural guarantees for this particularly vulnerable group of asylum seekers. On the negative side amended recast Article 25(1)(a) no longer requires a representative of an unaccompanied minor to be “impartial”, but simply requires such a person to have the necessary expertise in the field of childcare and to perform his/her duties in accordance with the principle of the best interests of the child. ECRE regrets the deletion of the requirement of impartiality in view of the added reference to the best interest of the child. The representative’s impartiality is not incompatible to his/her duty to act in the best interests of the child,<sup>75</sup> which is an overarching principle governing all measures and acts relating to children laid down in the UN Convention on the Rights of the Child.<sup>76</sup> However, the representative’s independence from the determining authority may be an even more important condition to ensure that decisions on procedural steps are taken in the child’s best interests. As it stands, amended recast Article 25(1)(a) allows for wide discretion to the Member States as to who may act as a representative. As long as he or she has the “necessary expertise in the field of childcare”, any private person or government official can act as a representative for the unaccompanied child. Where the representative is a staff member of the determining authority or the authority responsible for return, this may complicate their task to “perform his/her duties in accordance with the best interests of the child” as they may feel under pressure to let certain policy considerations prevail.<sup>77</sup> In order to facilitate the task of the representative and ensure that the best interest of the child is a primary consideration in practice, ECRE recommends to reinsert the requirement that a representative be “impartial and independent” in amended recast Article 25(1)(a). At least it

<sup>75</sup> As suggested by the Commission in COM(2011) 319 ANNEX, Detailed Explanation, p. 9.

<sup>76</sup> “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.” See Article 3(1) UN Convention on the Rights of the Child. See also UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008.

<sup>77</sup> This may also affect the decision to make an asylum application or not. See also the observations above with regard to amended recast Article 7 on applications made on behalf of dependants or minors.

should be ensured that a representative will take no instructions from the determining authority or the authority responsible for organising return with regard to the assessment of the child's best interests in the performance of his/her tasks. The latter should preferably be specified in a recital.

On the positive side, amended recast Article 25(4) now requires that not only unaccompanied minors, but also their representative be provided free of charge with legal and procedural information. This is important as persons with expertise in childcare are not necessarily experts in asylum and refugee law and should receive the necessary assistance for this aspect of their task. It also specifies that the provision of legal and procedural information and legal assistance and representation to unaccompanied minors must be strictly separated from the tasks of the representative. However, ECRE would welcome clarification of the fact that such legal and procedural information shall be guaranteed for all procedures as it was the case in the 2009 Commission recast proposal.<sup>78</sup> The latter guarantee is now only implicitly included in the wording of amended recast Article 25(4). In this respect, ECRE reiterates its recommendation to ensure in amended recast Article 25(1)(b) that both "the representative and the legal advisor or other counsellor admitted as such are present at that interview and have an opportunity to ask questions or make comments". The particular vulnerability of unaccompanied minors requires both representatives and legal advisers or counsellors to be present during the interview.<sup>79</sup>

#### *Appointment of representatives*

ECRE also welcomes the proposed deletion of the possibility for Member States to refrain from appointing a representative where the unaccompanied minor is married or has been married in amended recast Article 25(2). Whether a child is married or has been married has no bearing on his/her maturity and need for special treatment and assistance. In some societies it is lawful to marry at a very young age but this is unrelated to their maturity. Moreover, their marriage may be linked to their fear of persecution, for example in the case of a forced marriage. Therefore, the recast Asylum Procedures Directive should not allow depriving unaccompanied children from such a crucial procedural safeguard. However, ECRE regrets that the possibility to refrain from appointing a representative where the unaccompanied minor "will in all likelihood reach the age of 18 years before a decision at first instance is taken" is maintained in amended recast Article 25(2)(a).<sup>80</sup> Here again, ECRE reiterates its recommendation to delete such exception as this will encourage unnecessary delays and States should have a generous approach in the handling of cases where the child reaches the age of 18 years during either the determination procedure or during the process of finding the best solution for the child.<sup>81</sup>

As medical assessments are subject to a wide margin of error,<sup>82</sup> ECRE fully supports amended recast Article 25(5) according to which Member States must give an unaccompanied minor the benefit of the doubt when doubts concerning the applicant's age persist after such medical examination. Finally, ECRE welcomes the fact that amended recast Article 25(6) exempts unaccompanied minors from the application of a merits test, but reiterates its recommendation to simply delete the possibility of merits-testing in general as it risks undermining the applicant's access to justice.

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<sup>78</sup> Article 21(4) of the 2009 Commission recast proposal explicitly mentioned that unaccompanied minors shall be granted free legal assistance *with respect to all procedures provided for in this Directive*.

<sup>79</sup> As is also recommended by the UN Committee on the Rights of the Child: "In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.". See Committee on the Rights of the Child, General Comment NO. 6 (2005), *Treatment of unaccompanied and separated children outside their country of origin*, par. 36.

<sup>80</sup> The European Parliament proposed to delete this provision. See European Parliament Resolution of 6 April 2011, Amendment 59.

<sup>81</sup> ECRE, [Position on Refugee Children](#), November 1996, par. 30.

<sup>82</sup> See European Union Fundamental Rights Agency, *Separated, asylum-seeking children in European Union Member States. Comparative Report*, 2011, pp. 53-55.

ECRE welcomes amended recast Article 24 as an important safeguard for ensuring that special procedural guarantees are identified in due time and that applicants in need of such guarantees can present their claims under the best possible circumstances.

ECRE recommends further amending amended recast Article 25(1)(a) to require a representative to be “impartial and independent” and amended recast Article 25(1)(b) to require both a representative and a legal advisor or other counsellor to be present during personal interviews of unaccompanied minors.

ECRE recommends deleting amended recast Article 25(2) to ensure that representatives are appointed for all unaccompanied minors.

ECRE welcomes amended Article 25(4) but recommends adding that unaccompanied minors shall be granted legal and procedural information free of charge *with respect to all procedures provided for in this directive*.

ECRE welcomes the guarantee in amended Article 25(5) according to which Member States shall assume the applicant is a minor in case doubts persist concerning his/her age after a medical examination.

