EUROPEAN LAWYERS
EUROPEAN BARS
CCBE
BARREAUX EUROPÉENS
AVOCATS EUROPÉENS

Council of Bars and Law Societies of Europe
The voice of European Lawyers
Rue Joseph II, 40/8 - B-1000 Brussels
+32 (0)2 234 65 10 | ccbe@ccbe.eu | www.ccbe.eu

New Pact on Migration and Asylum: CCBE position on the amended proposal for a Regulation establishing a common procedure for international protection in the Union

14/04/2021

Introduction

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 welcomes the publication on 23 September 2020 of the Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union as one of the fundamental instruments of the New Pact on Migration and Asylum. The CCBE notes that the New Pact constitutes a fresh start in the area of international protection and migration management taking lessons from the migration crisis in the Union in 2015. The CCBE welcomes the adoption of a Regulation in this specific area to repeal and replace Directive 2013/32/EU and thereby introduce a common asylum procedure based on streamlined and harmonised rules and replacing divergences existing across the Member States in this field. The CCBE welcomes the clear commitment in the Explanatory Memorandum to the full respect of fundamental rights which is of crucial significance in the area of international protection procedures. The objective of this position paper is intended to provide a platform for constructive engagement between the CCBE and the institutions during the legislative process leading up to the adoption of the Regulation.

I. The accelerated procedure under Article 40/ the 20% rule and 'safe countries'

General procedural issues arising from Article 40 APPR[1]

Article 40 provides the legal basis for the accelerated examination procedure under the section heading "Special Procedures'. Eight separate bases are provided for in Article 40(1) where the Member States shall accelerate the examination of the merits of an application for international protection.

In the first place, the CCBE welcomes the removal of the ground for invoking the accelerated procedure contained in Article 31(8)(d) of the recast Procedures Directive 2013/32/EU which provided "*it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his identity or nationality*". This is difficult to establish in practice and the activity sought to be captured in this ground seems to be adequately captured in Article 40(1)(c) APPR that "*the applicant has misled the authorities by presenting false information or documents or by*

[1] For convenience the following terms are used in the document: the amended proposal for a Regulation establishing a common procedure for international protection in the Union is referred to as the APPR: Amended Proposal for a Procedures Regulation; CFR: Charter of Fundamental Rights

withholding relevant information or documents with respect to his identity or nationality that could have had a negative impact on the decision".

The CCBE furthermore welcomes the safeguard in Article 40(1)(g) APPR of "*unless he or she demonstrates that his or her failure was due to circumstances beyond his or her control*" in respect of noncompliance with the obligations set out in Article 4(1) and Article 20(3) of the recast Dublin Regulation. These provisions of the Dublin Regulation relate to circumstances where the applicant has not applied for international protection in the member state of first irregular entry or in a member state in which he had been legally present and this safeguard recognises that this can occur for reasons beyond the control of an individual applicant.

The CCBE also welcomes the additional safeguard of "*where the application is so clearly without substance or abusive that it has no tangible prospect of success*" contained in the ground for invoking the accelerated procedure of Article 40(1)(h) APPR (a subsequent decision) which but for this additional safeguard reflects Article 31(8)(f) of the recast Procedures Directive 2013/32/EU.

The CCBE however has concerns in respect of the reason for the removal of the ground for invoking the accelerated procedure contained in Article 31(8)(i) of the recast Procedures Directive 2013/32/EU where an applicant refuses to comply with an obligation to have his fingerprints taken. The explanatory memorandum in the APPR states that this is by reason of the inclusion of more serious consequences for such a failure to comply contained in article 7(3) APPR which states "*where an applicant refuses to cooperate by not providing the details necessary for the examination of the application and by not providing his fingerprints and facial image, and the responsible authorities have properly informed that person of his obligations and has ensured that that person has had an effective opportunity to comply with those obligations, his application shall be rejected as abandoned in accordance with the procedure referred to in article 39*" (emphasis added). Given the fundamental status of the right to asylum under Article 18 CFR, the CCBE has concerns that the mandatory consequences of Article 7(3) amount to a disproportionate interference with this fundamental right. The CCBE considers that reinserting a failure to comply with the obligation to provide fingerprints as a ground for invoking the accelerated procedure would amount to a more proportionate interference with this right.

