Conseil des barreaux européens
Council of Bars and Law Societies of Europe
Association internationale sans but lucratif
Rue Joseph II, 40 /8 – 1000 Bruxelles
T. : +32 (0)2 234 65 10
Email : ccbe@ccbe.eu – www.ccbe.eu

Comments of the Council of Bars and Law Societies of Europe (CCBE) on the draft Regulation presented on July 13, 2016 by the European Commission establishing a common asylum procedure for international protection and repealing Directive 2013/32/EU relating to minimal standards concerning the procedures for the granting and withdrawal of international protection

23/02/2017

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 consultations on policy issues which affect European citizens and lawyers.

On July 13, 2016, the European Commission presented several draft Regulations in order to reform the common European asylum system to bring a fairer share of responsibility between Member States to determine the recognition of international protection.

The Commission also wishes to remedy the irregular waves of population and the economic model of smugglers by opening safe and legal access to the European Union for third-country nationals in need of protection under a partnership with certain transit countries.

After having identified disparities in the treatment of asylum seekers and applications and, therefore, in the rates of acknowledgement of refugee status or in subsidiary protection according to Member States, which lead to secondary movements of asylum seekers once they have entered the territory of the European Union, the Commission recommends to replace the three Directives ("Reception", "Classification" and "Procedures"), currently applicable after transposition into the internal law of Member States, by Regulations which would be directly applicable here, which would result in reducing their leeway in the implementation of their provisions.

In order to strengthen the effectiveness of the European asylum policy by simplifying and shortening the procedures, the Commission proposes the repeal of Directive 2013/32/EU of June 26, 2013 relating to minimum standards concerning the procedure for granting refugee status in Member States by a Regulation creating a common procedure of international protection.

"*The objective of ensuring fast but high-quality decision-making at all stages of the procedure*" is reflected in the proposed text by a shorter time limit for determining international protection in relation to the current situation so that those who fulfil the conditions may benefit more quickly and that the rejected asylum seekers can be returned promptly.

In the words of the Commission, this new system is "*generous to the most vulnerable and strict towards potential abuse, while always respecting fundamental rights*".

The CCBE considers that, although this proposal for a Regulation is a step forward in the rights granted to asylum seekers, it contains, however, numerous provisions restricting them, which should therefore be amended.

1) STRENGTHENING THE COMMON GUARANTEES FOR THOSE SEEKING INTERNATIONAL PROTECTION

The draft Regulation presented by the Commission provides for the principle of the right of asylum seekers to free legal assistance and representation (Articles 14 to 17). This free provision of advice from a lawyer at an administrative and litigation stage is a step forward which should be welcomed.

The CCBE welcomes the proposal in principle that asylum seekers should be able to benefit from the free assistance of a lawyer at the various stages of processing their applications.

However, this principle of the right to free legal advice assumes a certain number of exceptions. This is particularly the case when "the application is considered as not having any tangible prospect of success".

Having regard to the obligation for asylum seekers to submit their application within 10 days after its registration in a language they do not master and in the absence, as it stands, of any bearing of costs for the intervention of interpreter at the stage of establishing their written account of events, the CCBE is of the opinion that the specific case of exclusion referred to above should be deleted.

In order to promote the effectiveness of this right to a lawyer, the CCBE is also of the opinion that the asylum seeker should be able to benefit from the free assistance of an interpreter when meeting with their lawyer during the administrative and litigation phases, whereas the Regulation only provides for the presence of a free interpreter during the asylum seeker's interview with the authorities (Article 12 (8)).

Likewise, the CCBE considers that when the internal legislation of a Member State imposes, due to invalidity, that the documents and materials in a foreign language which the asylum seeker intends to invoke under their application for protection be translated into the language of said State, with their costs being borne by the State up to a maximum amount to be defined.

The asylum seeker could be heard in a personal interview concerning the admissibility or substance of their application, regardless of the type of procedure applied to their case, during which they could be assisted by an interpreter and be represented. The benefit of this measure could, however, be refused in limited cases and under certain conditions. The strengthening of these guarantees would be provided for vulnerable persons and unaccompanied minors to whom a guardian should be appointed, no later than five working days from the submission of their asylum application.