## **7. Implicit withdrawal or abandonment of the application (Amended recast Article 28)**

Amended recast Article 28(1) reintroduces the possibility for Member States to reject an application for international protection in case an applicant has “implicitly withdrawn or abandoned his/her application”, whereas the 2009 Commission recast proposal only allowed Member States to discontinue the examination in such cases. As the implicit withdrawal or abandonment of an asylum application is based on assumptions about the applicant’s intentions that are difficult to verify, it should not anticipate on the applicant’s need for international protection. No asylum application should be rejected before a proper examination of the merits of the application has been carried out. As amended recast Article 28(1) now makes rejection of the application conditional on the fact that “the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 [...] EU [the Qualification Directive] and further to a personal interview”; it now provides for the necessary guarantees that an applicant will not be denied protection merely because of an implicit withdrawal or abandonment and without a rigorous examination of the merits of the application. As a result, ECRE finds the proposed wording acceptable with the exception of the reference to the examination being “adequate”. As the meaning of “adequate” in this context is unclear and does not seem to provide any added value it should be deleted. ECRE furthermore recommends inserting the same wording in amended recast Article 27(1) with regard to the explicit withdrawal of the application should ECRE’s recommendation to delete the possibility to reject the application in those cases not be followed.<sup>83</sup>

However, ECRE questions the introduction of a specified time limit of at least one year after which the applicant’s case can no longer be re-opened or the new application may be treated as a subsequent application. There may be various reasons beyond the asylum seeker’s control why he or she failed to respond to a request for information or did not appear for a personal interview, such as when the asylum seeker is hospitalised or when the invitation for an interview in fact never reached the asylum seeker. Preventing that the case be re-opened after a certain time-limit or treating it as a subsequent application unnecessarily complicates the handling of such cases and may result in applications being rejected before an examination of the substance of the application has taken place. In ECRE’s view a flexible

<sup>83</sup> See ECRE, [ECRE Comments on the 2009 APD Proposal](#), at p. 27-28.

system is preferable whereby the examination is discontinued without taking a decision but including a notice in the applicant's file as is foreseen under Article 19(2) Asylum Procedures Directive.<sup>84</sup> Such a system does not impose any additional administrative burden on the determining authority, while it avoids application of the potentially cumbersome procedure for subsequent applications. At the same time such a system ensures that the principle of *non refoulement* is fully respected in practice.

With regard to the parts of amended recast Article 28 that remain unchanged compared to the 2009 Commission recast proposal, ECRE maintains its recommendations.<sup>85</sup>

ECRE recommends removing the possibility to reject an application in cases of explicit withdrawal from amended recast Article 28(1).

If the possibility to reject an application in such cases is maintained, ECRE supports the proposed modifications in amended recast Article 28(1) but calls for further amendment in order to:

- delete the word "adequate" in amended recast Article 28(1)
- Restrict the grounds on the basis of which an asylum application may be considered as withdrawn by rephrasing the second sentence of recast Article 28(1) as follows: "Member State may assume that the applicant has implicitly withdrawn or abandoned his/her application for international protection *only* when it is ascertained that:"
- Add a possibility for asylum seekers to explain their failure to report in the situations covered by recast Article 28(1)(b) by adding the words: "unless the applicant demonstrates within a reasonable time that his/her failure to comply with such duties was due to circumstances beyond his/her control".

ECRE recommends including in amended recast Article 28(2) an obligation for Member States to honour a request to reopen an application after implicit withdrawal by replacing the words "is entitled to request that his/her case be reopened" with "is entitled to have his/her case re-opened".

## **8. Examination procedure (Amended recast Article 31).**

Article 27 of the 2009 Commission recast proposal is modified in two ways. First, amended recast Article 31(3) increases the level of flexibility for Member States with respect to the six-month time limit within which an asylum procedure should in principle be concluded. If adopted, Member States would be allowed to extend the six-month time limit by another six months for three reasons: (1) where complex issues of fact and law are involved; (2) the large number of third country nationals or stateless persons applying simultaneously makes it practically impossible for the Member State to conclude the procedure within six months and (3) the delay can be attributed to the failure of the applicant to comply with his/her obligations under amended recast Article 13. On top of these increased opportunities for Member States to extend the time limit by another six months, the amended proposal also allows Member States to postpone "concluding the procedure" beyond such an extended period without setting a clear deadline. This is allowed whenever "the determining authority cannot reasonably be expected to decide within the time limits laid down in this paragraph due to an uncertain situation in the country of origin which is expected to be temporary". Secondly, the

<sup>84</sup> It should be noted that such systems are being applied already in a number of Member States, such as France, The Netherlands, Spain and the UK. See UNHCR, *Improving Asylum Procedures. Comparative analysis and Recommendations for Law and Practice (hereinafter UNHCR, Asylum Procedures Study)*. Section 7, *The withdrawal or abandonment of applications*, Brussels, March 2010, at p. 8.

<sup>85</sup> See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), at p. 29.

amended recast proposal adds two criteria on the basis of which examination procedures may be accelerated *and/or conducted at the border in accordance with Article 43*.<sup>86</sup>

### *Six-month time limit*

ECRE has cautiously welcomed the idea of setting a six month time limit in principle as it will help to limit the period during which persons in need of international protection and those whose application is eventually rejected, remain in an uncertain situation, delaying their integration into the host society or the preparation of their return to the country of origin.<sup>87</sup> Such a time limit may also contribute to ensuring the general principle of EU law that a right guaranteed by EU law requires a procedural system that guarantees the persons concerned will have their applications dealt with objectively and within a reasonable time period.<sup>88</sup> However, the six month time-limit may also negatively affect the quality of the decisions taken by the asylum authorities as they may feel obliged to examine the applications less thoroughly because of the time-pressure. The latter risk may be rather limited as non compliance with the six- month time-limit or extended deadlines does not provoke any specific consequences for the Member States or for the applicants. In this regard the six month time limit in the amended recast proposal remains aspirational for Member States rather than a binding norm.

While the possibility to extend the time limit for concluding the procedure by another six months for reasons of complexity of the case is acceptable, ECRE strongly opposes the possibility to postpone concluding the procedure where a decision cannot be taken due to an uncertain situation in the country of origin. Although this remains optional for Member States, ECRE fears that this may be “abused” by determining authorities to systematically postpone the granting of protection statuses to persons in need of international protection in a wide range of situations based on the assessment that the situation in the country of origin is uncertain and expected to be temporary. This is particularly the case since such possibility to postpone concluding the procedure is not linked to a situation where a large number of third country nationals or stateless persons apply for asylum simultaneously in a Member State. Theoretically every situation in a given country of origin is to an extent uncertain and by definition temporary. Including this option in the recast Asylum Procedures Directive would in ECRE’s view equate promoting bad practice and would undermine the main purpose of any asylum system which is to provide protection to those who need it when it is needed. Member States have tools under international refugee law at their disposal to end protection when the reasons why protection was granted have ceased to exist, including when the situation in the country or origin has changed and protection can again be obtained from the authorities in the country of origin.<sup>89</sup> The cessation clauses in the Qualification Directive allow Member States to withdraw protection status under certain conditions and according to the procedural guarantees laid down in the Asylum Procedures Directive.<sup>90</sup> Member States should in any

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<sup>86</sup> Amended recast Article 31(6).