It is difficult to reconcile the emphasis placed on the importance of the best interests of the child and in particular the need to take due account of the minor's well-being and social development, including his background contained in recital 20 APPR with the provisions of Article 40(5)(b) APPR. The latter provides that the accelerated examination procedure may only be applied to unaccompanied minors where the applicant may for serious reasons be considered to be a danger to the national security or public order of the Member State. An unaccompanied minor who could pose such a danger is likely to be particularly vulnerable to third party adults and is likely to be in need of greater rather than lesser procedural protection.

Issues arising in respect of the concept of safe country of origin

The CCBE has concerns with the concept of "safe country of origin" as referred to in Article 40(1)(e) and Article 40(5)(a). The concept of a safe country of origin is defined at Article 47 APPR and this definition is similar to that contained in the recast Procedures Directive 2013/32/EU. The AIDA[2] report *"Safe countries of origin": A safe concept?* (AIDA Legal Briefing No. 3 September 2015) sets out a comprehensive analysis of difficulties encountered across EU Member States in respect of designating third countries as safe countries of origin.

[2] Asylum Information Database (AIDA) is a database managed by the European Council on Refugees and Exiles (ECRE) and funded by the European Programme for Integration and Migration (EPIM), a collaborative initiative by the Network of European Foundations, and the European Union's Asylum, Migration and Integration Fund (AMIF).

First, the criterion of there being "*generally no persecution*" in Article 47 APPR is difficult to reconcile with the spirit, scope and intent of the Geneva Convention. While a context of widespread conflict or violence may facilitate the identification of persecution or harm risks, it often happens that in certain countries of origin where nationals 'generally' enjoy state protection, certain minorities – whether ethnic, religious, sexual or other – find themselves exposed to ill-treatment. It is in respect of those categories of refugees, to which the Geneva Convention extends its protection, that the 'safe country of origin' concept in the APPR creates high risks of unfairness.

Second, despite ongoing efforts for convergence in country of origin information (COI) collection across the EU through EASO, Member States adopt quite distinct positions as to the general situation prevailing in countries of origin. By way of example, the UK (obviously no longer a Member State) diverged from other Member States in its assessment of Eritrea by relying on COI report (the methodology of which had been questioned) resulting in the grant of protection in the UK to only 34% of Eritrean applicants during the second quarter of 2015, as opposed to 73% during the first quarter.

Third, there are difficulties with the safety indicator arising from the number of violations found by the European Court of Human Rights (ECtHR) in its rulings in respect of the relevant third country. By way of example in this regard, recital 55 APPR observes that "*as regards Albania … in 2014, the European Court of Human Rights found violations in four out of 150 applications*". However, using this indicator fails to specify a number of relevant elements, including what proportion of the applications before the ECtHR actually resulted in decisions on the merits, at what time the alleged violation took place, how many cases concerned those countries' nationals, or even on what grounds the applications were based and violations were found. In that respect, a superficial look at the ECtHR's caseload without due regard to the context and content of those cases could be a misleading criterion of safety.

Fourth, there are difficulties with the safety indicator of the state of play of accession negotiations between the EU and candidate countries. In this respect, recital 55 APPR observes that "*Albania has been designated as a candidate country by the European Council. At the time of designation, the assessment was that Albania fulfilled the criteria established by the Copenhagen European Council … relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities …*". This finding fails to reflect details of progress reports issued as an ongoing part of the EU enlargement process, which consistently highlight critical deficiencies and weaknesses in these areas, which is why such candidate states have not yet progressed to accession.

The APPR explanatory memorandum states by way of objectives that "*the Commission proposes to progressively move towards full harmonisation in this area, and to replace national safe country lists with European lists or designations at Union level within five years of entry into force of the Regulation*". This reflects recital 49 and Articles 48 to 50 APPR. The CCBE welcomes this transition to a harmonised approach to the safe country concept and the five-year timeframe for this contained in Article 50 APPR. A harmonised approach will alleviate the divergences between Member States in interpreting this concept. The CCBE also notes the safeguard in Article 48 that the Commission "*shall regularly review the situation in third countries that are on the EU common list of safe countries of origin, with the assistance of the Union Agency for Asylum and based on the other sources of information referred to in Article 45(2)*". This reflects an apparent appreciation for the difficulties in applying this concept as identified in the AIDA report and for a conscientious and careful approach to this task.

