

CCBE Response to the EU Commission consultation on the New Pact on Migration and Asylum roadmap

26/08/2020

The Council of Bars and Law Societies of Europe (CCBE) representing the bars and law societies of 45 countries, and through them more than 1 million European lawyers welcomes the Commission's initiative and the opportunity to make observations on the Roadmap for a New Pact on Migration and Asylum. The CCBE emphasises the following principles in the area of international protection – communicated by the CCBE at earlier stages to the Commission and as appearing in the Annex - should be given prominence in the initiative:

1. Asylum Policy and Third Countries: persons seeking international protection must be permitted to access EU borders and should not be subject to any landing/disembarkation platforms in third countries where the operation of the Common European Asylum System (CEAS) cannot be guaranteed. The lawful operation of the CEAS requires access to legal advice and representation by a lawyer qualified to practise in the EU and access to an independent appeals tribunal governed by EU law and subject to the jurisdiction of the Court of Justice of the EU. The legal safeguards set out especially in Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Recast) including the right to an interpreter must be maintained.

2. Effective access to asylum procedure: efforts should be redoubled to ensure that adequate legal and procedural information is provided to persons seeking international protection to allow such persons to provide at each stage of the procedure a complete and accurate account of the reasons that led them to leave their country. The new Pact should ensure on a practical level that the information provided must include the criteria on foot of which the person may be granted protection.

3. Legal assistance at all stages of the procedure: the provisions of Directive 2013/32/EU entitling asylum seekers to benefit from legal advice at all stages of the asylum procedure (Article 22) as well as the right to free legal assistance and representation before a court of first instance when a decision is taken at the border (Article 20) should be strengthened by the new Pact to ensure that asylum seekers have legal assistance from independent lawyers at all stages of the procedure and not simply in respect of an appeal against a refusal to recognise protection status. All too often asylum seekers in good faith fail to explain or adequately explain elements which are essential from the perspective of the protection officer but are not obvious to an applicant recalling that the burden of proof rests with the applicant. Asylum seekers should also always be informed of the necessity to obtain legal advice and assistance and the Pact should ensure this happens on a practical level.

4. Training for Lawyers: the Pact should ensure that lawyers working in the field of international protection in the EU especially in migration hotspots are provided with comprehensive and regular training on the CEAS and that adequate financing should be put in place to achieve this goal. Training should focus in particular on assisting vulnerable persons including unaccompanied minors.

5. Legal aid funded at EU level: to ensure that legal assistance from independent lawyers at all stages of the procedure is effective, there is a need for legal aid schemes in the field of migration and asylum which the EU needs to ensure through a funding program.

6. Prohibition on Closed Controlled Centres and the Detention of Children: the Pact should continue to uphold the principle of prohibiting such centres in the EU. Children should never be detained.

7. Dublin System: decisions on responsibility sharing must always be subject to adequate notice to persons affected permitting appeals to independent tribunals. Common European approaches towards conditions in countries of origin would serve to ensure consistency of protection and thereby reduce secondary movements.

CCBE comments on the Commission proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)

29/03/2019

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 12 September 2018, the Commission published its [proposal for a recasting of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals](#). This proposal is part of a package of measures proposed by the Commission as a follow up to the European Council of 28 June 2018 and aims at ensuring the effective return of third-country nationals who do not have a right to stay in the EU. This constitutes one of the key objectives of European Union's migration policy.

The principal modifications proposed by the Commission as part of this targeted revision of the Return Directive concern the determination of the risk of absconding (Article 6); the obligation to cooperate for third country nationals (Article 7); the issuing of a return decision in connection with the termination of illegal stay (Article 8); the diminution of the timeframe for voluntary departure (Article 9); the possibility for Member States to issue entry bans during border check at exit, without issuing a return decision (Article 13); the introduction of national return management systems (Article 14); the remedies (appeals or reviews) (Article 16); the introduction of new grounds for detention (Article 18); the introduction of a simplified return procedure for third-country nationals who are refused asylum (Article 22).

The CCBE considers that several aspects of the proposals are problematic and should be reconsidered so as to guarantee fundamental rights safeguards.

It indeed appears that the reform is entirely aimed at facilitating the expulsion of irregular migrants. Under the proposal, judicial proceedings would be accelerated, with time limits below the standard set out by the CJEU, and the use of detention would be facilitated.

The CCBE considers that, as pointed out by Judith Sargentini MEP, Rapporteur for the European Parliament's LIBE Committee (hereafter the Rapporteur), any revision of the return *acquis* must "ensure that the steps taken in that direction are accompanied by unambiguous and enforceable fundamental rights safeguards".

1) LACK OF IMPACT ASSESSMENT

The CCBE regrets that the proposed revision of the Return Directive was not accompanied by any impact assessment from the Commission.