<sup>87</sup> ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 32.

<sup>88</sup> See Court of Justice, Case C-327/02, *Panayotova*, 16 November 2004, par. 27 concerning the Dutch system of temporary residence permits that was applied vis-à-vis Bulgarian nationals, and its compliance with the provisions relating to the right to establishment under the then EC-Bulgaria Association Agreement. See also COM(2009) 551 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Brussels, 21 October 2009.

<sup>89</sup> Article 1 C (5) and (6) of the 1951 Geneva Refugee Convention provides for the cessation of a refugee’s status “because the circumstances in connection with which he has been recognized as a refugee have ceased to exist”. For authoritative guidance on its application see UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003.

<sup>90</sup> See Article 11(3)(e) and (f) and 16(1) and (2) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter ‘Qualification Directive’), OJ 2004 L 304/12. It should be noted that the compromise between the European Parliament and the Council on the Commission proposal recasting the Qualification Directive amends both provisions by excluding the application of cessation to refugees or beneficiaries of subsidiary protection who are able to invoke compelling reasons arising out of previous persecution or serious harm for refusing to avail themselves of the protection of the country of nationality or of former habitual residence.



case not be encouraged in the recast Asylum Procedures Directive to withhold protection from those who need and deserve it contrary to their obligations under international refugee and human rights law and the Qualification Directive.<sup>91</sup> Swift decision-making is in the States' interests as it contributes to the efficiency of the procedure while postponing decisions prolongs the provision of reception conditions to asylum seekers and increases costs of the asylum system. From this perspective, the proposed amendment also undermines the stated objective of making the recast proposal more efficient and cost-effective.<sup>92</sup>

At the same time, ECRE recommends deleting recast Article 31(3)(c) allowing an extension of the six-month time-limit by a further six months where the delay can be attributed to the failure of the applicant to comply with his/her obligations under Article 13. Some of the obligations referred to, such as the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) Qualification Directive, are open to wide interpretation. As such the provision grants considerable discretion to the Member States to decide when an applicant for international protection fails to comply with his/her obligations. As this would potentially render any positive impact of a six month time limit for concluding the procedure meaningless in practice, ECRE strongly recommends deleting this possibility.

### *Grounds for accelerated procedures*

Amended recast Article 31(6) reintroduces two grounds for acceleration of the examination of the asylum application and at the same time creates the possibility for States to conduct the asylum procedure at the border in all cases where the procedure may be accelerated.

Recent research by UNHCR on asylum procedures in 12 EU Member States has again shown how accelerated procedures in most cases undermine procedural safeguards for asylum seekers and put them in a disadvantaged position. Negative effects of accelerated asylum procedures include less time for asylum seekers to submit an application form to the determining authority, reduced time to prepare for an interview – which is, in some cases, conducted the same day the application is lodged – and less time to consult a lawyer.<sup>93</sup> The use of accelerated procedures should be the exception not the rule and ECRE encourages States to prioritise, rather than accelerate the examination of asylum applications and agrees with the approach taken in amended recast Article 31(5). However, if a provision on accelerated procedures is considered necessary in the context of the recast Asylum Procedures Directive, it should be limited to cases within the scope of UNHCR's EXCOM Conclusion No. 30 – cases which are clearly fraudulent or not related to the grounds for granting international protection.<sup>94</sup> Therefore, ECRE reiterates its recommendation to delete amended recast Article 31 (6)(c) as the use of false documentation in the asylum application is in principle immaterial to the question of whether the person concerned is in need of international protection. In addition, channelling such applications systematically in accelerated procedures is questionable under Article 31 of the 1951 Geneva Refugee

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<sup>91</sup> See Article 13 and 18 Qualification Directive imposing *an obligation* on Member States to grant refugee status or subsidiary protection status to a third country national or stateless person who qualifies as a refugee or is eligible for subsidiary protection in accordance with the directive respectively. See M.-T. Gil-Bazo, "Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum", in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, p. 236–239

<sup>92</sup> Amended Recast Proposal, *Explanatory Memorandum*, p. 1.

<sup>93</sup> It should also be noted that some interviewers and case workers expressed concern to UNHCR that, because of the short time limits that apply in accelerated procedures, they have not enough time to investigate and assess evidence. See UNHCR, *Study on Asylum Procedures. Section 9 – Prioritized and accelerated examination of applications*, p. 35-38.

<sup>94</sup> See ECRE, [The Way Forward – Asylum Systems](#), p. 43. Defined in EXCOM Conclusion No 30 as "applications which are considered to be so obviously without foundation as to merit full examination at every level of the procedure". It should be noted that the EXCOM conclusion at the same time reminds states that such applications can also be processed through other mechanisms for speeding up procedures, such as allocating sufficient personnel and resources to determining authorities, and measures that would reduce the time required for the completion of appeals procedures.

Convention, according to which states “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.<sup>95</sup>

ECRE is also opposed to the use of a safe country of origin concept in the asylum procedure as it is inconsistent with the proper focus of international refugee law on individual circumstances and can amount to discrimination between refugees in violation of Article 3 of the Geneva Refugee Convention and is therefore also opposed to using the concept as a ground for acceleration. Amended recast Article 31(6)(e) reintroduces existing Article 23(4)(g) but deletes any reference to the applicant’s “inconsistent, contradictory or insufficient representations” and requires that the applicant makes “clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information” before the examination of the application can be accelerated on this ground. As this is now rephrased to clearly concern the substance of the asylum application within the framework of EXCOM Conclusion No. 30, ECRE believes such ground for acceleration could be acceptable as it is related to the amended recast Article 31(6)(a) relating to the applicant having raised only issues that are not relevant to the examination of whether the applicant qualifies for international protection.

Amended recast Article 31(6)(g) reintroduces Article 23(4)(m) but replaces the requirement that the applicant “is” a danger to the national security or public order with the more vague test that an applicant “may for serious reasons be considered” a danger to the national security. Whatever formulation is being used, ECRE believes that being a danger to the national security or public order should not necessarily be a reason to accelerate the examination of the individual’s asylum application. As mentioned above, Member States have other tools at their disposal, such as prioritisation of such cases, to ensure that such cases are being dealt with first. As these are, by definition, sensitive cases, it is paramount that such asylum applications are examined rigorously in a procedure guaranteeing the full range of procedural safeguards.

