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CCBE comments on the Commission proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) - COM (2016) 270

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members to policy issues which affect European citizens and lawyers.

This document is intended to provide comments by the CCBE on the proposal for the reform of Council Regulation (EC) No 604/2013 of 26 June 2013 (hereinafter "the Dublin III Regulation", "Dublin III" or the "Dublin IV proposal") which said proposal was published by the European Commission on 4 May 2016.[1]

With the proposed revision of the Dublin III Regulation (hereafter the "proposal") the Commission's stated objectives are those of:

- enhancing the system's capacity to determine efficiently and effectively a single Member State responsible for examining the application for international protection. In particular, it would remove the cessation of responsibility clauses, and significantly shorten the time limits for sending requests, receiving replies and carrying out transfers between Member States;
- ensuring a fair sharing of responsibilities between Member States by complementing the current system with a corrective allocation mechanism. This mechanism would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers;
- discouraging abuses and preventing secondary movements of applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry, and to remain in the Member State determined as being responsible. This also requires proportionate procedural and material consequences in case of non-compliance with their obligations.[2]

In order to achieve these objectives, the main proposed amendments intend to improve the efficiency of the system while at the same time limit secondary movements of asylum seekers within the European Union.[3] In addition, the proposal introduces a new corrective allocation mechanism, which allows for the allocation of asylum seekers amongst the different Member States, in situations where a Member State is faced with a disproportionate amount of applications for international protection.

[1] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270.

[2] Ibid, p. 3-4.

[3] Ibid, p. 14.

In view of these general objectives, these comments endeavour to analyse the compatibility of the proposed reforms with human rights law, international law and general principles of European Union law. The aim of this document is to provide the CCBE's view of certain of the substantial changes sought to be introduced and accordingly certain of the more technical amendments are not addressed. The information provided is therefore limited to an overview of the most significant proposed amendments to the Dublin III Regulation.

One consideration should be canvassed at the outset: the CCBE considers that the Dublin III Regulation in itself has been unsuccessful in terms of providing for a fair and workable system for the allocation of the responsibility of EU Member States for determining asylum applications made on the territory of the European Union. Therefore, a system based on the reform of Dublin III required a complete overhaul in order to, on the one hand, create a more efficient system to ensure a fair and efficient system, and on the other hand, to ensure the vindication of fundamental rights of asylum seekers. Unfortunately, this purpose has not been achieved by the proposal, as the proposed system appears, in many aspects, to be even more problematic from a legal perspective than the previous system established by Dublin III.

In fact, the Dublin IV proposal, instead of taking the opportunity to improve on the known deficiencies of Dublin III, seems to further complicate the system by *a)* providing no changes to the criteria for determining the responsible State, *b)* inserting a type of preliminary examination based on the competence of the Member State of first application, *c)* further limiting the possibility of moving to other Member States, through the provision of penalties for asylum seekers, *d)* providing restrictions for unaccompanied minors and for the application of the discretionary clauses, and e*)* introducing a corrective allocation mechanism for the intended equitable sharing of responsibilities between Member States, which in many aspects replicates the unsuccessful elements of the temporary relocation mechanisms already in force.

Therefore, the view taken by the CCBE is that the proposal as a whole should be reconsidered, and the best option would be its withdrawal or, at the very least, a profound improvement in the provisions of the proposal so as to comply with international and European human rights standards.

1. Access to the procedure for examining an application for international protection (Article 3 of the proposal)

Most notably, Article 3(3)(a) of the proposal establishes that the responsibility criteria and allocation procedure provided for by the Regulation may only be applied in respect of asylum seekers whose claims are not inadmissible on 'first country of asylum' (not being an EU Member State) or 'safe third country' grounds. In addition, Article 3(3)(b) of the proposal establishes that the first Member State in which the application is lodged shall examine the application for international protection in the accelerated procedure if the asylum seeker is a national of, or was formerly habitually resident, in an EU-designated 'safe country of origin', or if the applicant has been considered 'a danger to national security or public order' to the Member State. These provisions have been included in the proposal "*in order to prevent that applicants with inadmissible claims or who are likely not to be in need of international protection, or who represent a security risk are transferred among the Member States."*[4] The Member State carrying out the assessment of either the admissibility of the claim or the examination using the accelerated procedure shall additionally be considered the Member State responsible (Article 3(4) and (5) of the proposal).