According to the explanatory memorandum of the Commission, this targeted revision of the Return Directive was necessary to address the key challenges to ensure effective returns and notably to “*reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding*”. This argument relies principally on the little progress made in terms of increasing the effectiveness of returns. However, to measure effectiveness of returns, the Commission primarily based itself on the absolute number of return decisions enforced by Member States. Other types of data such as the number of forced and voluntary returns and qualitative data on the sustainability of returns are therefore often disregarded. As regards the necessity of an impact assessment, the Commission concluded the following:

“Taking into account that an in-depth assessment of the key issues in the field of return has been accomplished, the urgency in which legislative proposals need to be tabled and also acknowledging that the revision of the existing Directive is the most appropriate option both in terms of substance and timing, an Impact Assessment on this proposal is not deemed necessary.”

In this context, the CCBE welcomes the targeted substitute impact assessment (available [here](#)) made by the European Parliamentary Research Service (EPRS) at the request of the LIBE Committee.

Firstly, this substitute impact assessment rightly points out the lack of persuasiveness of the Commission’s decision not to issue an impact assessment. It underlines the necessity of having an impact assessment whenever a Commission initiative is likely to have significant economic, environmental or social impacts and that nothing in the rules of procedure provide for any exception regarding the urgency of the reform. The CCBE considers therefore that an impact assessment should have been issued by the Commission as the proposed reform of the Return Directive meets those requirements and has major impacts on fundamental rights safeguards both at EU level and at national level.

It also reveals a number of key issues which were not properly taken into consideration and should have been examined in more detail in the Commission’s proposal, such as the lack of clear evidence supporting the Commission’s claim that its proposal would lead to more effective returns of irregular migrants; the lack of compliance of the Commission’s proposal with the proportionality principle; the impact of the Commission’s proposal on a number of social and human rights of irregular migrants, including likely breaches of fundamental rights, as safeguarded under international and EU law, in particular the EU Charter of Fundamental Rights; and substantial additional costs that will be generated for Member States and the EU.

2) ACCESS TO JUSTICE - ADEQUATE PROCEDURAL SAFEGUARDS SHOULD BE GUARANTEED

Access to justice is essential to achieve a sustainable and humane return policy and is of paramount importance in a European Union governed by the Rule of Law. Accordingly, legal aid and interpretation must be provided for third-country nationals at any stage of the procedure. Besides, effective remedies by way of appeal or review should be ensured.

Access to legal advice

As regards Article 7 of the Commission’s proposal, the CCBE supports the Rapporteur’s proposal to provide migrants “*access to timely, unbiased and reliable information allowing them to make an informed decision and fosters preparedness for return and ownership of the return process, thereby*

enhancing prospects for sustainable reintegration”, instead of imposing an obligation for them to cooperate with the competent authorities which may not be effective in practice.

Remedies (Appeals and reviews)

Regarding Article 16, the CCBE considers that:

- appeals should not be restricted to a single level of jurisdiction, thus allowing Member States to apply higher levels of protection by virtue of their constitutions;
- an appeal against a return decision should always have a suspensive effect or otherwise the applicant would lack an effective remedy;
- the maximum time limit of five days to lodge an appeal, where the return decision is the consequence of a decision rejecting an asylum application, should be removed given that such a short time limit would in practice undermine the effectiveness of the appeal notably in the context of multiple asylum applications. This measure does not take into account positive decisions in the context of multiple asylum applications. Besides, this time limit is too short for practitioners to provide adequate legal advice and representation.

3) THE USE OF DETENTION SHOULD BE STRICTLY LIMITED

The Commission’s proposal provides for the use of detention for a minimum period of 3 months and a maximum period of 6 months in cases of (a) a risk of absconding, (b) the third-country national avoids or hampers the preparation of return and (c) a threat to public order or national security.

This minimum period of detention is not compatible with the requirement of applying detention only for as short a period as possible.

As pointed out by the Rapporteur in her report, available data have shown that there exists no clear correlation between longer period of detention and the effectiveness of return. Lengthy detentions may even be counterproductive and not encourage voluntary returns.

The CCBE considers that the following provisions of the Commission are also problematic and should be reviewed:

Threat to public order or national security (Article 18)

There is no exact definition of these risks. This can lead to arbitrary decisions. It is of the utmost importance that clear boundaries are set.

Risk of absconding (Article 6):

Article 6 provides for a long non-exhaustive list of very broad criteria to assess the risk of absconding which may capture almost all irregularly staying third-country nationals. This definition will make it easier to refuse the prospect of voluntary departure and easier to justify detention.

- (b) & (c) Lack of residence, fixed abode or reliable address & lack of financial resources: this criterion is very vague.
- (d) Illegal entry into the territory of the Member State: this criterion would without justification concern almost every former asylum seeker.

- (i) Non-compliance with the requirement of article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorization offering a right to stay: this criterion is too wide and would include too many persons.