The proposed Regulation sets forth the principle according to which the personal interview "*constitutes an essential element in examining the asylum application"* and that it must be registered and that the asylum seeker and their lawyer must have access to its registration and report or transcription.

Text proposed by the Commission	***Amendments proposed by the CCBE***
Article 15	***Article 15***
Free legal assistance and representation	***Free legal assistance and representation***
1. Member States shall, at the request of the applicant, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.	*1. Member States shall, at the request of the applicant, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.*
2. For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:	*2. For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:*
(a) the provision of information on the procedure in the light of the applicant's	*(a) the provision of information on the procedure in the light of the applicant's individual*

individual circumstances;	*circumstances;*
(b) assistance in the preparation of the application and personal interview, including participation in the personal interview as necessary;	*(b) assistance in the preparation of the application and personal interview **with the free assistance of an interpreter**, including participation in the personal interview as necessary;*
(c) explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information as to how to challenge that decision.	*(c) explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information as to how to challenge that decision.*
	(d) the covering, by the Member State responsible for asylum claim, of the translation costs for all documents supporting the applicant's asylum claim.
3. The provision of free legal assistance and representation in the administrative procedure may be excluded where:	*3. The provision of free legal assistance and representation in the administrative procedure may be excluded where:*
(a) the applicant has sufficient resources;	*(a) the applicant has sufficient resources;*
(b) the application is considered as not having any tangible prospect of success;	***~~(b) the application is considered as not having any tangible prospect of success;~~***
(c) the application is a subsequent application.	*(c) the application is a subsequent application.*

The Commission's proposal also sets out that asylum seekers would benefit from the right to remain on the territory of the Member State in which they have submitted their asylum application, for the duration of the administrative procedure, until the end of the deadline provided for the submission of a first level of appeal and if the claimant exercised this right, pending the outcome of the appeal, so that they are able to exercise their right to an actual appeal. This right of temporary residence would be subject to exceptions. It would not constitute a right to residence and would not give the asylum seeker the right to travel to another Member State without authorisation.

2) SIMPLIFICATION AND REDUCTION OF THE DURATION OF PROCEDURES FOR GRANTING INTERNATIONAL PROTECTION

The overall procedure would be shortened and rationalised.

Following the proposed Regulation presented by the Commission, any application for international protection should be registered within three working days from the time that it has been formulated instead of 30 days according to the provisions of the currently applicable directive (Article 27(1)).

Within three days following the submission of their application, a document certifying their asylum seeker status and that they are entitled to remain on the territory of the Member State should be issued to the asylum seeker who is seeking international protection (Article 29).

The national authorities who register the asylum application would have to inform the asylum seeker of their rights and obligations, as well as of the consequences resulting from their non-respect, if and where appropriate. Following registration, the asylum seeker would have 10 working days to submit their application, as thoroughly and in as much detail as possible (Article 28(1)). For unaccompanied minors, this deadline would only start to run from when the guardian is appointed and meets the child (Article 32(2)).

The CCBE considers that t*his 10-day deadline,* referred to above, *appears much too short for the asylum seeker to be able to compile or dictate the narrative account, which must then be translated into the language of the country where they are submitting their application for protection, the facts which have led them to flee their country of nationality or usual place of*

residence and their fears to be taken into account should they have to return.

The deadline provided for in the proposed Regulation for examining applications under an ordinary procedure is six months. It could be extended once for a three-month period in case of the influx of asylum seekers or due to the complexity of a case (Article 34(2 and 3)).

Shorter deadlines would now be, however, established in case of inadmissible applications (one month) (Article 34(1)) or manifestly unfounded (10 days), or when the accelerated procedure is applicable (two months) (Article 40(2)).

The accelerated examination procedure would become mandatory in case of the manifest lack of grounds for application, when the asylum seeker tricks the authorities by providing false information or when they come from a safe country of origin (Article 40).