The CCBE notes that the Dublin III Regulation does not oblige, but merely provides Member States with the option to deem an application for international protection to be inadmissible, because the applicant has arrived from a 'safe third country'. In its recent judgment in *Mirza*,[5] the CJEU established

[4] Ibid, recital 17.
[5] Case C-695/15 PPU Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal [2016].

that Member States are indeed permitted to send back an applicant for international protection to a 'safe third country' in the situation of a take back request, where the applicant has left the responsible Member State before a decision on the substance of his first application for international protection had been made. The current proposal converts the option of sending back an application for international protection to a 'safe third country' into an obligation. Hence, the proposal seems to reflect the concept of externalization of refugee protection and is a direct result of the recent adoption of the EU-Turkey agreement,[6] which provides for, among others, the return of asylum seekers from Greece to Turkey as a 'safe third country'.[7]

However, the CCBE is concerned that the provisions of the new Article 3 of the proposal would create a system that contradicts the Commission's aims to enhance access to the asylum procedure, remedy the inefficiencies and delays of the procedure, and combat inequalities among Member States for the following reasons:

- it results in the adding of a variety of new tasks and responsibilities to the Member State of application: apart from identification, fingerprinting and registration of claims, the Member State concerned will have to further conduct (in)admissibility checks, security screenings, examination of inadmissible and unfounded claims (in addition to those for which they will be designated as responsible under Dublin criteria). This could lead to increased bureaucracy and administrative tasks that are not protection-related. Furthermore, these countries will have to bear additional responsibility of effecting more returns as a result of mass rejection of claims;
- it fails to combat illegal migration and secondary movements as individuals may simply continue to travel illegally to more "attractive" countries and file their asylum claims there;
- it fails to relieve overburdened Member States, namely border states and the ones that constitute the most desirable destinations, as apart from the enhanced responsibilities, they will have to provide for increased reception procedures and facilities for the time required to process the claims.[8] As past experience has shown, this extra pressure on Member States may lead them to avoid fulfilling obligations such as registration of arrivals, access to asylum procedures and providing for proper reception conditions.

As many applications for international protection may in the future be declared inadmissible either on grounds of first country of asylum and safe third country grounds or, safe country of origin or security concerns, this proposed amendment raises several concerns regarding the substantial protection of asylum seekers.

In this regard, the proposal significantly reduces the possibilities for an individual to file a successful application for international protection within the EU, as the concepts of a "safe third country" and a "safe country of origin" would prevail over refugee protection. In practice the CCBE has serious concerns that this would inevitably lead to widespread rejection of applications on the grounds of inadmissibility, thus minimising the chances of acquiring protection in the EU following a thorough examination of the claim on its merits. Furthermore, the introduction of a preliminary examination of

[6] European Council, 'EU-Turkey Statement, 18 March 2016' (European Council, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> [accessed 6 June 2016]; European Council, 'European Council conclusions, 17, 18 March 2016' (European Council, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/> [accessed 6 June 2016].

[7] For an adequate critique of whether Turkey can be considered as a safe third country see: Dutch Council for Refugees and European Council on Refugees and Exiles, 'The DRC/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey' (May 2016) < http://www.asylumlawdatabase.eu/en/content/dcrecre-desk-research-application-safe-third-country-and-first-country-asylum-concepts/ [accessed 6 June 2016]; UN High Commissioner for Refugees (UNHCR), Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, available at: http://wwww.refworld.org/docid/56f3ee3f4.html [accessed 13 June 2016].

[8] Directorate –General for internal policies, FRANCESCO MAIANI; see here.

the asylum application with regard to security concerns constitutes a further impediment to access to effective protection (Article 3(3 b ii) of the proposal). Following these amendments in practice the real concern exists that there may be a drastic reduction in the number of applications being examined in substance. In this respect, the CCBE underlines that the adoption of generalised concepts should be used with extreme caution by decision making authorities, and should not replace the need for individualised assessment of asylum claims that would *per se* violate the right to (access to) effective protection as provided for in the 1951 Refugee Convention and the 1950 European Convention on Human Rights.[9] As the UNHCR noted in a press release of 18 March 2016, *"Refugees need protection, not rejection"*.[10]

Clearly the CCBE recognises the legitimate concern of Member States to ensure that the EU is an area of safety and security for the people residing within its territory, and to minimise levels of fear, insecurity and uncertainty. Nevertheless, whenever a Member State is confronted with cases raising serious questions of national security or public order, the claims should be treated with due care and diligence so as not to reject applicants in clear need of international protection. In order to avoid such circumstances, the CCBE considers that, even during the course of an accelerated procedure, the application should not be rejected unless a prior examination of the substance has been conducted and the rejection is well-reasoned and in full accordance with the principles of proportionality, family unity and other fundamental principles of human rights law.