As the Rapporteur rightly explained in her report, this way of assessing the risk of absconding “*may therefore result in extended and automatic use of detention or deprive large numbers of third country nationals from a period of voluntary departure, thereby undermining key principles of proportionality and necessity. At the same time, the non-exhaustive character of the list allows Member States to adopt supplementary objective criteria, and, therefore, further expand the notion of the risk of absconding, contrary to the aim of defining and harmonizing the definition of the risk of absconding.*”

Border procedure (Article 22)

The Commission’s proposal introduces specific simplified rules applicable to third-country nationals who were subject to asylum border procedures: issuance of a decision by a simplified form, no period for voluntary return granted as a rule (except if the third-country nationals holds a valid travel document and cooperates with the national authorities), and a shorter time-limit for lodging an appeal, dedicated ground for detention.

A third-country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be maintained in detention for a maximum period of 4 months under the border procedure for return. If the return decision is not enforced during that period, the third-country national may be further detained if one of the conditions set out in the provisions relating to the general rules on detention is fulfilled and for the period in detention set in accordance with article 18.

As a result, the maximum term of 6 months can be exceeded.

The CCBE agrees with the substitute targeted impact assessment which underlines that “*the lack of clarity as to the procedural guarantees that will be available under the proposed Asylum Procedure Regulation makes it difficult to foresee the potential impact of the proposed border procedure (Article 22) on fundamental rights, although some of the relevant provisions, are prima facie problematic*”, such as the detention period exceeding 6 months or reduced procedural safeguards undermining effective access to justice.

Detention of minors (Article 20)

Article 20 provides for the possibility to detain minors with their families. This provision appears to contradict Article 37 of the [United Nations Convention on the Rights of the Child](#) (UNCRC) (right to liberty) read in conjunction with article 3 (principle of the best interest of the child) and is not in accordance with the Joint General Comment n° 4 (2017)¹ (para.5) which says that “Every child, at all times, has a fundamental right to liberty and freedom from immigration detention”. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees (the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child) have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law

¹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*

and such prohibition should be fully implemented in practice. Immigration detention is never in the best interest of the child. The UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests.²

It is also contrary to the [Resolution 2020 \(2014\)](#) of the Parliamentary Assembly of the Council of Europe that considers that unaccompanied children should never be detained and that the detention of children on the basis of their or their parents' immigration status is contrary to the best interests of the child and constitutes a child rights violation. PACE has called on the member States to: introduce legislation prohibiting the detention of children for immigration reasons and ensure its full implementation in practice.

Indeed, according to Article 3 in conjunction with Article 22 UNCRC the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children. In that regard, the Rapporteur notes that the detention of minors is never in their best interests and that family unity should never be used to justify the decision to detain accompanied minors. Moreover, no discrimination should be made between unaccompanied and separated children and children within families.

² UNHCR's position regarding the detention of refugee and migrant children in the migration context. January 2017

CCBE Statement on the need to guarantee legal assistance to all persons requesting international protection

19/10/2018

The Council of Bars and Law Societies of Europe is a membership organisation uniting the Bars and Law Societies of 45 countries from the European Union, the European Economic Area, and wider Europe. Recognised as the voice of the European legal profession, the CCBE represents, through its members, more than 1 million European lawyers.

The regulation of the profession, the defence of the Rule of Law, human rights and democratic values are the most important missions of the CCBE. Areas of special concern include, amongst others, the right of access to justice, the development of the Rule of Law, and the protection of the individual citizen.

The Summits of European Union Heads of State and Government held in June and September 2018 raised the issue of migration policy and, in particular, the policy on the reception of migrants applying (or not applying) for international protection.

There was discussion around the creation of (closed) controlled centres where asylum seekers would be screened on EU soil, or even landing/'disembarkation' platforms in third countries (mainly North African countries bordering the Mediterranean Sea) whose role would also be to ensure the screening of arrivals to separate asylum seekers from migrants arriving for other reasons.

The CCBE, without taking a final position on the legality of these solutions especially in advance of concrete and comprehensive proposals being available for consideration, recalls that the determination of refugee status is accompanied by legal safeguards set out especially in Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Recast).

In concrete terms, the determination of refugee status requires that the authority responsible for determining whether to grant or refuse asylum receives the most accurate information from the applicant regarding their situation and the reasonableness of the fears they have regarding the authorities in their country of origin.

This requires that the applicant provide a complete and accurate account of the reasons that led them to leave their country.

However, in many cases, even if the asylum seeker is aware of the fears of persecution that have caused them to leave their country, they are unaware of the criteria which will allow them to be recognised as a refugee.

This may lead them, in good faith, to fail to explain or adequately explain elements which are essential from the perspective of the protection officer but to the applicant are either so minor or so obvious that they do not see the need to explain them.