Finally, by adding the words *and/or conducted at the border in accordance with Article 43* to amended recast Article 31(6) possibilities for conducting asylum procedures at the border are considerably extended. This would theoretically allow Member States to examine an application at the border, even if the applicant had made his/her application within the territory. As conducting an asylum procedure at the border as such is undesirable, ECRE strongly opposes this amendment and recommends deleting it.<sup>96</sup>

ECRE recommends deleting amended recast Article 31(3) (b) and (c) and amended recast Article 31(3) as they provide inappropriate reasons for extending the conclusion of the asylum procedure and promoting bad practice.

ECRE recommends deleting amended Article 31(6) (b), (c), (d) and (g) as they unnecessarily add criteria for acceleration of asylum procedures.

ECRE recommends deleting the words “*and/or conducted at the border in accordance with Article 43*” in amended recast Article 31(6).

<sup>95</sup> See Article 31(1) 1951 Geneva Refugee Convention. According to Hathaway “[t]he case is strong that the assignment of refugees who arrive without proper documentation to abbreviated procedures is in essence a penalty inflicted for irregular entry. [...] Because the essential purpose of Art. 31 is to insulate refugees from penalties for the act of crossing a border without authorization, a refugee may not lawfully be denied access to ordinary legal entitlements to a complete refugee status inquiry simply because he or she has used false documents to enter the country, or otherwise contravened migration control laws.” See J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 408

<sup>96</sup> See below section 12.



## 9. Inadmissible applications (Amended recast Articles 33 and 34)

The only substantial change to Article 29 of the 2009 Commission recast proposal on inadmissible applications concerns amended recast proposal 33(2)(d). The latter reformulates this admissibility ground as referring to any subsequent application where no new elements or findings have arisen or have been presented by the applicant whereas, in the 2009 Commission recast proposal, this was limited to when the “applicant had lodged an identical application after a final decision”.<sup>97</sup> The consequence of finding an application inadmissible is that Member States are no longer required to examine whether the applicant qualifies for international protection. Therefore, the inadmissibility grounds listed in the recast Asylum Procedures Directive should be restricted to those cases where it is guaranteed that protection is available elsewhere or it is clear that protection is not needed. With respect to subsequent applications, sufficient guarantees need to be in place to ensure that all aspects of the asylum application have been examined in the first procedure and that a proper assessment has taken place as regards the new elements or findings with regard to the need for international protection. Amended recast Article 40(2) continues to make a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant mandatory for the purpose of applying amended recast Article 33(2)(d). Therefore, ECRE believes that the new wording of amended Article 33(2)(d) still offers such guarantee and is acceptable as an inadmissibility ground.

However, in order to ensure that such preliminary examination in the case of a subsequent application is meaningful in practice it should include a personal interview. This is because in many cases asylum seekers are not able to produce material proof of new elements as defined in amended recast Article 40(3) substantiating their subsequent application, even where such new elements exist. Therefore, ECRE reiterates its recommendation to restrict the exception to the mandatory personal interview on the admissibility of the application in the case of a subsequent application to where it is possible to consider such application as admissible solely on the basis of the written material provided by the applicant or where the applicant for international protection is unfit or unable to be interviewed. In ECRE’s view, amended recast Article 33(2)(d) is acceptable as an inadmissibility ground only on the condition that Article 34 on special rules on an admissibility interview are amended as suggested by ECRE.

Furthermore, ECRE reiterates its opposition to the inclusion of safe third country cases in admissibility procedures. In light of the potential irreversible harm that may result (directly or indirectly) from returning an applicant to a third country, the question of whether a country can be considered safe for a particular applicant must always be the subject of rigorous scrutiny and must be dealt with in a substantive determination procedure. Therefore ECRE recommends deleting amended recast Article 33(2)(c)

ECRE recommends deleting amended recast Article 33(2)(c) allowing Member State to use the safe third country concept as an inadmissibility ground.

ECRE recommends modifying amended recast Article 34(1) by adding: “*Such an exception should only be applied where a subsequent application can be considered admissible on the basis of the written material provided by the applicant for international protection or where the applicant for international protection is unfit or unable to be interviewed*”.

## 10. Safe country concepts (Amended recast Articles 35 – 39).

The amended recast proposal only includes a limited number of changes to the provisions on the four safe country concepts in the 2009 Commission recast proposal. The explicit requirement added in amended recast Article 35 to allow the applicant to challenge the

<sup>97</sup> Recast Article 29(2)(d).

application of the first country of asylum concept in his/her particular circumstances in amended recast Article 35 as well as the new obligation in amended recast Article 39 on Member States to inform the Commission periodically on the countries to which the European safe third country concept is applied, are welcome improvements to the 2009 Commission recast proposal. With respect to the concept of first country of asylum, ECRE reiterates its recommendation to require, in amended recast Article 35(b), protection to be effective rather than sufficient.<sup>98</sup> This is necessary to ensure that not only protection against *refoulement* but the full range of refugee rights enumerated in the Geneva Refugee Convention, the Qualification Directive and other international and European human rights instruments are guaranteed in a first country of asylum.

However, ECRE regrets that the Commission did not take the opportunity to fundamentally review the role of safe country concepts in the construction of the CEAS. This is despite of the European Parliament's suggestion to delete the European Safe Third Country Concept and replace it with a fundamentally revised Safe Third Country concept and abolish the possibility of national lists of safe countries of origin and safe third countries.<sup>99</sup> The Commission considers the European Parliament's idea to delete national lists of safe countries and adopt common EU lists to be unrealistic at this moment but something to be considered in the future once the EASO has sustainable capacity to draft country of origin reports.<sup>100</sup>

ECRE remains opposed to the use of the concepts of safe countries of origin and safe third countries as they may fundamentally undermine asylum seekers' access to a fair and efficient asylum procedure and prevent persons in need of international protection to have access to such protection. ECRE is also opposed to the concept of European Safe Third Country as laid down in the Asylum Procedures Directive.<sup>101</sup> As it allows Member States to conduct no or no full examination of the asylum application and completely deny the applicant's particular circumstances under certain conditions, it could amount to a violation of the principle of *non-refoulement*. Moreover, the use of national lists of safe countries of origin and safe third countries is incompatible with the establishment of a CEAS as practice shows that Member States have fundamentally different views as to which countries should be considered safe and why. This raises fundamental doubts as to the relevance and reliability of such concepts within the context of a CEAS.<sup>102</sup> ECRE therefore prefers to delete these clauses in the recast Asylum Procedures Directive including the possibility for Member States to make use of national lists.<sup>103</sup>

Should the creation of common EU lists of safe countries be included in the recast Directive, as suggested by the European Parliament, it is imperative that those lists be adopted according to the ordinary legislative procedure so as to ensure compliance with the jurisprudence of the CJEU.<sup>104</sup> At the same time, measures should be taken to ensure a swift adjustment of such a common list in case the human rights situation in one of the countries included in the common list deteriorates and the country concerned can no longer be considered safe. Given its potential impact on the fairness of asylum procedures throughout the EU and its politically sensitive nature, the composition and adaptation of such list should fully respect European Parliament's powers under the Lisbon Treaty in the area of freedom,

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<sup>98</sup> This would also be consistent with the wording of Article 7(2) of the recast Qualification Directive as agreed between the European Parliament and the Council that now explicitly requires protection to be "effective". See Council of the European Union, *Proposal for a Directive 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, a uniform status for refugees or for persons eligible for subsidiary protection and the content of the protection granted*, Doc. No. 12337/11 REV1, Brussels, 6 July 2011.