This is particularly important, as the proposal as currently constituted could impede asylum seekers from reuniting with their family members in another Member State, having been declared inadmissible based on these grounds. This result seems to be in sharp contrast with the right to respect for family life as safeguarded by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights. Moreover, the obligation to carry out the admissibility assessment undermines the broadening of the definition of 'family member', namely the inclusion of siblings and families formed after leaving the country of origin (recital 19 of the proposal). Whereas respect for family life should be a primary consideration of Member States when applying the Dublin Regulation (recital 16 of the proposal), the application of Article 3(3) of the proposal would result in the separation of certain families, and is therefore potentially of serious legal consequences.

In this respect, the CCBE emphasises that the principle of family unity in the area of refugee protection gives rise to an obligation for the Member State to not only refrain from actions that would lead to the separation of a family, but also to take (positive) action to allow for family unification within a safe environment, that is assuring adequate protection from persecution for the members of the same family. Moreover, the experience of legal practitioners working in the field reveals that family members understandably seek to reunite in the same country. At the same time, family ties increase confidence, assistance, and mutual support among their members which in the long run increase chances for integration of refugees. By contrast, namely in the absence of family reunification prospects and lack of safe channels to the EU, the proposed amendment may trigger secondary (illegal) movements of applicants in search of family reunification while maintaining an undocumented profile in the meantime and being at risk of *refoulement* for an indefinite period of time. It is well known that the concepts of "safe third country" and "safe country of origin" especially in the post-EU-Turkey agreement era have led to a debate over the issue of their (in)compatibility with refugee protection in the EU and considerable litigation before Greek courts and the ECHR. The CCBE considers that restricted access to asylum combined with possible separation of families based on the new provisions

[9] For what constitutes an "effective" refugee protection, see, among others, UN High Commissioner for Refugees (UNHCR), Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, available at: http://www.refworld.org/docid/3fe9981e4.html [accessed 9 September 2016].

[10] Available at: http://www.unhcr.org/news/press/2016/3/56ec533e9/unhcr-eu-turkey-deal-asylum-safeguards-must-prevail-implementation.html [accessed 9 September 2016].

of Article 3(3) of the proposal will give rise to further litigation that will ultimately add to the already cumbersome procedures established by the proposal.

In the light of the above, the CCBE believes that Article 3 (3) should not be amended.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 3. paragraphs 3- 4 -5 - New *3. Before applying the criteria for determining a Member State responsible in accordance with Chapters III and IV, the first Member State in which the application for international protection was lodged shall:* *(a) examine whether the application for international protection is inadmissible pursuant to Article 33(2) letters b) and c) of Directive 2013/32/EU when a country which is not a Member State is considered as a first country of asylum or as a safe third country for the applicant; and* *(b) examine the application in accelerated procedure pursuant to Article 31(8) of Directive 2013/32/EU when the following grounds apply:* *(i) the applicant has the nationality of a third country, or he or she is a stateless person and was formerly habitually resident in that country, designated as a safe country of origin in the EU common list of safe countries of origin established under Regulation [Proposal COM (2015) 452 of 9 September 2015]; or (ii) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.* *4. Where the Member State considers an application inadmissible or examines an application in accelerated procedure pursuant to paragraph 3, that Member State shall be considered the Member State responsible.* *5. The Member State which has examined an application for international protection, including in the cases referred to in paragraph 3, shall be responsible for examining any further representations or a subsequent application of that applicant in accordance with Article 40, 41 and 42 of Directive 2013/32/EU, irrespective of whether the applicant has left or was removed from the territories of the Member States.*	*Article 3. Keep the original text from Dublin III* **3. Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU.**

2. Obligations of the asylum seeker (Article 4 and 5 of the proposal)

This proposal introduces a provision on the obligations of asylum seekers. Article 4 of the proposal states that:

- the asylum seeker is obliged to lodge an application for international protection in the Member State of first entry (article 4(1) of the proposal);
- the asylum seeker is obliged to submit as soon as possible, and at the latest during the interview pursuant to Article 7, all the elements and information relevant for determining the Member State responsible and cooperate with the competent authorities of the Member States (article 4(2) of the proposal);
- the applicant is obliged to comply with the transfer decision and be available to the authorities in this regard (article 4(3)(a) and (b) of the proposal).