It is for these reasons that Directive 2013/32/EU (as well as Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status) provide for the right of asylum seekers to receive legal or procedural information relating to the asylum procedure from NGOs or professionals from government authorities or specialised State services (see recital 22 and Articles 8(2) and 19). Similarly, Directive 2013/32/EU provides for the right of asylum seekers to benefit from legal advice at all stages of the asylum procedure (Article 22) as well as the right to free legal assistance and representation before a court of first instance on behalf of the applicant when a decision is taken at the border (Article 20).

Article 22 of Directive 2013/32/EU provides for the right to legal assistance at the applicant's expense at all stages of the procedure.

In order to provide free legal assistance to people in need of international protection, the "European Lawyers in Lesvos" (ELIL) initiative was launched by the CCBE and the German Bar Association in 2016 (<https://www.europeanlawyersinlesvos.eu/>). This initiative, now managed by an independent non-profit charitable organisation, provides free and independent legal assistance to asylum seekers on the Greek island of Lesvos. The on-site team includes, among others, highly experienced asylum lawyers from Greece and other EU/EEA Member States (plus Switzerland), who provide their services on a strictly voluntary basis.

These services have proved indispensable given that asylum seekers who have benefitted from their advice and assistance before a hearing by Greek asylum authorities have had a much higher rate of recognition of refugee status than asylum seekers who had not received their assistance.

However, the CCBE recalls that this initiative is neither organised nor subsidised by national or European authorities, and that thus far they are only sustained by volunteer lawyers and by funding from Bars and Law Societies, lawyers' organisations and NGOs.

Generally, the number of lawyers present in the "hotspots" in Greece is currently insufficient to allow every asylum seeker to benefit from the rights guaranteed by the Asylum Procedures Directives.

The CCBE reiterates the essential need for legal assistance to be granted to asylum seekers throughout all stages of the procedure under the Asylum Procedures Directives.

At this juncture the CCBE expresses its strong concerns as a matter of principle if closed controlled centres were to be opened in one or more EU Member States, and especially if landing platforms and screening platforms were to be created at the borders but outside the territory of EU Member States.

The CCBE recalls that any structure thus created should at the same time provide the means, in particular the financial means, to ensure that all asylum seekers can benefit from the aforementioned guarantees.

The magnitude of the task of building controlled centres would make it impossible for migration lawyers from only one Member State to deal with the workload this entails. As regards the possible creation of landing platforms, the CCBE notes that the legal assistance contemplated by the Asylum Procedures Directives is provided by legal practitioners qualified and practising in the law of one or more Member States. Similarly, the CCBE notes that the right to an effective remedy provided for by those Directives (and more fundamentally by Article 47 of the EU Charter on Fundamental Rights) is a right of appeal or review to or by a tribunal or court established under the law of a Member State where the member or judge concerned is appointed by the Member State. The CCBE awaits sight of any proposal which respects this right to an effective remedy as provided for by the Asylum Procedures Directive and the Charter, noting that the right to apply for asylum in the European Union is itself a fundamental right recognised by Article 18 of the Charter.

The CCBE therefore calls on the Parliament, the Council and the Commission, in any consideration being given to the creation of these asylum structures, to ensure the adequate provision of material and effective human resources so that the essential legal support provided for in the aforementioned Directives are duly guaranteed.

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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p><i>Article 15</i> <i>Free legal assistance and representation</i></p> <p>1. <i>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.</i></p> <p>2. <i>For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:</i></p> <p style="padding-left: 40px;"><i>(a) the provision of information on the procedure in the light of the applicant's</i></p> | <p><i>Article 15</i> <i>Free legal assistance and representation</i></p> <p>1. <i>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.</i></p> <p>2. <i>For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:</i></p> <p style="padding-left: 40px;"><i>(a) the provision of information on the procedure in the light of the applicant's individual</i></p> |

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| <p><i>individual circumstances;</i></p> <p>(b) <i>assistance in the preparation of the application and personal interview, including participation in the personal interview as necessary;</i></p> <p>(c) <i>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.</i></p> <p>3. <i>The provision of free legal assistance and representation in the administrative procedure may be excluded where:</i></p> <p>(a) <i>the applicant has sufficient resources;</i></p> <p>(b) <i>the application is considered as not having any tangible prospect of success;</i></p> <p>(c) <i>the application is a subsequent application.</i></p> | <p><i>circumstances;</i></p> <p>(b) <i>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;</i></p> <p>(c) <i>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.</i></p> <p>(d) the covering, by the Member State responsible for asylum claim, of the translation costs for all documents supporting the applicant's asylum claim.</p> <p>3. <i>The provision of free legal assistance and representation in the administrative procedure may be excluded where:</i></p> <p>(a) <i>the applicant has sufficient resources;</i></p> <p>(b) the application is considered as not having any tangible prospect of success;</p> <p>(c) <i>the application is a subsequent application.</i></p> |
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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 *this 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 |
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| <p>Article 28</p> <p>Lodging of an application for international protection</p> <ol style="list-style-type: none"><i>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.</i><i>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.</i><i>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</i> | <p>Article 28</p> <p>Lodging of an application for international protection</p> <ol style="list-style-type: none"><i>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.</i><i>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.</i><i>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</i> |