An application should also be examined under the accelerated examination procedure when it is manifestly abusive.

The proposed Regulation sets out that vulnerable persons (Article 19) and unaccompanied minors (Articles 21 and 22), who constitute a category of asylum seekers requiring special procedural guarantees, may nevertheless be subject to an accelerated or border procedure if the appropriate support that their condition requires can be provided to them.

The CCBE considers that the greater interest of the child, as set out in the New York Convention on children's rights, precludes asylum applications from unaccompanied minors being examined in an accelerated procedure, even when they come from a safe country of origin.

The CCBE is of the opinion that only applications which are, at first view, manifestly unfounded or clearly abusive should be subject to accelerated procedures.

The deadlines for appealing the decision would range from one week to one month depending on the procedure having led to the rejection of the application.

The CCBE is of the opinion that the brevity of the deadline of one week imparted in some cases to the disputing of decisions, where asylum applications have been rejected by the authorities, does not allow the effectiveness of the right to exercise the appeal to be guaranteed.

Procedural deadlines could be extended in case of simultaneous influxes of applications in order to help the Member State to cope with them.

Text proposed by the Commission	**Amendments proposed by the CCBE**
Article 28	***Article 28***
Lodging of an application for international protection	***Lodging of an application for international protection***
1. The applicant shall lodge the application within ten working days from the date when the application is registered provided that he or she is given an effective opportunity to do so within that time-limit.	*1. The applicant shall lodge the application within* ***~~ten working days~~ one month*** *from the date when the application is registered provided that he or she is given an effective opportunity to do so within that time-limit.*
2. The authority responsible for receiving and registering applications for international protection shall give the applicant an effective opportunity to lodge an application within the time-limit established in paragraph 1.	*2. The authority responsible for receiving and registering applications for international protection shall give the applicant an effective opportunity* ***– which includes the services of an interpreter -*** *to lodge an application within the time-limit established in paragraph 1.*
3. Where there is a disproportionate number of third-country nationals or stateless persons that apply simultaneously for international protection, making it difficult in practice to enable the application to be lodged within the time-limit established in paragraph 1, the	*3. Where there is a disproportionate number of third-country nationals or stateless persons that apply simultaneously for international protection, making it difficult in practice to enable the application to be lodged within the time-limit established in paragraph 1, the*

responsible authority shall give the applicant an effective opportunity to lodge his or her application not later than one month from the date when the application is registered. *[…]*	*responsible authority shall give the applicant an effective opportunity to lodge his or her application not later than* ***~~one month~~ two months*** *from the date when the application is registered.* *[…]*
Article 53 ***The right to an effective remedy*** *[…]* *6. Applicants shall lodge appeals against any decision referred to in paragraph 1:* *a) within one week in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded;* *[…]*	***Article 53*** ***The right to an effective remedy*** *[…]* *6.* ***For all cases****, applicants shall lodge appeals against any decision referred to in paragraph 1* ***within one month.***

3) ESTABLISHMENT OF NEW OBLIGATIONS FOR ASYLUM SEEKERS IN ORDER TO FIGHT AGAINST ABUSES

New obligations of cooperation with the national authorities would be imposed by the Commission on asylum seekers.

The non-compliance of these obligations would result in major consequences for asylum seekers.

The asylum seekers would be required to formulate their application in the Member State of first entry or in the country in which they regularly find themselves, by providing the authorities with all the necessary information for the examination of their application.

During the time of the investigation of their application by the authorities, they cannot leave this Member State (Article 7(5)).

Asylum seekers should notably keep the responsible authorities informed of their place of residence or telephone number so that they can be contacted during the processing of their case (Article 7(4)).

Currently left to the discretion of each Member State, the sanctions provided for in case of misuse of the procedure, lack of cooperation with the authorities and secondary movement would become compulsory.

The accelerated procedure would thus be automatically used in case, notably, of unreasonable or unfounded application, desire of the asylum seeker to trick the authorities, or in the case of an asylum seeker having the nationality of a safe country of origin.