Issues arising in respect of the 20% recognition rate

The CCBE has serious concerns with the identification of a concept of a country of origin based on its nationals having an EU-wide protection recognition rate of 20% or less of Article 40(1)(i) and 40(5)(c), which previously was one manner by which Member States designated a safe country of origin.

There are considerable difficulties with this indicator of safety. By way of illustration, AIDA sets out data in respect of first instance recognition rates for Albanian nationals over the first and second

quarter 2015. Almost 80% of first instance decisions on Albanian applicants were taken by three countries alone: France, the UK and Germany. Yet the recognition rates between those countries varied considerably. During the first quarter of 2015, the UK and France granted protection to 17.4% and 12.9% of cases respectively, while Germany only issued positive decisions for 1.6%. Germany's low recognition rate for Albanian nationals dropped significantly to 0.2% during the second quarter of 2015, with only 10 positive decisions out of a total 3,655 first instance decisions. This suggests that the assessment of risks of persecution or serious harm in light of the situation in the country is not conducted uniformly across EU Member States. Further contrasts may be made between countries such as the Netherlands and Ireland, which rejected all claims by Albanian nationals during the first quarter of 2015, by contrast with Italy and Switzerland which recorded protection rates of 54% and 33.3% respectively.

AIDA also sets out data in respect of first instance recognition rates for Turkish nationals over the first and second quarter 2015 as it was proposed to add Turkey to the EU safe country of origin list. No individual member state had deemed Turkey a "safe country of origin" in its national list and the EU-wide recognition rate for Turkish asylum seekers in 2014 was 23.1%, and as high as 85.8% for Switzerland.

These figures cast doubt on the utility of the presumption of safety itself. The concepts of persecution and serious harm require an individualised assessment of specific personal characteristics which may place a person at risk of ill-treatment in his home country. The fact that Member States do in fact recognise the existence of such risks for a significant number of persons originating from countries which are designated as "generally and consistently" free from persecution calls into question the utility of designating them as safe. In every international protection application, it is presumed that a country of origin will protect its own citizens. The concept of a safe country seems to add little to this but does provide a further ground for challenge by way of litigation, contrary to the interests of Member States. The CCBE urges careful consideration as to whether it is appropriate to retain this concept in the future.

The CCBE does not consider the 20% recognition rate should be retained as an indicator of safety. It circumvents the already established safe country rules. Safe country designation should be harmonised and Member States should not retain this tool for circumventing Union level designations. This is particularly so given the considerable discrepancies in approach by different Member States in applying this indicator to date as identified above. The CCBE does not consider that the safeguard clause stating that the rule would not be applied where '*the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs'* can only lead to further national divergences, possibly forum shopping and merely serves the emphasise the overall necessity to engage with the individual circumstances of each application for international protection.

The CCBE therefore has serious concerns with the concept of a safe country of origin being based on a simple indicator as to its nationals having an EU-wide protection recognition rate of 20% or less contained in Articles 40(1)(i) and 40(5)(c), which previously was one manner by which Member States designated a safe country of origin.

Article 40 Accelerated examination procedure	
Current text	Proposed amendments
1. … (i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs. 5. …	**Delete** **Insert**: **"1. …** **(j) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with Regulation XX on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation XX establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes."** [**and delete** article 7(3) APPR: "where an applicant refuses to cooperate by not providing the details necessary for the examination of the application and by not providing his fingerprints and facial image, and the responsible authorities have properly informed that person of his obligations and has ensured that that person has had an effective opportunity to comply with those obligations, his application shall be rejected as abandoned in accordance with the procedure referred to in article 39."]

(b) the applicant may for serious reasons be considered to be 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;	**Delete**
5. …	
(c) the applicant is of a nationality or, in the case of stateless persons, a former habitual residence of a third country for which the proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs.	**Delete**

II. Border procedures under Article 41

Difficulties arising from the necessary link to the screening procedure

Article 41(1) in its amended format states that the border procedure applies "*following the screening procedure carried out in accordance with the [proposed new Screening Regulation]*". The proposed new Screening Regulation operates expressly within the parameters of the Schengen Borders Code (Regulation 2016/399), the Schengen Information System, the Visa Code (Regulation 810/2009) and the Visa Information System. For the sake of clarity, in particular as regards those Member States that have opted out of these instruments, the addition of the terms "where applicable" after "following the screening procedure" might be considered.