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| <p><i>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.</i></p> <p>[...]</p> | <p><i>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.</i></p> <p>[...]</p> |
| <p>Article 53 The right to an effective remedy</p> <p>[...]</p> <p>6. Applicants shall lodge appeals against any decision referred to in paragraph 1:</p> <p>a) within one week in the case of a decision rejecting a subsequent application as inadmissible or manifestly unfounded;</p> <p>[...]</p> | <p>Article 53 The right to an effective remedy</p> <p>[...]</p> <p>6. For all cases, applicants shall lodge appeals against any decision referred to in paragraph 1 within one month.</p> |

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 |
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| <p>Article 39 Implicit withdrawal of applications</p> <p>1. The determining authority shall reject an application as abandoned where:</p> <p>(a) the applicant has not lodged his or her application in accordance with Article 28,</p> | <p>Article 39 Implicit withdrawal of applications</p> <p>1. The determining authority shall reject an application as abandoned where:</p> <p>(a) the applicant has not lodged his or her application in accordance with Article 28,</p> |

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| <p>despite having had an effective opportunity to do so;</p> <p>(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);</p> <p>(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);</p> <p>(d) the applicant has not appeared for a personal interview although he was required to do so pursuant to Articles 10 to 12;</p> <p>(e) the applicant has abandoned his place of residence, without informing the competent authorities or without authorisation as provided for in Article 7(4);</p> <p>(f) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 7(5).</p> | <p>despite having had an effective opportunity to do so;</p> <p>(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);</p> <p>(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);</p> <p>(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;</p> <p>(e) the applicant has abandoned his place of residence, without informing the competent authorities or without authorisation as provided for in Article 7(4);</p> <p>(f) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 7(5).</p> |
| <p>Article 40</p> <p>Accelerated examination procedure</p> <p>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:</p> <p>(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);</p> <p>(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);</p> <p>(c) the applicant has misled the authorities by</p> | <p>Article 40</p> <p>Accelerated examination procedure</p> <p>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:</p> <p>(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);</p> <p>(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);</p> <p>(c) the applicant has misled the authorities by presenting false information or documents</p> |

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| <p><i>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;</i></p> <p>(d) <i>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;</i></p> <p>(e) <i>a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;</i></p> <p>(f) <i>the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States;</i></p> <p>(g) <i>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;</i></p> <p>(h) <i>the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.</i></p> <p>[...]</p> | <p>– 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;</p> <p>(d) <i>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;</i></p> <p>(e) <i>a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;</i></p> <p>(f) <i>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;</i></p> <p>(g) <i>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;</i></p> <p>(h) <i>the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.</i></p> <p>[...]</p> |
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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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p>Article 36</p> <p>Decision on the admissibility of the application</p> <p>1. <i>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:</i></p> <p>(a) <i>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;</i></p> | <p>Article 36</p> <p>Decision on the admissibility of the application</p> <p>1. <i>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:</i></p> <p>(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;</p> |

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| <p>(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;</p> <p>[...]</p> <p>Article 45</p> <p>The concept of safe third country</p> <p>[...]</p> <p>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.</p> <p>[...]</p> | <p>(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;</p> <p>[...]</p> <p>Article 45</p> <p>The concept of safe third country</p> <p>[...]</p> <p>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.</p> <p>[...]</p> |
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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

16/09/2016

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://www.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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p><i>Article 3. paragraphs 3- 4 -5 - New</i></p> <p><i>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:</i></p> <p><i>(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</i></p> <p><i>(b) examine the application in accelerated procedure pursuant to Article 31(8) of Directive 2013/32/EU when the following grounds apply:</i></p> <p><i>(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.</i></p> <p><i>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.</i></p> <p><i>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.</i></p> | <p><i>Article 3. Keep the original text from Dublin III</i></p> <p>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.</p> |

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 EU¹¹ (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.