<sup>99</sup> European Parliament, European Parliament Resolution of 6 April 2011 on Commission Proposal recasting the Asylum Procedures Directive, Amendments 84, 85 and 91.

<sup>100</sup> Amended Recast Proposal, *Explanatory Memorandum*, p. 4.

<sup>101</sup> See Article 36 Asylum Procedures Directive.

<sup>102</sup> See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), pp. 36-42.

<sup>103</sup> For suggestions as to how to improve the wording of the relevant provisions in the amended recast proposal, should the concepts of safe countries of origin and safe third countries be maintained, see ECRE, [ECRE Comments on the 2009 APD recast proposal](#), at p. 39 and 41.

<sup>104</sup> Court of Justice, Case C-133/06, *European Parliament and Commission v. the Council*, 6 May 2008.

security and justice. However, in addition to its objections to the use of safe country concepts, ECRE seriously doubts the feasibility of a common EU list of safe countries of origin or safe third countries, even on the basis of reports drafted by EASO. This is because Member States have very diverging views on which countries can be considered safe and which criteria should be used in order to consider them safe. In addition it is hard to imagine an EU mechanism that would have the degree of flexibility required to respond adequately to often rapidly changing situations in the countries concerned and ensure constant updating of the common list.

ECRE recommends further modifying amended recast Article 35 by replacing the word “sufficient” with “effective”.

ECRE recommends deleting amended recast Article 36 as the relevance of the concept of a safe country of origin in the context of the CEAS can be seriously questioned, and it creates a disproportionate procedural disadvantage for the applicant.

ECRE recommends deleting amended recast Article 37 regarding national lists of safe countries as they undermine harmonisation and are incompatible with a CEAS.

ECRE recommends deleting amended recast Article 38. If the safe third country concept is to be maintained, ECRE recommends further amending Article 38 to ensure that it can only be applied as part of an individual examination with essential safeguards and clear requirements as suggested in its May 2010 comments paper.

ECRE recommends deleting amended recast Article 39 on the European Safe Third Country concept.

## **11. Subsequent applications (Amended recast Articles 40-42).**

The rising number of subsequent applications remains a cause for concern in a number of EU Member States as it places additional burden on their asylum systems and may affect the proper functioning of asylum procedures. As much as government's concerns may be legitimate, ECRE reiterates that the growing number of subsequent applications may also be indicative of the failure of asylum authorities to identify protection needs properly and in a timely manner during the first asylum procedure. The phenomenon of subsequent applications should not be predominantly addressed from the perspective of “abuse” and it is important that the recast Asylum Procedures Directive reflects a balanced approach. ECRE therefore welcomes the fact that the amended recast proposal further clarifies the rules on subsequent applications in the Asylum Procedures Directive while maintaining a sufficient level of procedural guarantees.

As it is stipulated in recast amended Article 40(5), a subsequent application must now be declared inadmissible when after a preliminary interview it is determined that no new elements have arisen or have been presented by the applicant, whereas the 2009 Commission recast proposal remained silent on this issue. ECRE welcomes such clarification as it also unambiguously ensures access to an effective remedy under the recast Asylum Procedures Directive.<sup>105</sup> Further clarification is also provided by the new definition of subsequent application referring to a further application made after a final decision was taken on a previous application.<sup>106</sup> However, as the latter unambiguously requires that a final decision has been taken, ECRE recommends further clarifying “further representations” in amended recast Article 40(1). This notion is, according to amended recast Article 41(1), to be distinguished from subsequent applications but is on the other hand only referred to in amended recast Article 40(7) dealing with persons with regard to whom a transfer decision

<sup>105</sup> See amended recast Article 46(1)(a)(ii).

<sup>106</sup> See amended recast Article 2(q).

has to be enforced pursuant to the Dublin Regulation. The rest of the provision is exclusively referring to subsequent applications while the notion of further representations is not defined nor used elsewhere in the amended recast proposal.

Furthermore, ECRE reiterates its recommendation to delete amended recast Article 40(4). This provision continues to allow Member States discretion to decide *not to examine* a subsequent application because the applicant could have raised the new elements and findings during the previous procedure, and in particular during the appeals procedure. There may be numerous legitimate reasons why an asylum seeker did not fully disclose relevant facts during an initial application and therefore a subsequent application may be necessary, even if no “new facts” have been raised.<sup>107</sup> ECRE shares the Commission’s analysis of the main root causes of subsequent applications<sup>108</sup>, but believes that deletion of amended recast Article 40(4) is necessary to ensure effective safeguards against *refoulement*.<sup>109</sup>

In ECRE’s view, new amended recast Article 41, while formulating Member States’ options more clearly in case of a subsequent application made after an inadmissibility decision pursuant to Article 40(5) or a final negative decision on a previous subsequent application, does not change the substance of the corresponding recast Article 35(8) in the 2009 proposal. It is acceptable that in those cases fewer guarantees can be applied provided that the first application was subject to a fair and substantive examination.

In line with its recommendations on amended recast Article 33 and 34 and for the reasons explained above, ECRE recommends further modifying amended recast Article 42(2)(b) in order to restrict the possibility to omit a personal interview in the context of a preliminary examination to those cases where the written material submitted allows to consider such an application admissible or where the applicant is unfit or unable to be interviewed. Such amendment would make the explicit exception in amended recast Article 42(2)(b), for the cases referred to in amended recast Article 40(6)) redundant as their right to be interviewed would be covered by the proposed wording.

ECRE recommends further clarification of the notion of “further representations” in the context of subsequent applications or alternatively delete such notion.