The explanatory memorandum of the APPR under the heading 'New pre-entry phase' states that the screening procedure does not affect the right of a person to make an asylum application immediately when arriving on the territory of a member state but only means that their application will be registered once the screening has ended and the necessary information is at hand to decide whether the border procedure should be used. The memorandum proceeds to state that the new Article 41(1) and (2) clarifies that only such applications can be assessed in a border procedure where applicants have not yet been authorised to enter the Member State's territory and without meeting the entry conditions under the Schengen Borders Code. Where a Member State has opted out of the Schengen Borders Code, it is not clear what procedures are envisaged to determine whether the border procedure should be used in the absence of a screening procedure (which seems to be inextricably linked to the criteria in the Schengen Borders Code). For the sake of clarity, it would be preferable for the border procedure to be self-contained without any necessary link to the screening procedure in order to take into account the position of Member States who have opted out of the Schengen Borders Code.

Serious issues arise with Article 40(1)(i) as set out above. These in turn affect Article 41(3) to the extent that a Member State could be obliged to carry out the border procedure where Article 40(1)(i) is deemed to apply.

General procedural issues arising from Article 41 APPR

It is difficult to reconcile the emphasis placed on the importance of the best interests of the child and in particular the need to take due account of the minor's well-being and social development, including his background contained in recital 20 APPR with Article 41(5) APPR for the same reasons as set out above in respect of Article 40(5)(b) APPR.

Article 41(10) provides that international applications subject to border procedures shall be lodged within five days from registration or from arrival following a relocation under the new Regulation on Asylum and Migration Management. This is stated to be by way of derogation from Article 28 APPR which provides that lodgement must be within "*10 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*" (emphasis added). The CCBE proposes the insertion of these two safeguards of "working days" and "provided that he or she is given an effective opportunity to do so within that time-limit" into Article 41(10).

Clear incorporation of the standards of the Reception Conditions Directive

In respect of the locations where border procedures are to be carried out as envisaged in Article 41(13) and (14), CCBE welcomes that the Commission must be informed of these locations within two months or prior to designation of a temporary alternative location. Recital 40(c) APPR expressly states that "*when applying the border procedure for the examination of an application for international protection, Member States should ensure that the necessary arrangements are made to accommodate the applicants at or close to the external border or transit zones, in accordance with the [Reception Conditions Directive]*". The CCBE proposes that it be made expressly clear in the text of Article 40 itself that the minimum standards of the Reception Conditions Directive apply to applicants throughout the duration of the border procedure.

Article 41 Border procedure for the examination of applications for international protection	
Current text	Proposed amendments
1. Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], …	**Insert as underlined**: "1. Following the screening procedure, **where applicable,** carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], …"
3. Member State shall examine an application in a border procedure in the cases referred to in paragraph 1 where the circumstances referred to in Article 40(1), point (c), (f) or (i), apply.	**Amend as follows**: "3. Member State shall examine an application in a border procedure in the cases referred to in paragraph 1 where the circumstances referred to in Article 40(1), point (c)~~,~~ **or** (f) ~~or (i),~~ apply."
5. The border procedure may only be applied to unaccompanied minors and to minors below the	

age of 12 and their family members in the cases referred to in Article 40(5) (b) [danger to national security or public order].	**Delete**
10. By way of derogation from Article 28 of this Regulation [lodgment within 10 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], applications subject to a border procedure shall be lodged no later than five days from registration for the first time or, following a relocation in accordance with Article [x] of Regulation EU (No) XXX/XXX [Regulation on Asylum and Migration Management], five days from when the applicant arrives in the Member State responsible following a transfer pursuant to Article 56(1), point (e), of that Regulation.	**Amend as follows**: " … applications subject to a border procedure shall be lodged no later than five **working** days from registration for the first time or, following a relocation in accordance with Article [x] of Regulation EU (No) XXX/XXX [Regulation on Asylum and Migration Management], five **working** days from when the applicant arrives in the Member State responsible following a transfer pursuant to Article 56(1), point (e), of that Regulation**, provided that he or she is given an effective opportunity to do so within these time-limits."**
13. During the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones. Each Member State shall notify to the Commission …	**Amend as follows**: "13. During the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones **in accordance with the Reception Conditions Directive**. Each Member State shall notify to the Commission…"
14. In situations where the capacity of the locations notified by Member States pursuant to paragraph 14 is temporarily insufficient to process the applicants covered by paragraph 3, Member States may designate other locations within the territory of the Member State and upon notification to the Commission accommodate applicants there, on a temporary basis and for the shortest time necessary.	**Amend as follows**: "14. In situations where the capacity of the locations notified by Member States pursuant to paragraph 14 is temporarily insufficient to process the applicants covered by paragraph 3, Member States may designate other locations within the territory of the Member State and upon notification to the Commission accommodate applicants there, on a temporary basis**,** ~~and~~ for the shortest time necessary **and always in accordance with the Reception Conditions Directive.**"