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 |
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| <p>Article 4</p> <p>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.</p> <p>3. The applicant shall:</p> <p>(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;</p> <p>(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.</p> <p>Article 5</p> <p>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.</p> <p>4. The competent authorities shall take into account elements and information relevant for determining the Member State responsible only</p> | <p>Article 4</p> <p>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. <u>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.</u></p> <p>3. The applicant shall</p> <p>(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;</p> <p>(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, <u>save that in no case shall an applicant be transferred to a Member State where the fundamental rights of the applicant cannot be assured.</u></p> <p>Article 5</p> <p>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;</p> <p>4. the competent authorities shall take into account elements and information relevant for determining the Member State responsible only</p> |

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*. I. 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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p><i>Article 8</i></p> <p><i>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.</i></p> <p><i>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</i></p> | <p><i>Article 8</i></p> <p><i>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 <u>all</u> 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.</i></p> <p><i>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. <u>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</u> 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.</i></p> |

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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p><i>Article 19</i></p> <p><i>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</i></p> | <p><i>Article 19 - Keep the original text from Dublin III</i></p> <p>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.</p> <p>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.</p> <p>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.</p> <p>3. The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to</p> |

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| <p><i>adding the date when the decision to examine the application was taken.</i></p> <p><i>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.</i></p> | <p>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.</p> <p>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.</p> |
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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.

| <i>Text proposed by the Commission</i> | <i>Amendments proposed by the CCBE</i> |
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| <p><i>Article 28</i></p> <p><i>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.</i></p> <p><i>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.</i></p> | <p><i>Article 28</i></p> <p><i>2. Member States shall provide for a period of <u>7 20</u> 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. <u>The term shall be extended to 30 days when the transfer decision concerns an unaccompanied minor.</u></i></p> <p><i>4. The scope of the effective remedy laid down in paragraph 1 shall be limited <u>extended</u> 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 <u>the provisions of the Charter of Fundamental Rights of the European Union are infringed upon.</u></i></p> |

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

¹⁹ Case C-155/15 *Karim v Migrationsverket* [2016].

CCBE SECOND DECLARATION ON MIGRATION

26/06/2015

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE is recognised as the voice of the European legal profession by the national Bars and Law Societies on the one hand and by the EU institutions on the other. It acts as the liaison point between the EU and Europe's national Bars and Law Societies.

The CCBE notes that according to the International Organisation for Migration as at June 8 2015 approximately 101,900 migrants had arrived in Europe by way of smuggler's vessels principally arriving in Italy and Greece. Of these about 7,000 people were rescued near Sicily between 6 and 8 June by a flotilla of international ships. Tragically some 1865 persons are reckoned to have lost their lives in attempting to travel to the European Union across the Mediterranean Sea between 1 January and 8 June 2015.

As a result of the very large numbers of persons travelling clandestinely to the European Union at present and the worsening in the public discourse surrounding the perception of migrants in some Member States, the CCBE has noted the concerns expressed by some of its national delegations about the pressures being placed on the national legal systems and in particular the resources available to the national legal systems by the large numbers involved and the ongoing economic difficulties experienced by many Member States. In this regard the CCBE welcomes recent European Commission initiatives and welcomes the focus on saving lives and ensuring protection for those in need contained in the Agenda on Migration adopted by the Commission on 13 May 2015.

In the context of the initiatives now presented to consolidate the Common European Asylum System, the CCBE believes it timely and of importance to reiterate certain fundamental principles applicable in the field of migration law regardless of the present difficulties undoubtedly faced by Member States. These principles include the defence of the rule of law, the protection of fundamental rights and freedoms including the right of access to justice and protection of the client and the protection of the democratic values inextricably associated with such rights. It should also be added that these matters, which are all objectives protected by the Statutes of the CCBE, must always prevail over any political or economic consideration. These fundamental principles of the rule of law and the protection of fundamental rights must always prevail over any political, economic or security consideration. In particular the CCBE notes the obligation placed on all Member States and the European Union itself to treat all asylum seekers in a humane and dignified manner.

It is also timely to recall that Article 18 of the EU Charter on Fundamental Rights recognises the right to asylum in European Union law in accordance with the Geneva Convention of 28 July 1951 and its Protocol of 31 January 1967 relating to the status of refugees. Article 19 of the EU Charter establishes protection in the event of removal, expulsion or extradition and Article 47 of the EU Charter (as well

as Article 13 of the European Convention on Human Rights) provides for the right to an effective remedy and to a fair trial.

The CCBE notes that part of the essential functions of a lawyer providing services in the area of migration law includes advocacy on behalf of those who seek protection in the European Union, thus ensuring the guarantee of fundamental human rights regardless of the nature of the migration concerned. Having regard to the role of lawyers in society and given genuine concerns regarding recent developments in migration in Europe and elsewhere that have the potential to seriously affect human rights, the CCBE wishes to emphasise that the European Union and its Member States are obliged to vindicate and guarantee the rights and dignity of migrants. This includes the entitlement of migrants to readily access courts and tribunals with the benefit of legal aid and legal representation in order to ensure the right to an effective remedy is guaranteed.

The challenges posed by migration law and the response of the European Union and its member states to increased migration caused largely by displacement owing to war, instability and persecution mean that lawyers and their national bars have a specific interest in this regard in protecting the core principles of the legal profession in Europe as articulated in the Charter of Core Principles of the Legal Profession adopted by the CCBE on 24th November 2006. The principles engaged include but are not limited to the freedom of lawyers to pursue their clients' cases, the right and duty of lawyers to keep their clients' affairs confidential and to ensure respect for professional secrecy as well as respect for the rule of law and the fair administration of justice.