The automaticity of sanctions and placing in an accelerated procedure, in some cases, seems to the CCBE incompatible with the necessary possibility of taking into consideration the specificity of each situation.

Text proposed by the Commission	***Amendments proposed by the CCBE***
Article 39 ***Implicit withdrawal of applications*** *1. The determining authority shall reject an application as abandoned where:* *(a) the applicant has not lodged his or her application in accordance with Article 28,*	***Article 39*** ***Implicit withdrawal of applications*** *1. The determining authority shall reject an application as abandoned where:* *(a) the applicant has not lodged his or her application in accordance with Article 28,*

despite having had an effective opportunity to do so;	*despite having had an effective opportunity to do so;*
(b) a spouse, partner or minor has not lodged his or her application after the applicant failed to lodge the application on his or her own behalf as referred to in Article 31(3) and (8);	~~***(b) a spouse, partner or minor has not lodged his or her application after the applicant failed to lodge the application on his or her own behalf as referred to in Article 31(3) and (8);***~~
(c) the applicant refuses to cooperate by not providing the necessary details for the application to be examined and by not providing his or her fingerprints and facial image pursuant to Article 7(3);	*(c) the applicant refuses to cooperate by not providing the necessary details for the application to be examined and by not providing his or her fingerprints and facial image pursuant to Article 7(3);*
(d) the applicant has not appeared for a personal interview although he was required to do so pursuant to Articles 10 to 12;	***(d)*** *the applicant has not appeared for a personal interview although he was required to do so pursuant to Articles 10 to 12****, unless he or she was unable to appear due to health reasons or circumstances beyond his or her control, such as a lack of residence;***
(e) the applicant has abandoned his place of residence, without informing the competent authorities or without authorisation as provided for in Article 7(4);	*(e) the applicant has abandoned his place of residence, without informing the competent authorities or without authorisation as provided for in Article 7(4);*
(f) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 7(5).	*(f) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 7(5).*
Article 40	*Article 40*
Accelerated examination procedure	***Accelerated examination procedure***
1. The determining authority shall, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:	*1. The determining authority shall, in accordance with the basic principles and guarantees provided for in Chapter II, accelerate the examination on the merits of an application for international protection, in the cases where:*
(a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation);	~~*(a)*~~ ~~***the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation);***~~
(b) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation);	*(b) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation);*
(c) the applicant has misled the authorities by	*(c) the applicant has misled the authorities by presenting false information or* ***documents***

presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision;	***– except for passports which allowed the applicant to leave his or her country, even if they are borrowed or false passports –*** *or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision;*
(d) the applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State;	*(d) the applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State;*
(e) a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;	*(e) a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;*
(f) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States;	*(f) the applicant may, for serious reasons,* ***which are supported by evidence,*** *be considered a danger to the national security or public order of the Member States;*
(g) the applicant does not comply with the obligations set out in Article 4(1) and Article 20(3) of Regulation (EU) No XXX/XXX (Dublin Regulation), unless he or she demonstrates that his or her failure was due to circumstances beyond his or her control;	*(g) the applicant does not comply with the obligations set out in Article 4(1) and Article 20(3) of Regulation (EU) No XXX/XXX (Dublin Regulation), unless he or she demonstrates that his or her failure was due to circumstances beyond his or her control;*
(h) the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.	***~~(h) the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.~~***
[…]	*[…]*

4) THE HARMONISATION OF RULES ON "SAFE COUNTRIES OF ORIGIN AND SAFE THIRD COUNTRIES"

In its communication dated April 6, 2016 entitled "*Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*", the Commission considers that recourse to the mechanism of "safe countries" constitutes an essential aspect of a common approach.

Regulation presented by the Commission makes a clarification of the concept of "first asylum countries" and "safe third countries" which have, however, as common points for allowing to declare inadmissible an application for protection submitted in a Member State of the Union.