ECRE recommends deleting amended recast Article 40(4) and amend recast Article 42(2)(b) to read as follows: “permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, *only where it is possible to consider a subsequent application admissible without such personal interview or where the applicant is unfit or unable to be interviewed.*”

## 12. Border Procedures (Amended recast Article 43).

Amended recast Article 43 usefully clarifies that procedures at the border or in transit zones may only deal with the admissibility of applications as defined in amended recast Article 33, lodged in such locations. As a result, the revised provision now ensures that the same concept of admissibility applies regardless of where the application for international protection

<sup>107</sup> This is especially the case for traumatised individuals or victims of rape and torture who may have difficulties recounting their experiences. ECtHR and UNCAT case law underlines the need for flexibility in such cases. See ECtHR, *Hatami v. Sweden*, Application No. 32448/96, Judgement of 23 April 1988, par. 106 and UNCAT, Communication No. 13/93, *Matumbo v. Switzerland*, 27 March 1994.

<sup>108</sup> See COM(2009) 554 final ANNEX, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast). Detailed explanation of the Proposal*, pp. 16-17.

<sup>109</sup> The corresponding Article 35(6) in the 2009 recast proposal was deleted by the European Parliament. See European Parliament Resolution of 6 April 2011, Amendment 88.

is being lodged and therefore also avoids diverging interpretations of this notion in the context of border procedures which would undermine the objective of harmonisation.<sup>110</sup>

While this is to be welcomed, ECRE is concerned that the amended recast proposal still allows Member States to deal with the substance of an application in an accelerated procedure at the border or in a transit zone. Conducting an examination of the substance of an asylum application at such locations in the majority of cases negatively affects the quality of the examination procedure and the decision taken. This is because there are often restraints on access to legal assistance and representation<sup>111</sup> and the availability of interpretation and qualified personnel in these locations. Border procedures are by definition ill-suited to deal with the substance of an application for international protection as asylum seekers have, in most cases, no or very limited time to prepare for the interview and the examination is taking place while the applicant is in detention, which is not an appropriate environment. Therefore, ECRE maintains its recommendation to delete amended recast Article 43(1)(b).

Unfortunately, the amended recast proposal also extends considerably the possibilities for Member States to make use of accelerated procedures at the border. This is because amended recast Article 31(6) now provides that “an examination procedure in accordance with the basic principle and guarantees of Chapter II be accelerated *and/or conducted at the border in accordance with Article 43*” in case the applications falls within one of the categories listed in this provision. By allowing that such procedures be either accelerated and/or conducted at the border, the amended recast proposal at least theoretically introduces the possibility for Member States to conduct a procedure at the border in such cases, even if the applicant applied within the territory. This would unnecessarily undermine the applicant's access to a fair and efficient asylum procedure, as it would, in most Member States, be likely to make for example access to legal assistance and representation more difficult as well as communication with family members or members of their community present in the host Member State.<sup>112</sup> As mentioned above, in ECRE's view border procedures should in principle not be used to examine the substance of the application. However, should such a possibility be maintained in the recast Directive, ECRE strongly suggests to delete the words “and/or conducted at the border in accordance with Article 43” in amended recast Article 31(6) for the reasons stated above. If the aim of the amendment is to clarify that Member States are allowed to examine asylum applications made at the border according to an accelerated procedure in the cases listed in this provision, it should be noted that this is already covered by the reference to Article 31(6) in amended recast Article 43(1)(b). As in this case the amendment would be duplicating what is already stipulated in the provision on border procedures, it should simply be deleted for the sake of clarity.

ECRE recommends deleting amended recast Article 43(1)(b) allowing for the substance of an application for international protection to be examined in border procedures.

ECRE recommends deleting the words “*and/or conducted at the border in accordance with Article 43*” in amended recast Article 31(6).

<sup>110</sup> As recommended by ECRE with regard to recast Article 37(1)(a) of the 2009 proposal. See ECRE, [ECRE Comments on the 2009 APD recast proposal](#), p. 44. ECRE's observations with regard to admissibility decisions at the border must be read in light of the comments above on inadmissibility procedures.

<sup>111</sup> Research by ECRE/ELENA on legal aid in Europe revealed various obstacles for asylum seekers at the border to have access to legal assistance or representation in practice in a number of EU Member States, including insufficient time to see a lawyer's assistance at the border; lack of funding for NGO's providing legal assistance at the border or lack of information on legal assistance. See ECRE/ELENA, [Legal Aid Survey](#), p. 44.

<sup>112</sup> Ibid.

### 13. Effective remedy (Amended recast Article 46).

ECRE notes that the principles underlying amended recast Article 46 do not fundamentally differ from Article 41 of the 2009 Commission recast proposal. It requires a right to an effective remedy against most decisions possible under the Asylum Procedures Directive as well as for persons granted subsidiary protection against the decision to consider an application unfounded in relation to refugee status. It continues to define the scope of an effective remedy as requiring a full examination of both facts and points of law, including an examination of international protection needs pursuant to the Qualification Directive at least in appeal procedures before a court or tribunal of first instance at the time of appeal.<sup>113</sup> Member States are required to provide for reasonable time limits which shall not render impossible or excessively difficult the access of applicants to an effective remedy. An important modification as compared to the 2009 Commission recast proposal is the deletion of the decision “not to conduct an examination pursuant to Article 36” in the list of decisions against which Member States must ensure applicants the right to an effective remedy. This provision concerns the application of the European Safe Third Country concept, according to which Member States may decide to conduct no, or no full, examination of the asylum application of asylum seekers who have entered or seek to enter illegally into their territory from a country that has ratified the ECHR and the 1951 Geneva Refugee Convention and has an asylum procedure in place. As the application of this concept already fundamentally undermines the right to asylum, it is crucial that applicants for international protection have access to an effective remedy against such decisions in order to ensure compliance with the principle of *non-refoulement*. As mentioned before,<sup>114</sup> ECRE’s preferred option is for the deletion of the concept of European Safe Third Countries in the recast Asylum Procedures Directive, in which case amended recast Article 46 does not need to guarantee the right to an effective remedy against such decisions. However, should the concept be maintained in the recast Directive, ECRE strongly recommends reinserting amended recast Article 46(1)(a)(iv) “not to conduct an examination pursuant to Article 39”.

#### *Suspensive effect*

As to the suspensive effect of the effective remedy, which is essential in asylum procedures to ensure compliance with *non-refoulement* in all circumstances, the same double standard that was introduced in the 2009 Commission recast proposal applies. In principle, Member States must allow applicants to remain in the territory pending the outcome of the remedy during “normal appeals”. The clarification that such right to remain exists “until the time within which to exercise their right to an effective remedy has expired or, when this right has been exercised with the time limit, pending the outcome” does not affect the meaning of such right. It simply establishes a link with the time-limit for lodging the appeal provided for in national legislation and the consequences for not complying with such a time-limit.<sup>115</sup> However, where the appeal is against a decision to consider an application unfounded where any of the circumstances listed in amended recast Article 31(6)(a) to (g) apply<sup>116</sup> or against a decision to

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<sup>113</sup> The requirement of an *ex nunc* examination of international protection needs in Amended recast Article 46(3) is in line with established case-law of the ECtHR: “If the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133). A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities (see *Salah Sheekh*, cited above, § 136)” See ECtHR, *N.A. v UK*, Application No. 25904/07, Judgement of 17 July 2008, par. 112.