In 2014, the CCBE also adopted declaration on migration stressing that the rule of law and the protection of fundamental human rights and freedoms must always prevail over any political or economic consideration. It also published guidelines aiming to assist lawyers practising in the field of migration law by highlighting some of the issues and concerns that should be taken into consideration.

Accordingly the CCBE wishes to emphasise certain principles and rights that should be taken into consideration by the institutions of the European Union and the Member States at the present time when dealing with increased inflows and in connection with all initiatives seeking to consolidate the Common European Asylum System and in the proposed debate on a common Asylum Code:

DECLARATION:

I – Protection of fundamental rights

1. Persons in need of international protection must have access to quality asylum and reception systems throughout the Union;
2. Proposals should be advanced to ensure refugees should have legal avenues to reach safety in the European Union;
3. Protection capacity and systems should be supported in third countries to ensure that standards applied regarding the assessment of protection seekers are equivalent to those protected by European Union law and that all persons working in the protection system of those third countries are trained to an equivalent level to their counterparts in the European Union;
4. Any emergency response mechanism, resettlement and relocation programmes introduced by the Member States must ensure that asylum seekers are treated in a human and dignified manner and in particular that effective mechanisms are ensured for the identification and legal protection, of unaccompanied and separated children, survivors of sexual and gender-based violence and survivors of torture;
5. National procedures regarding asylum and practice of relevant national authorities should comply with international standards on human rights and rights of asylum seekers as well as have to assure in practice the protection of fundamental rights.

II – Access to justice/Legal aid

6. EU funding should be provided in order for national authorities to ensure comprehensive legal aid for migrants and that there is effective access to such aid at all stages of the relevant migration procedure. In this regard it is essential to note that all detainees in migration matters are entitled to have access to a qualified lawyer to advise and assist them in relation to both the detention itself as well as in relation to relevant protection and/or immigration procedures.
7. Adequate legal aid is provided in removal centres including in the cases of voluntary return especially to determine whether the will of the migrant is being exercised voluntarily.
8. The right of access to justice and the right to an effective remedy includes the right of access to a fully qualified interpreter who is independent in the performance of his or her duties in order to effectively communicate their instructions. This right also encompasses the right to have sight of documentation in a language which the client can understand in order to facilitate effective advice being given by the lawyer.
9. All accelerated procedures must respect the basic rights of migrants to justice and to an effective legal remedy and must ensure that in all these procedures the access to the international protection has been guaranteed. Appropriate safeguards must be maintained in all asylum systems particularly for manifestly unfounded applications.
10. Migrants must be entitled to access all necessary remedies before the domestic courts on an equivalent basis to nationals of the host Member State.

III – Access to a lawyer

11. Initiatives must be introduced to ensure the ongoing provision of an adequate number of lawyers in all Member States who are expert in the field of migration law and asylum law and who can provide a comprehensive service in all matters related to entry, residence and departure.
12. Access to a lawyer must be guaranteed once a migrant is detained whether at EU borders or otherwise and/or where an expulsion is intended.
13. Member States must also ensure that the removal of individuals without access to a lawyer does not occur and that there are no summary removals.
14. Migrants are entitled to privately consult and communicate with their lawyer in accordance with the principle of confidentiality and the respect of professional secrecy.

IV – Training of lawyers

15. Sufficient resources must be provided to ensure that special training can be provided to lawyers practicing in the field of migration and asylum law. It is of grave importance that the training should ensure that the lawyers concerned are adequately equipped to identify protection requirements for their clients having regard in particular to the relevant legal provisions on gender based protection, trafficking of persons, sexual slavery, unaccompanied migrant children and other vulnerable persons.

CCBE DECLARATION ON MIGRATION

29/11/2014

The CCBE represents the Bars and Law Societies of 32 member countries and 13 further associate and observer countries and through them more than 1 million European lawyers. The CCBE is recognised as the voice of the European legal profession by the national Bars and Law Societies on the one hand and by the EU institutions on the other. It acts as the liaison point between the EU and Europe's national Bars and Law Societies.

The CCBE objectives include the following aim¹: *"To monitor actively the defense of the rule of law, the protection of the fundamental and human rights and freedoms, including the right of access to justice and protection of the client, and the protection of the democratic values inextricably associated with such rights."*

The founding instruments of the European Union all enshrine fundamental democratic values and the rule of law. These basic values apply equally to the area of migration as to other areas of competence of the European Union. Article 2 of the Treaty on European Union provides: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."* Article 3 states inter alia *"The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."*

The Treaty on the Functioning of the European Union² recognises the right to freedom of movement for European Union citizens in Article 20.2(a). The immigration policy of the European Union finds its legal basis in Title V which is entitled 'Area of freedom, security and justice' and Chapter 2 of Title V is entitled 'Policies on border checks, asylum and immigration' (c.f. articles 77/80)³.