The asylum seeker who already benefits from international protection which has been granted to them by a third country before entering the Union and which is still valid could, according to the will of the Commission, from now on, no longer have their asylum application examined on the substance of the case by the Member State where they reside.

The appeal against a decision of inadmissibility of an application submitted by a person having already been granted protection would not be suspensive.

Due to its automatic nature, this provision runs the risk of criticism in that it prohibits from asserting with the Member State the fears of persecution faced by a person in the country which has granted it international protection.

The concept of a safe third country seeks to restrict asylum seekers from entering the territory of the Union by sending them to countries where respect for human rights is questionable.

The asylum application of a person having entered the Union from a safe third country will be regarded as inadmissible.

The concept of a safe country of origin allows a Member State to examine an asylum application under an accelerated procedure on the basis of a rebuttable presumption according to which the asylum seeker's country of origin is respectful of human rights (Article 40(1)(e)).

When the application for protection is rejected as manifestly unfounded on this ground, there is no automatic suspensive effect of the appeal.

At the current time, each Member State has sole jurisdiction for deciding on the list of these countries which differs considerably according to the countries of the Union.

The Commission wishes to replace the national lists of safe countries of origin and safe third countries with European lists or designations established at EU level, within five years from the coming into force of the Regulation.

The CCBE considers that the automaticity of the conclusions drawn from the Commission's proposal on the identification that an asylum seeker has the nationality of a safe country of origin risks criticism as it leaves no discretionary power in assessing the specificities of each situation to the Member State in charge of investigating the application. The concept of a safe country of origin is contrary to the application of the personal criterion of the fears for each asylum seeker, regardless of their country of origin.

The increased use of the concept of "safe third countries" would result in reducing, very significantly, the access of the European Union to seekers of international protection.

If the Commission's concern to reduce the dangers of crossings in the Mediterranean can only be praised, it should not, however, result in the increased use of the externalisation of asylum applications with Non-Member States whose respect for the rights of asylum seekers is questionable.

The Commission also sets out that the European Agency for Asylum will provide Member States with operational and technical assistance, in order to help them to process the applications within a timely manner, notably by taking support measures with regard to a Member State based on a decision by the Commission.

Lastly, in times of crisis, the authorities of other Member States and international organisations would be also required to help the authorities of a country which would need it for the registration and examination of applications.

Text proposed by the Commission	***Amendments proposed by the CCBE***
Article 36	***Article 36***
Decision on the admissibility of the application	***Decision on the admissibility of the application***
1. The determining authority shall assess the admissibility of an application, in accordance with the basic principles and guarantees provided for in Chapter II, and shall reject an application as inadmissible where any of the following grounds applies:	*1. The determining authority shall assess the admissibility of an application, in accordance with the basic principles and guarantees provided for in Chapter II, and shall reject an application as inadmissible where any of the following grounds applies:*
(a) a country which is not a Member State is considered to be a first country of asylum for the applicant pursuant to Article 44, unless it is clear that the applicant will not be admitted or readmitted to that country;	***~~(a) a country which is not a Member State is considered to be a first country of asylum for the applicant pursuant to Article 44, unless it is clear that the applicant will not be admitted or readmitted to that country;~~***

(b) a country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 45, unless it is clear that the applicant will not be admitted or readmitted to that country;	***~~(b) a country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 45, unless it is clear that the applicant will not be admitted or readmitted to that country;~~***
[…]	***[…]***
Article 45	***Article 45***
The concept of safe third country	***The concept of safe third country***
[…]	*[…]*
4. *Before his or her application can be rejected as inadmissible pursuant to Article 36(1)(b), an applicant shall be allowed to challenge the application of the concept of safe third country in light of his or her particular circumstances when lodging the application and during the admissibility interview.*	***4.*** *Before his or her application can be rejected as inadmissible pursuant to Article 36(1)(b), an applicant shall be allowed to challenge the application of the concept of safe third country in light of his or her particular circumstances when lodging the application* ***~~and during the admissibility interview.~~***
[…]	*[…]*