<u>General observations – Legal Base, Right to Effective Remedy and Judicial Protection</u>

Recital 31a APPR provides: '*In order to increase the efficiency of procedures and to reduce the risk of absconding and the likelihood of unauthorised movements, there should be no procedural gaps between the issuance of a negative decision on an application for international protection and of a return decision. A return decision should immediately be issued to applicants whose applications are*

rejected. Without prejudice to the right to an effective remedy, the return decision should either be part of the negative decision on an application for international protection or, if it is a separate act, be issued at the same time and together with the negative decision.'

The APPR's explanatory memorandum states under the heading "Legal basis, Subsidiarity and Proportionality" that *"The legal bases for the proposal are Articles 78(2)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union. These foresee the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status as well as illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, respectively. The former legal basis was also used in the Commissions 2016 proposal for an Asylum Procedure Regulation. It is necessary to add the latter legal basis to provide for specific provisions regulating the return of rejected asylum seekers, notably in relation to the joint issuance of a return decision following a negative decision on an application, the joint remedy against such decisions and the seamless asylum and return border procedures*." It is clear that the stated legal bases for the proposal are disputable because they rely on Article 79 (2)(c) TFEU which does not regulate refugee issues but rather, illegal immigration and unauthorised residence.

CCBE is concerned about the strong emphasis on the connection between the international protection procedure and the return procedure as prescribed in the proposed amendment in Article 35a.

Firstly, by way of derogation to the suspensive effect of an appeal under the revised Article 54(3), it is stated that '*The applicant shall not have the right to remain … where the competent authority has taken one of the following decisions: (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) [*Accelerated examination procedure*] and (5) apply [including safe country of origin] or in the cases subject to the border procedure; (b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];(c)a decision which rejects an application as implicitly withdrawn' ….* This means that there will be cases in which there will be no suspensive effect notwithstanding a lawful application for an appeal or review by way of exercising the right to an effective remedy expressly recognised in Article 54(2). An applicant for international protection who has been refused at first instance for the reasons stated will therefore be exposed to a risk of a return decision being enforced in advance of the second instance decision by the court or tribunal in the case about the international protection application.

Secondly, Article 53(7) APPR establishes short time-limits of at least one week in the case of a decisions rejecting an application as inadmissible, or as implicitly withdrawn or as unfounded, if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply [Accelerated examination procedure] for applicants to lodge their appeals. While this is a minimum standard, the possibility of such short deadlines being lawfully imposed by Member States may increase divergences in the implementation of the Common European Asylum System.

Despite the option of such short time limits, Article 15(3) (b) and (c) APPR permit the exclusion of free legal assistance and representation in the administrative procedure where the application is considered as '*not having any tangible prospect of success'* or where the application is a subsequent application. CCBE wishes to stress that it should be recalled that persons who apply for international protection are non-nationals who very often do not know the language and law of the EU Member State in which they apply for international protection. It should also be borne in mind that as their claim is that they are victims of persecution or serious harm, there is a reasonable possibility that where their claim is valid, they may also have undergone and be suffering from sufficient stress and anguish of a significant level. For example, they may need more time and/or help than other people to take steps such as preparing and lodging an appeal. However, a lack of free legal assistance combined with short time-limits for lodging appeals creates a risk that applicants will be returned to the countries where they will be exposed to risk of persecution or serious harm before the final decision on their international protection will be made in the EU. There is also a risk that they will not lodge an appeal

on time because the preparation of the appeal within the short time-limit will be too difficult for them especially if they have to prepare it by themselves, owing to limited or indeed non-existent access to legal representatives. Therefore, CCBE is concerned that the right to an effective legal remedy (which is one of the most fundamental of all human rights) for some applications will be significantly compromised if not abrogated in certain cases.