Article 5 of the proposal establishes the consequences of non-compliance with these obligations. In summary:

- if an asylum seeker does comply with the obligation set out in Article 4(1) of the proposal, the responsible Member State will examine the application in an accelerated procedure (Article 5(1) of the proposal);
- the Member State in which the applicant is obliged to be present shall continue the procedures for determining the Member State responsible even when the applicant leaves the territory of that Member State without authorisation, or is otherwise not available to the competent authorities of that Member State (Article 5(2) of the proposal);
- the applicant shall not be entitled to the reception conditions set out in Articles 14 to 19 of Directive 2013/33/EU, with the exception of emergency health care, during the procedures under this Regulation in any Member State other than the one in which he or she is required to be present (Article 5(3) of the proposal;
- the competent authorities shall take into account elements and information relevant for determining the Member State responsible only insofar as these were submitted within the deadline set out in Article 4(2) of the proposal (Article 5(4) of the proposal).

Article 4 and 5 of the proposal have been included in order to further prevent the secondary movements of asylum seekers. If an asylum seeker does not lodge an application for international protection in the Member State of first entry, their application for international protection will be examined in the accelerated procedure. As a result, the asylum seeker will be excluded from an entitlement to benefits, such as healthcare (except for emergency healthcare), education welfare, and accommodation. The CCBE is concerned that this could not only cause concerns of public order, but also severely curtail the basic right of asylum seekers to shelter and a dignified minimum existence. In particular, the CCBE emphasises that European Union legislation on asylum must be interpreted in a manner fully cognisant with the 1951 Geneva Convention and other relevant treaties, and in full compliance with fundamental rights and principles recognised by the Charter of Fundamental Rights of the EU[11] (c.f the CJEU's judgements in inter alia, *Salahadin Abdulla* and others, *Bolbol*). The CCBE considers that the proposed limitation on access to social rights is not compatible with the protection of human rights as safeguarded by the 1951 Refugee Convention, the European Convention on Human Rights, the Convention on the Rights of the Child, and the Charter of Fundamental Rights of the European Union.[12] In this respect, the abovementioned provisions of the proposal are incompatible

[11] See in particular Article 18 – Right to asylum- affirming expressis verbis the respect of rules and rights under the Refugee Convention and 1967 Protocol.

[12] Constantin Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission' (EU Immigration and Asylum Law and Policy (17 May 2016), available at http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/ [accessed 9 September 2016].

with the common values of peoples and states of the Union, the latter being *"founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", placing "the individual at the heart of its activities (…)".*[13]

Furthermore, these proposed amendments seem to contradict previous judgments of the CJEU. In *CIMADE and GISTI,*[14] the CJEU held that the minimum conditions for the reception of asylum seekers must be granted by the Member State in receipt of an application for asylum even when it calls upon another Member State, which it considers to be responsible for the examination of the application to take charge of the application.

Similarly, from the perspective of the ECHR, asylum seekers are vulnerable individuals and as such, an *"underprivileged and vulnerable population group in need of special protection"*. For this reason, the Strasbourg Court attaches considerable importance to the special protection needs, at least to cover the *"most basic needs: food, hygiene and a place to live* (M.S.S., para 254). Failure to comply with these minimum standards would create circumstances that are incompatible with respect for human dignity and would amount to ill-treatment, engaging state responsibility for violation of Article 3. After all, it is to be noted that the protection under this provision is absolute.

In addition, the CCBE observes that this proposal appears incompatible with the Constitutions of several Member States that have guaranteed access to social rights.