<sup>114</sup> See above, section 10.

<sup>115</sup> Amended recast Article 46(5).

<sup>116</sup> It should be noted that the new wording of amended recast Article 46(6) differs from Article 41(6) of the 2009 Commission recast proposal that referred to “in case of a decision taken in an accelerated procedure pursuant to Article 27(6)”. This does not alter the meaning of this provision except for excluding those cases where in accordance with amended recast Article 32(2) Member States consider an application as manifestly unfounded under national legislation in any of the circumstances listed in amended recast Article 31(6). As a consequence, as those cases are not covered by amended recast Article 46(6), the “normal appeal” including automatic suspensive effect is applicable.



consider an application inadmissible pursuant to Article 33(2)(a) or (d), no automatic suspensive effect is required. In these cases it is sufficient that a court or tribunal is empowered to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or on its own motion. Pending such intermediary ruling the applicant must be allowed to remain on the territory of the Member State concerned.<sup>117</sup>

ECRE maintains its position that the latter system may be acceptable in the case of an appeal against an inadmissibility decision on a subsequent application because no new elements or findings relating to the examination of whether the applicant qualifies as a refugee or a person eligible for subsidiary protection have arisen or have been presented by the applicant. As the special rules in amended recast Article 41 following the rejection or inadmissibility of a subsequent application include guarantees to ensure compliance with the principle of *non-refoulement*, in such cases a full automatic suspensive effect may not be required, provided that a full examination of the merits of the first asylum application has taken place in accordance with the procedural safeguards laid down in the directive. ECRE is concerned about the extension of this mechanism by amended recast Article 46(6) to where an inadmissibility decision has been taken on the basis that another Member State has granted refugee status. At this moment EU asylum law does not include the principle of mutual recognition of positive decisions on asylum applications and in fact a reference to this principle in the Stockholm Programme as was suggested by the Commission, was rejected by Member States. Recent research has shown that in some Member States, persons with refugee status or subsidiary protection status have great difficulty in accessing socio-economic rights guaranteed under the Qualification Directive in practice.<sup>118</sup> As the European Court of Human rights in the case of *M.S.S v Belgium and Greece* did not accept the application of an automatic assumption that EU Member States comply with their obligations under the ECHR and required access to an effective remedy with the same guarantees as defined in its case law concerning expulsions to countries outside the framework of the Dublin Regulation,<sup>119</sup> the provision of lower guarantees on the basis that another EU Member State granted refugee status is questionable. Therefore, ECRE recommends deleting the reference to amended recast Article 33(2)(a) in amended recast Article 46(6).

Considering the potential consequences of removal before protection needs have been fully and finally ascertained, ECRE urges the Council and the European Parliament to ensure in the recast Asylum Procedures Directive that appeals against negative asylum decisions taken in accelerated procedures have full automatic suspensive effect. This is necessary to ensure compatibility with the jurisprudence of the ECtHR with regard to Article 13 ECHR, which clearly requires an automatic suspensive effect.<sup>120</sup> It is ECRE's view that, if acceleration is to take place, it should be enacted at the appeal stage. However, such acceleration at the appeal stage must never deprive an applicant of access to an automatic suspensive appeal, as this is an inherent part of the right to an effective remedy as interpreted by the European Court of Human Rights. On at least two occasions the European Court of Human Rights has criticised appeal procedures that do not provide for automatic suspensive effect but apply systems similar to the ones proposed in amended recast Article 46(6). In a case concerning the expulsion by Turkey of two Iranian Refugees to Iran, the Court found that the applicants were never afforded an effective and accessible remedy in relation to their complaints under

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<sup>117</sup> Amended recast Article 46(7).

<sup>118</sup> See Pro Asyl, *The Living Conditions of Refugees in Italy*, February 2011 and Swiss Refugee Council and Jussbuss, *Asylum Procedure and reception conditions in Italy. Report on the situation of asylum seekers, refugees and persons under subsidiary or humanitarian protection, with focus on Dublin returnees*, May 2011.

<sup>119</sup> ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, par. 387.

<sup>120</sup> "Given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect." See ECtHR, *Abdolkani and Karimnia v. Turkey*, Application No. 30471, Judgment of 22 September 2009, par. 108. See also ECtHR, *Baysakov and others v. Ukraine*, Application No. 54131/08, Judgment of 18 February 2010, par. 71; *Gebremedhin v. France*, Application No. 25389/05, Judgment of 26 April 2007, par. 66 and *Muminov v. Russia*, Application No. 42502/06, Judgment of 11 December 2008, par. 101.



Article 3 ECHR. The Court stated explicitly that “[i]n any case, judicial review in deportation cases in Turkey can not be regarded as an effective remedy since an application for annulment of a deportation order does not have suspensive effect unless the administrative court specifically orders a stay of execution of that order”.<sup>121</sup> In a case concerning the transfer of an Afghan asylum seeker under the Dublin Regulation between Belgium and Greece, the European Court of Human Rights found a violation of Article 13 ECHR with regard to Belgium. The Court came to this conclusion notwithstanding the possibility for the applicant to request the suspension of the removal order in an extremely urgent procedure pending the outcome of the procedure on the annulment of the transfer decision because “while it is true that the Aliens Appeals Board did examine the complaints under Article 3 of the Convention in that judgment, the Court fails to see how, without its decision having suspensive effect, the Aliens Appeals Board could still offer the applicant suitable redress even if it had found a violation of Article 3”.<sup>122</sup>

The appeal procedure proposed in amended recast Article 46(6) does not necessarily cover an independent and rigorous scrutiny of a risk of *refoulement*. Essentially, in its examination of whether an appeal in those cases would have suspensive effect, the court or tribunal would begin examining the merits of the appeal, but would only later complete the examination and rule on the appeal itself. This process creates double scrutiny of the same material, burdening the already stretched judicial systems. Moreover, if the court or tribunal decided, on the basis of the preliminary assessment, that the asylum seeker need not remain in the territory, but after a full examination of the appeal concludes that the asylum seeker is nevertheless in need of international protection, the individual may have already been returned and subjected to irreversible harm. As a result, the appeal could be disadvantaged on the basis of a rapid, incomplete assessment of the case. Granting automatic suspensive effect and conducting a full examination of appeals in a single judicial hearing would avoid such a risk while also speeding up the final assessment of the protection claim and reducing overall judicial burdens. Therefore, ECRE recommends deleting, at a minimum, the reference to decisions to consider an application unfounded in an accelerated asylum procedure in amended recast Article 46(6).