The CCBE welcomes the general commitment to the right to an effective remedy for both asylum and returns decisions. The right to an effective remedy is a fundamental safeguard to ensuring protection from refoulement and therefore an inherent part of a fair and efficient asylum procedure. It is important however that the right to an effective remedy envisaged in Article 53(1) must comply with Article 47 of the EU Charter and must also be interpreted in light of the jurisprudence of the European Court of Human Rights in relation to the guarantees to the right to a fair and public hearing as provided in Articles 6 and 13 ECHR.

The CCBE welcomes the guarantee in Article 53(3) that a full *ex nunc* examination of an appeal can be made both in fact and law. This is a vital protection in the international protection process given that extensive research which exists on the very particular difficulties faced by many applicants in disclosing incidents of past persecution at an initial stage of their claims especially without having the benefit of legal advice. CCBE suggests the insertion of a right to an oral hearing into Article 53(3)(a) to guarantee the right to a fair and public hearing as provided in Articles 6 and 13 of the European Convention of Human Rights (ECHR) (cf Jussila v Finland Application No 73053/01, Judgment of 23 November 2006, par. 40.). On the basis of the foregoing, it seems clear that ECtHR envisages that an oral hearing would normally typically be required in cases affecting fundamental rights such as the present one. The lack of an explicit reference in the Commission's proposal to a *prima facie* right to an oral hearing is a significant omission.

Article 53(6) proposes that if the documents are not submitted in time for the court or tribunal to ensure their translation, the court or tribunal may refuse to take those documents into account if they are not accompanied by a translation provided by the applicant. It is also noted that the concept of "time" is not defined in the article. This potentially gives rise to a serious unfairness because as currently worded, it places an undue onus on an applicant or his or her legal representatives to provide documentation to a tribunal or court particularly where an appeals body has been charged with carrying out a full and *ex nunc* examination of all points of fact and law. Often documents may only become available after a hearing has been held for example but before a final decision is reached frequently stemming from the applicant's particularly difficult circumstances and vulnerabilities. From a practical perspective, this would leave a tribunal or a court potentially making a decision without a full consideration of available documentation if a national tribunal or court was to be overly prescriptive in defining the deadlines for the submission of relevant documents. By allowing time for documents to be properly considered even if after a hearing has concluded but before a final decision is reached, it will inevitably lead to better informed proceedings and considered decisions and may eventually result in more efficient appeal proceedings with fewer further appeals challenges potentially arising.

The CCBE recognises the goal of increased efficiency in the international protection process. The current proposals, as presently formulated, do not define the concept of when something is '*submitted in time'* and is uncertain and does not aid the goal of common rules. The CCBE would further note that by not being overly prescriptive in relation to when relevant documentation is received (provided it is received prior to the delivery of a determination) will inevitably lead to better informed decisions and may eventually result in more efficient appeal proceedings with fewer further appeals or reviews.

Proposed Text:

Delete 53(6) as currently worded and replace with:

Article 15 Free legal assistance and representation	
Current text	Proposed amendments
…	…
3. The provision of free legal assistance and representation in the administrative procedure may be excluded where:	**Amend as follows**:
(a)the applicant has sufficient resources;	3. The provision of free legal assistance and representation in the administrative procedure may be excluded where~~:~~
(b)the application is considered as not having any tangible prospect of success;	~~(a)~~the applicant has sufficient resources~~.~~**,** ~~;~~
(c)the application is a subsequent application.	~~(b)the application is considered as not having any tangible prospect of success;~~
	~~(c)the application is a subsequent application~~.

Article 53 The right to an effective remedy	
Current text	Proposed amendments
3. An effective remedy within the meaning of paragraph 1 shall provide for a full and ex nunc examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation.	3. An effective remedy within the meaning of paragraph 1 shall provide for a full and ex nunc examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation. **This right shall include applicant shall have a right to an oral hearing before a first level appeal court or tribunal…**
…	
6. (Delete in whole)	**6. The court or tribunal shall ensure that all documents it receives from an applicant that are relevant and necessary to their claim shall be translated and considered prior to the issuing of its the final decision.**
	Amend as follows:
7.Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1:	7.Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1~~:~~
(a)at least one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the	(~~a)at least one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the~~

time of the decision any of the circumstances listed in Article 40(1) or (5) apply; (b)between a minimum of two weeks and a maximum of two months in all other cases. 8.The time-limits referred to in paragraph 7 shall start to run from the date when the decision of the determining authority is notified to the applicant or his or her representative or legal adviser. The procedure for notification shall be laid down in national law. 9.Member States shall provide for only one level of appeal in relation to a decision taken in the context of the border procedure.	~~time of the decision any of the circumstances listed in Article 40(1) or (5) apply;~~ ~~(b)~~between a minimum of two weeks and a maximum of two months~~ in all other cases~~.