Crucially, the proposal does not separately provide for an exemption clause in cases where asylum seekers have not been able to apply for international protection in the Member State of first entry due to systemic errors in the asylum procedure and reception facilities in that Member State. In such cases, an asylum seeker is liable to be punished for acts or omissions that may result from merely objective circumstances and to be excluded from protection for factors other than personal behaviour.

In light of the above, the CCBE is concerned that the proposed amendments create harsh sanctions that are disproportionate with the Commission's objective of preventing secondary movements within the EU. At the same time, it seems that the proposal does not take into consideration the real factors for the failure of the Dublin system over the past years. The CCBE considers that the main reasons for the unworkability of the Dublin system has been the unattractiveness of the system itself for applicants in combination with large-scale existing disparities among asylum and reception systems of the member states.[15] Reception conditions and access to social rights are of the utmost importance for refugees arriving at the frontiers of Europe. Nevertheless, monitoring of migration flows and asylum procedures in Europe indicates that refugees fleeing war and persecution rely more on smuggling networks to find their way to a destination where they (think that they) can find proper reception and dignified living conditions. Refugees prefer to stay in Calais and improvised substandard camps for as long as it takes to buy their way to destination countries; it goes without saying that secondary movements are not the cause but, indeed, the outcome of a failed system.

In addition, the generalised introduction of acceleration procedures may further undermine the right to a fair trial and related procedural guarantees under Article 6 of the ECHR, in particular, as regards short deadlines and sanctions for non-compliance which may be considered as limitations affecting the essence of the right itself.

Furthermore, the CCBE considers that the above measures are indeed unnecessary and inappropriate to meet the Commission's objectives, and suggests that efforts should be strengthened in order to facilitate applicants' cooperation, and to implement the use of alternative less coercive measures to ensure their compliance with the system.

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13 Preamble of the Charter of Fundamental Rights of the European Union.

14 Case C-179/11, CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, 2012.

15 Francesco Maiani, The reform of the Dublin III Regulation, Study for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2016, pp. 20-27 and references.

There is also an obvious concern arising with regard to the obligation sought to be established under Article 4(2) of the proposal requiring asylum seekers to submit during their interview at the latest all of the elements/information relevant for determining the Member State responsible in circumstances where some of this information may not be obtainable by the asylum seeker at the time of the interview especially where an accelerated procedure is employed. The CCBE considers that concerns may arise here in particular in relation to vulnerable categories of applicants. In this regard, according to the UNHCR handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Geneva Convention and the 1967 Protocol,[16] there are principles and methods concerning the establishment of facts and gathering of evidence. According to the general legal principle which also applies in the context of an asylum procedure, the burden of proof lies on the applicant. This means that, generally, it is the applicant's responsibility to bring all appropriate evidence to prove their arguments. Crucially however the UNHCR Handbook goes on to note:

"Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. (…)"

Thus, a caseworker should always assess the ability of an applicant to bring the evidence required, especially in view of the general context in which the applicant is placed, namely the existence or not of proper reception conditions, the applicant's access to legal or other supports that are crucial for fulfilling his/her obligations, and the emotional burden that is to some extent inherent in the circumstances in which many asylum seekers find themselves. Yet, it can be argued that an asylum seeker with no access to proper housing, deprived of legal aid, and/or adequate interpretation, with limited or no access to internet facilities –or in detention- will have real and genuine difficulties in being able to respond to the obligation of providing the caseworker with enough evidence within the deadline so as to establish the facts for the determination of the responsible member state and, possibly, prove the elements of his case (i.e. the proof of family links in another Member State, ensure family unification).

The situation is of more concern in the cases of extremely vulnerable individuals such as applicants suffering trauma or other emotional/mental burdens that significantly impairs their ability to act, decide and, consequently, fulfil their obligations. Self-evidently the treatment of such cases calls for different methods examination.

Consequently, the CCBE strongly recommends that the proposed provision should be amended so as to introduce strong procedural safeguards such as establishing a reasonable deadline for the provision of evidence. In any case, as advised by UNHCR, *"if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt*". In the absence of the above, the procedure may fall short of the rules and requirements for a fair procedure guaranteed by Article 6 of the European Convention on Human Rights.