The right to an effective remedy in Article 39 Asylum Procedures Directive and the principle of effective judicial protection have recently been interpreted by the CJEU in the context of accelerated procedures. The CJEU explicitly stated the following: “The objective of Directive 2005/85 is to establish a common system of safeguards serving to ensure that the Geneva Convention and the fundamental rights are fully complied with. The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, *there being no irrebutable presumption as to the legality of those reasons*”.<sup>123</sup> As the CJEU does not distinguish between decisions taken in an accelerated procedure or in a “normal procedure” with respect to the required scope of the effective remedy, it is difficult to see how the system proposed in amended recast Article 46(6) would comply in practice with the right to an effective remedy as interpreted by the CJEU.<sup>124</sup>

<sup>121</sup> See ECtHR, *Abdolkani and Karimnia v. Turkey*, Application No. 30471, Judgement of 22 September 2009, par. 116.

<sup>122</sup> See ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, par. 393.

<sup>123</sup> CJEU, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, par. 61 (emphasis added).

<sup>124</sup> Although the CJEU ruled that Article 39 Asylum Procedures Directive does not preclude national rules such as in Luxembourg under which no action can be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, it must be noted that this was based on the fact that in the case of Luxembourg the reasons for justifying the use of an accelerated procedure are the same as those which lead to the application being rejected and were subject to substantive review at a later stage. “What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum. It would not be compatible with EU law if national rules such as those deriving from Article 20(5) of the Law of 5 May 2006 were to be construed as precluding all judicial review of the reasons which led the competent administrative authority to examine the

### *Time limits for lodging an appeal*

In this regard it should be noted that the CJEU does not oppose the use of shorter but reasonable time limits for lodging an appeal against a negative decision taken in an accelerated procedure compared to the time limits applicable in the ordinary procedure. With regard to accelerated procedures the CJEU stated that in general a 15-day time limit for bringing an action does not seem to be “insufficient in practical terms” and “appears reasonable and proportionate in relation to the rights and interests involved”.<sup>125</sup> However, at the same time, it indicated that in certain circumstances such a time limit may prove insufficient in a given situation which is for the national court to determine. As a result, according to the CJEU any time limit for lodging an appeal in an accelerated procedure against a negative decision under 15 days would clearly no longer be reasonable and proportionate, whereas in view of particular circumstances a longer time limit for lodging the appeal may be required.<sup>126</sup> Amended recast Article 46(4) requires Member States to provide for “reasonable” time limits which shall not render impossible or excessively difficult the access of applicants to an effective remedy. While this wording may reflect the jurisprudence of the CJEU and the ECHR, ECRE believes that, in light of the practice in some EU Member States, including a minimum time limit for lodging appeals in the recast Asylum Procedures Directive would provide for a more efficient guarantee that asylum seekers have access to an effective remedy in practice. The European Parliament amended the Commission’s recast proposal to require a minimum time limit for lodging an appeal of forty-five working days in the case of regular asylum procedures and of thirty working days in the case of accelerated procedures.<sup>127</sup> ECRE believes such time limits are reasonable and proportionate and at the same time allow for sufficient flexibility to anticipate particular circumstances which may render lodging an appeal more complicated or difficult for the asylum seeker. Providing sufficient time for asylum seekers and lawyers to thoroughly examine possible grounds for challenging the first instance decision and substantiate the appeal will contribute to more efficient appeal procedures as it will enable courts and tribunals to hear appeals more quickly and therefore cost-effectively.<sup>128</sup>

ECRE recommends reinserting amended recast Article 46(1)(a)(iv) “not to conduct an examination pursuant to Article 39” in case amended recast Article 39 on the European Safe Third Country concept is maintained.

ECRE recommends deleting the words “a decision to consider an application unfounded where any of the circumstances listed in Article 31(6)(a) to (g) apply or of” in amended recast Article 46(6) and the reference to amended recast Article 33(2)(a) in amended recast Article 46(6).

ECRE recommends amending recast Article 46(4) to require Member States to provide for a minimum time limit of 45 working days for lodging an appeal against a first instance decision taken in a regular asylum procedure and of minimum 30 working days for lodging an appeal against a first instance decision taken in an accelerated asylum procedure.

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application for asylum under an accelerated procedure”. See CJEU, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, par. 58.

<sup>125</sup> See CJEU, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, par. 67.

<sup>126</sup> In some EU Member States extremely short time limits for lodging appeals apply in accelerated procedures. This is for instance the case in Germany (three days in airport procedures), Slovenia (three days) or the UK (two days in the detained fast track procedure). See UNHCR, *Asylum Procedures Study – Detailed Research*, pp. 253-255.

<sup>127</sup> See European Parliament, European Parliament Resolution of 6 April 2011 on Commission Proposal recasting the Asylum Procedures Directive, Amendment 93.

<sup>128</sup> See also ECRE, [The Way Forward – Asylum Systems](#), pp. 38-39.

## Conclusion

Fair and efficient asylum procedures are a key component of a CEAS capable of identifying those in need of protection swiftly and are crucial to ensure that states comply with their obligations under international and EU law vis-à-vis refugees and persons otherwise in need of international protection. Those obligations exist regardless of recent developments, such as in North Africa, and the concerns regarding growing numbers of asylum applications in EU Member States as a result. This evolution has clearly affected the Commission's amended recast proposal that increases the level of discretion for Member States to derogate from basic procedural guarantees for asylum seekers. This is in particular reflected in the increased flexibility for Member States with regard to their obligations vis-à-vis asylum seekers where "a large number of third country nationals or stateless persons request international protection simultaneously". At the same time, it is acknowledged that the amended recast proposal also clarifies certain provisions while maintaining a sufficient level of procedural guarantees.

ECRE believes it is paramount that the negotiations on the amended recast proposals be inspired by the firm determination to set out solid common procedures at EU level that fully respect the right to asylum and ensure access to a fair and efficient asylum procedure. The recast Asylum Procedures Directive should provide for sustainable procedural standards at EU level in the long term rather than short term administrative responses to current specific challenges. In this document ECRE has made a number of suggestions to further amend the Commission's amended proposal in order to ensure that administrative efficiency is not guaranteed at the expense of procedural fairness and that Member States' obligations under EU law and international human rights and refugee law and standards is properly reflected. ECRE calls on the Council, the European Parliament and the Commission to take this opportunity to considerably improve the standards laid down in the Asylum Procedures Directive in the spirit of the 2009 Commission proposal.

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