Article 54 Suspensive effect of appeal	
Current text	Proposed amendments
… 3.The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one of the following decisions: (a)a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure; (b)a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements]; (c)a decision which rejects an application as implicitly withdrawn; (d)a decision which rejects a subsequent application as unfounded or manifestly unfounded; (e)a decision to withdraw international protection in accordance with Article14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation NoXXX/XXX (Qualification Regulation).	**Amend as follows**: … 3.The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken the following decision: ~~(a)a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;~~ ~~(b)a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];~~ (c)a decision which rejects an application as implicitly withdrawn; ~~(d)a decision which rejects a subsequent application as unfounded or manifestly unfounded;~~ ~~(e)a decision to withdraw international protection in accordance with Article14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation NoXXX/XXX (Qualification Regulation).~~

Subsequent applications

Article 42 (1) APPR defines "*subsequent applications*" as any further application which is submitted by the same applicant in any of the EU Member States after a previous application has been rejected by means of a final decision. Hence, every application made by the same applicant in the EU after he/she receives a final decision in international protection cases will be considered to be a subsequent application. Article 42(4) states that "*a new procedure for the examination of the application for international protection shall be initiated where: (a) relevant new elements or findings …have arisen or have been presented by the applicant…*".

CCBE expresses its concerns about the use of the expression "*in any Member State*" in Article 42(1). The Commission's proposal appears based on three flawed assumptions in this regard: firstly, that during the first and second procedures the application may be examined by the same EU Member State; secondly, that during the second procedure, applicants will be able to address directly facts or evidence he/she provided during the first application and thirdly, that during the examination of the second application the relevant authority will have access to the files from the first procedure.

In practice some of these assumptions may be incorrect. It should be emphasised in this regard that Article 24(1) and (2) of the proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management – hereafter 'AMMR' - establishes an exemption from the general rules of the criteria and mechanisms for determining the Member State responsible for examining an application for international protection as follows: "1. *Where, on account of pregnancy, having a new-born child, serious illness, severe disability, severe trauma or old age, an applicant is dependent on the assistance of his or her child or parent legally resident in one of the Member States, or his or her child or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child or parent, provided that family ties existed before the applicant arrived on the territory of the Member States, that the child or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing*. (…) *2. Where the child or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child or parent of the applicant to its territory*."

Furthermore Article 25(1) AMMR states: "*By way of derogation from Article 8(1), each Member State may decide to examine an application for international protection by a third-country national or a stateless person registered with it, even if such examination is not its responsibility under the criteria laid down in this Regulation*." In addition, Article 35 (2) AMMR provides: "*Where the transfer does not take place within the time limits set out in paragraph 1, first subparagraph, the Member State responsible shall be relieved of its obligations to take charge of or to take back the person concerned and responsibility shall be transferred to the requesting or notifying Member State*." This means that the Member State responsible for the international protection application can change during or between the procedures for international protection. In such a situation it may be that the evidence which was provided by an applicant during the first procedure will not be available for the second EU Member State when different Member States will examine the first and second applications. This is because the documentation, information and evidence will still be in the first Member State's authority's archive. Also, the documents will be written in or translated into the first Member State's language. While it is true that the first Member State may send the files to the second Member State, a translation of all documents will be needed, and this will take time. Therefore, the EU Member State which is responsible for the second application should check to determine if there are any relevant new elements or findings which give the right to initiate a new procedure for the examination of the application for international protection in the light of the full files transferred from the first Member State. Otherwise, the procedure raises concerns that the second decision will be based on incompletely

collected or transmitted evidence and consequently it may incorrectly be assumed to be a subsequent application.

It should also be emphasised that under Article 15(3)(c) APPR, the provision of free legal assistance and representation in the administrative procedure may be excluded in the case of subsequent applications. This means in practice that an applicant who applied for international protection in one Member State and then made a new application in the second Member State may have no right to free legal assistance. It should also be borne in mind that there are different rates and standards of recognition for applications for international protection in the Member States.