[16] http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html, para 195-223.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 4 *2. The applicant shall submit as soon as possible and at the latest during the interview pursuant to Article 7, all the elements and information relevant for determining the Member State responsible and cooperate with the competent authorities of the Member States.*	*Article 4* *2. The applicant shall submit as soon as reasonably possible, , all the elements and information relevant for determining the Member State responsible and cooperate with the competent authorities of the Member States.* ***In cases where the personal interview is omitted in accordance with Article 7, the elements and information needed should be submitted within a reasonable time from the date of the application for international protection. An extension of the this deadline should be granted whenever it appears reasonable to do so having regard to the rights and interests involved and insofar as the applicant provides reasons justifying such an extension. The competent authorities shall take into account the elements and information relevant for determining the Member State responsible only insofar as these were submitted within the above time limits and, in every case, before the transfer of the applicant to the member State responsible.***
3. The applicant shall: *(a) comply with a transfer decision notified to him or her in accordance with paragraphs 1 and 2 of Article 27 and point (b) of Article 38;* *(b) be present and available to the competent authorities in the Member State of application, respectively in the Member State to which he or she is transferred.*	*3. The applicant shall* *(a) comply with a transfer decision notified to him or her in accordance with paragraphs 1 and 2 of Article 27 and point (b) of Article 38;* *(b) be present and available to the competent authorities in the Member State of application and also in the Member State to which he or she is transferred,* ***save that in no case shall an applicant be transferred to a Member State where the fundamental rights of the applicant cannot be assured.***
Article 5 *3. The applicant shall not be entitled to the reception conditions set out in Articles 14 to 19 of Directive 2013/33/EU, with the exception of emergency health care, during the procedures under this Regulation in any Member State other than the one in which he or she is required to be present.* *4. The competent authorities shall take into account elements and information relevant for determining the Member State responsible only*	*Article 5* *3. the applicant shall ~~not~~ be entitled to the reception conditions set out in Articles 14 to 19 of Directive 2013/33/EU, ~~with the exception of emergency health care,~~ during the procedures under this Regulation in any Member State other than the one in which he or she is required to be present;* *4. the competent authorities shall take into account elements and information relevant for determining the Member State responsible only*

insofar as these were submitted within the deadline set out in Article 4(2).	*insofar as these were submitted within the deadline set out in Article 4(2) of the proposal* ***and subject to the right to an effective remedy to be determined by a competent national court or tribunal.***

3. Unaccompanied Minors (Article 8(2) and (4) of the proposal)

The proposal envisages new rules for determining the Member State responsible for examining an application lodged by an unaccompanied minor. In cases of the absence of family members or relatives, the Member State of first application shall be responsible for the examination of the asylum application, unless this is not in the best interests of the minor (Article 8(4) and 10 of the proposal). The new text deprives unaccompanied minors of the right to a representative if they are not in the Member State where they are "obliged to be present" (Article 8(2) of the proposal).

The Commission seems to presume that it is in the best interest of the child to be transferred back to the country of first application where the child does not have family in another Member State unless the contrary is proven. The CCBE notes that this presumption is to a certain extent contrary to the CJEU's judgment in *M.A. and others v SSHD*.[17] In this judgment, the CJEU held that in circumstances where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the Member State responsible. In light of this proposal, the Commission had previously adopted a proposal in order to implement *M.A. and others v SSHD*. l. The CCBE is concerned about the negative impact the new procedure would have on minors, in particular the psychological side effects that uncertainty, delays and even possible involuntary decisions may lead to. As stated in the above mentioned judgment, this vulnerable group of applicants require stronger protection, and to achieve this goal, secondary movements should be discouraged, because it is not in their best interest: in fact, "as a rule, unaccompanied minors should not be transferred to another Member State".

There is also a concern that the test to be applied when deciding to transfer an unaccompanied minor and which is stated to require an assessment of his or her best interests does not in fact require that the best interests of the minor are the primary consideration in any such assessment. Instead Article 8(4) of the proposal provides for the best interests of the child being a primary consideration and not the primary consideration. While strictly speaking this may be in compliance with Article 3(1) of the UN Convention on the Rights of Child *strictu sensu,* the assessment process itself regarding transfer is stated to be required to be done by staff ensuring that the best interests of the minor are taken into consideration. The CCBE is of the opinion that the text needs to be amended to ensure that the best interests of the child are in fact vindicated, and to establish the principle that in most cases where there is an exceptional need, the unaccompanied minor should not be transferred.