At the same time, the proposal in Article 43 provides that the Member States may provide an exception from the right to remain on their territory and derogate from the suspensive effect of an appeal when an application is a subsequent application. This proposal read with the short time-limit for lodging an appeal in this type of procedure which under Article 53(6)(a) APPR states that applicants shall lodge appeals *'within one week in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded*' may lead to a situation in which an applicant will be deprived of access to free legal assistance, and he/she will still be obliged to lodge an appeal in short order under the subsequent procedure. All of the above-mentioned obstacles create a risk that the application may be wrongly determined to be a subsequent application and, consequently, may in practice expose the applicant to a risk of being subject to a return decision before the second-instance decision will be made in his/her international protection case.

The recognition that the preliminary examination shall be carried out on the basis of written submissions and a personal interview in accordance with the basic principles and guarantees provided for in Chapter II of the new Regulation is positive. However, the second part of this Regulation which states that the personal interview may be dispensed with in those instances where, from the written submissions, it is clear that the application does not give rise to relevant new elements or findings or that it is clearly without substance and has no tangible prospect of success creates a risk that a right to the personal interview during the second or next proceeding may in practice be unenforceable.

Article 42 Subsequent applications	
Current text	Proposed amendments
1. After a previous application had been rejected by means of a final decision, any further application made by the same applicant in any Member State shall be considered to be a subsequent application by the Member State responsible. 2. A subsequent application shall be subject to a preliminary examination in which the determining authority shall establish whether relevant new elements or findings have arisen or have been presented by the applicant which significantly increase the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation) or which relate to the reasons for which the previous application was rejected as inadmissible.	**<u>Amend as follows</u>**: **1.Where a person who has applied for international protection in a Member State makes further representations or a subsequent application in the same Member State, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.** **2. For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 36(1)(d), a**

3.The preliminary examination shall be carried out on the basis of written submissions and a personal interview in accordance with the basic principles and guarantees provided for in Chapter II. The personal interview may be dispensed with in those instances where, from the written submissions, it is clear that the application does not give rise to relevant new elements or findings or that it is clearly without substance and has no tangible prospect of success. 4.A new procedure for the examination of the application for international protection shall be initiated where: (a)relevant new elements or findings as referred to in paragraph 2(a) have arisen or have been presented by the applicant; (b)the applicant was unable, through no fault on his or her own part, to present those elements or findings during the procedure in the context of the earlier application, unless it is considered unreasonable not to take those elements or findings into account. 5.Where the conditions for initiating a new procedure as set out in paragraph 4 are not met, the determining authority shall reject the application as inadmissible, or as manifestly unfounded where the application is so clearly without substance or abusive that it has no tangible prospect of success.	**subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Regulation XXXX.** **3. In cases when after a previous application has been rejected by means of a final decision and a further application is made by the same applicant in any other Member State, the Member State responsible for examining the subsequent application should request from the Member State which issued the final decision the transfer of all materials relating to the case considered by that Member State.** **4. The preliminary examination shall be carried out on the basis of written submissions and a personal interview to be conducted in accordance with the basic principles and guarantees provided for in Chapter II.** **5. A new procedure for the examination of the application for international protection shall be initiated where:** **(a)relevant new elements or findings as referred to in paragraph 2 have arisen or have been presented by the applicant;** **(b)the applicant was unable, through no fault on his or her own part, to present those elements or findings during the procedure in the context of the earlier application, unless it is considered unreasonable not to take those elements or findings into account.** **Member States may also provide for other reasons for a subsequent application to be further examined.** **6. Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 4 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 53.** **7. When a subsequent application is not further examined pursuant to this Article, it**

	shall be considered inadmissible, in accordance with Article 36(1)(d). **8. The procedure referred to in this Article may also be applicable in the case of:** **(a) a dependent who lodges an application after he or she has, in accordance with Article 31(1), consented to have his or her case be part of an application lodged on his or her behalf; and/or** **(b) an unmarried minor who lodges an application after an application has been lodged on his or her behalf pursuant to Article 31(7).** **In those cases, the preliminary examination referred to in paragraph 2 will consist of examining whether there are facts relating to the dependent's or the unmarried minor's situation which justify a separate application.** **9. Where a person with regard to whom a transfer decision has to be enforced pursuant to Regulation XXX makes further representations or a subsequent application in the transferring Member State, those representations or subsequent applications shall be examined by the responsible Member State, as defined in that Regulation, in accordance with this Regulation.**