The proposal to deprive unaccompanied minors of the right to a representative if they are not in the Member State where they are "obliged to be present" appears to run counter to the principles established by the UN Committee for the Rights of the Child whose Convention states: "*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child […]. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*." (Article 12).

[17] Case C-648/11, MA, BT and DA v Secretary of State of the Home Department, 2013.

Furthermore, the deprivation of the right to a representative may in turn lead to the undermining of other rights of minors under the Regulation, e.g. the right to appeal under Article 28 of the proposal.

Thus, the CCBE suggests to repeal the amendment envisaged by the proposal. If the objective of the Commission was to allow “swift access to the procedure” for unaccompanied minors, the CCBE alternatively proposes the introduction of an accelerated procedure so as to speed up the outcome of the decision for this vulnerable group of applicants. In other words, accelerated procedures could be positively utilised to improve, in certain situations (i.e. for most vulnerable people), compliance with European human rights standards.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 8 *2. Each Member States where an unaccompanied minor is obliged to be present shall ensure that a representative represents and/or assists the unaccompanied minor with respect to the relevant procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant’s file including the specific leaflet for unaccompanied minors.* *This paragraph shall be without prejudice to the relevant provisions in Article 25 of Directive 2013/32/EU.* *4. Before transferring an unaccompanied minor to the Member State responsible or, where applicable, to the Member State of allocation, the transferring Member State shall make sure that the Member State responsible or the Member State of allocation takes the measures referred to in Articles 14 and 24 of Directive 2013/33/EU and Article 25 of Directive 2013/32/EU without delay. Any decision to transfer an unaccompanied minor shall be preceded by an assessment of his/her best interests. The assessment shall be based on the factors listed in paragraph 3. The assessment shall be done swiftly by staff with the qualifications and expertise to ensure that the best interests of the minor are taken into consideration*	*Article 8* *2. Each Member State where an unaccompanied minor is ~~obliged to be~~ present shall ensure that a representative represents and/or assists the unaccompanied minor with respect to **all** procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant’s file including the specific leaflet for unaccompanied minors.* *This paragraph shall be without prejudice to the relevant provisions in Article 25 of Directive 2013/32/EU.* *4. ~~Before transferring an unaccompanied minor to the Member State responsible or, where applicable, to the Member State of allocation, the transferring Member State shall make sure that the Member State responsible or the Member State of allocation takes the measures referred to in Articles 14 and 24 of Directive 2013/33/EU and Article 25 of Directive 2013/32/EU without delay. Any decision to transfer an unaccompanied minor.~~ **The application and any other decision concerning unaccompanied minors shall be examined in prioritised procedure pursuant to Article 31(7) of Directive 2013/32/EU and** shall be preceded by an assessment of his/her best interests. The assessment shall be based on the factors listed in paragraph 3. The assessment shall be done swiftly by staff with the qualifications and expertise to ensure that the best interests of the minor are taken into consideration.*

4. Discretionary clauses (Article 19 of the proposal)

The Commission proposes to restrict the current sovereignty and humanitarian clauses. Currently, the sovereignty clause enables a Member State to decide to examine an application for international protection. The humanitarian clause, however, enables a Member State to request another country to take charge of the applicant for family, cultural or humanitarian reasons.

Under the proposal, Member States would merely be able to examine any asylum claims, or request another Member State to do so, in order to bring together any family members. By contrast, the current Dublin Regulation does not specify any conditions for the application of the sovereignty and humanitarian clauses. These clauses could therefore previously be used as an important tool to prevent any human rights violations resulting from the application of the Dublin Regulation.

The CCBE recommends that this part of the proposal be deleted, as it conflicts with the ECHR and with the *M.S.S. v. Belgium and Greece* judgement of the ECtHR. With regard to the latter, the Court stated that there was a violation of the Convention, clarifying that the Belgian government could have decided to use the Sovereignty clause to render the EU legislation compatible with the prescription of the Convention. This judgment's ratio has been confirmed by the European Court of Justice in the case of *N.S. v. UK*, where the EU Court stated that this "discretionary power […] forms an integral part of the Common European Asylum System" and that "a Member State which exercises that power must therefore be considered as implementing Union law". In other words, an interpretation of this clause which would permit the protection of vulnerable people and family relations was strongly supported in order to overcome the flaws of Dublin III.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 19 *1. By way of derogation from Article 3(1) and only as long as no Member State has been determined as responsible, each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person based on family grounds in relation to wider family not covered by Article 2(g), even if such examination is not its responsibility under the criteria laid down in this Regulation. The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of the applicant. The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation [Proposal for a Regulation recasting Regulation (EU) No 603/2013] by*	*Article 19 - Keep the original text from Dublin III* **1. Where a Member State issues a residence document to the applicant, the obligations specified in Article 18(1) shall be transferred to that Member State.** **2. The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.** **An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.** **3. The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to**

adding the date when the decision to examine the application was taken. *2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, may, at any time before a Member State responsible has been determined, request another Member State to take charge of an applicant in order to bring together any family relations, even where that other Member State is not responsible under the criteria laid down in Articles 10 to 13 and 18. The persons concerned must express their consent in writing. The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation. The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within one month of receipt. A reply refusing the request shall state the reasons on which the refusal is based. Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.*	**take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States in compliance with a return decision or removal order issued following the withdrawal or rejection of the application.** **An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.**

5. Remedies (Article 28 of the proposal)

Finally, the Commission proposes to adapt the rules on remedies in order to "considerably speed up and harmonise the appeal process". Consequently, appeals from now on shall be limited to situations of a risk of inhuman or degrading treatment (Article 3(2) of the proposal), for family reasons (Article 10 and 13 of the proposal), or dependency reasons (Article 18 of the proposal). Moreover, an individual will only have seven days to appeal after the notification of a transfer decision (Article 28(2) of the proposal). Previously, the remedy had to be provided for within a reasonable period. The CCBE is of the opinion that seven days is too short. If an individual makes use of a remedy, the transfer will be automatically suspended (Article 28(3) of the proposal). Most notably, a new remedy is introduced for cases where no transfer decision is taken, and the applicant claims that a family member or, in the case of minors, also a relative, is legally present in another Member State (Article 28(5) of the proposal).

Such a short amount of time is contrary to the principles enshrined in Article 6 ECHR, and in particular with the right of access to court, which the jurisprudence of the ECtHR requires to be both practical and effective. For this reason, the CCBE considers that the period provided to the person concerned should be, at least, doubled. Member States shall provide for a period of a minimum of 15/20 days after the notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1. However, one month (30 days) would be a more appropriate and feasible choice.

Another problem arises from the proposal: the situation of an unaccompanied minor required to appeal a transfer decision within 7 days with no representative, who is present in a Member State

other than the Member State where they were "obliged to be present", appears to be a violation of his/her fundamental rights.

The CCBE notes that the proposal raises serious questions regarding the legality of any limitations to appeals in light of the right to an effective remedy (e.g. Article 47 of the Charter of Fundamental Rights of the European Union and Article 13 of the ECHR) and the cases of *Ghezelbash*[18] and *Karim*[19]. These recent judgments are related to the scope of the right to an effective remedy as safeguarded by recital 19 and Article 27(1) of the Dublin III Regulation. The CJEU held that an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility for the claim laid down in Chapter III of the Dublin Regulation. Accordingly, the CCBE proposes the amendment to the text as specified hereunder.

Text proposed by the Commission	*Amendments proposed by the CCBE*
Article 28 *2. Member States shall provide for a reasonable period of time 7 days after the notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.* *4. The scope of the effective remedy laid down in paragraph 1 shall be limited to an assessment of whether Articles 3(2) in relation to the existence of a risk of inhuman or degrading treatment or Articles 10 to 13 and 18 are infringed upon.*	*Article 28* *2. Member States shall provide for a period of ~~7~~ **20** days after the notification of a transfer decision within which the person concerned may exercise is or her right to an effective remedy pursuant to paragraph 1. **The term shall be extended to 30 days when the transfer decision concerns an unaccompanied minor.*** *4. The scope of the effective remedy laid down in paragraph 1 shall be ~~limited~~ **extended** to an assessment of whether ~~Articles 3(2) in relation to the existence of a risk of inhuman or degrading treatment or Articles 10 to 13 and 18 are infringed upon~~ **the provisions of the Charter of Fundamental Rights of the European Union are infringed upon.***

[18] Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016].
[19] Case C-155/15 *Karim v Migrationsverket* [2016].