The preamble to the Charter of Fundamental Rights of the European Union declares that:

"The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the

¹ http://www.ccbe.eu/fileadmin/user_upload/document/statuts/statutes_en.pdf III. "Objects and activities III.1._c) To monitor actively the defense of the rule of law, the protection of the fundamental and human rights and freedoms, including the right of access to justice and protection of the client, and the protection of the democratic values inextricably associated with such rights"

² <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments.html>.

20. 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) the right to move and reside freely within the territory of the Member States;

³ <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments.html>

Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

Article 18 of the EU Charter recognises the right to asylum in European Union law stating that "...The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')." Article 19 of the EU Charter establishes "Protection in the event of removal, expulsion or extradition and provides that 1) Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

Article 47 of the EU Charter (together with Article 13 of the European Convention on Human Rights) provide for the right to an effective remedy and to a fair trial. The former which enshrines in European Union law the right of access to justice states at paragraph 1: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

The basic principles applicable to migration law are also to be discerned at international level from Article 2 of the United Nations Universal Declaration on Human Rights which declares: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

As advocates for fundamental human rights, freedoms and liberties and the rule of law principle, independent lawyers constitute part of the essential foundations of a democratic society. This special role of lawyers in society has been recognised by the Council of Europe Recommendation Nr. R (2000) 21 on the freedom of exercise of the profession of lawyer (and its Explanatory Memorandum) adopted by the Committee of Ministers on October 25 2000 as well as by the Basic Principles on the Role of Lawyers adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the 45th session of the General Assembly of the UN on 14 December 1990. The essential functions of a lawyer providing services in the area of migration law include advocacy on behalf of those who seek protection in the European Union, migration into the European Union and migration within the borders of the European Union thus ensuring the guarantee of fundamental human rights regardless of the nature of the migration concerned. In particular the CCBE notes the obligation placed on all Member States and the European Union itself to treat all asylum seekers in a humane and dignified manner.

The free movement of persons within the European Union is one of the fundamental and founding tenets of the European Union. Economic pressures and the increased threat to public security must not undermine the fundamental nature of the right to move and reside freely for all EU nationals and their family members (including third country national family members) between the Member States. The CCBE shall remain vigilant in relation to any obstacles placed in the path of this most basic freedom.

Having regard to the special role of lawyers in society referred to earlier and given genuine concerns regarding recent developments in migration in Europe and elsewhere that have the potential to seriously affect human rights, the rule of law principle and solidarity between Member States, the CCBE wishes to emphasise the importance of fundamental human rights, freedoms and liberties and of the rule of law principle in the area of migration law and states as follows:

DECLARATION

I – The CCBE’s objectives include the defence of the rule of law, the protection of fundamental human rights and freedoms, including the right of access to justice and protection of citizens, and the protection of the democratic values inextricably associated with such rights. These objectives are shared with the member bars of the CCBE.

II – Migration whether documented or undocumented⁴, poses joint challenges for all Member States of the European Union, the Union itself and our neighbours and not simply those Member States on the frontline. Migration is a complex and diverse matter giving rise to concerns and issues across a broad spectrum of rights and law including but not limited to human rights and humanitarian law, criminal law, employment law, family law and administrative law.

III – The European Union and its Member States are obliged to vindicate and guarantee the rights and dignity of migrants. This includes the entitlement of migrants to readily access courts and tribunals with the benefit of legal aid and legal representation in order to ensure the right to an effective remedy is guaranteed. It is the role and duty of lawyers providing services in the field of migration law to ensure that migrants’ rights and dignity are upheld.

IV – The principles of our Society including the rule of law and the protection of fundamental human rights and freedoms must always prevail over any political or economic consideration, and the protection of our security must not be at the cost of human rights and the rule of law at any time.

V – Migration is a crucial issue to the future development of our society, both economic and demographic; requiring the provision of the necessary funds and resources by the governments of the Member States and by the EU institutions to ensure that lawyers may provide their services in an effective manner to clients in the field of migration law. This includes but is not limited to the provision of funding for training in migration law as well as access to competent interpretation and translation facilities.

⁴ The expert working group discussed the various legal terms used in the area. The legal systems of certain Member States refer to “migration” whereas the term used in other Member States is “immigration”. Given the appointment of a Commissioner with responsibility for Migration the agreed position was that the term migration should be used by the CCBE to mirror that of the European Commission. There was also discussion regarding the question of terminology for documented and undocumented migration which may also be referred to as inter alia legal/regular and illegal/irregular immigration or migration and/or legal/regular and illegal/irregular entry. Again, different terms are used in the different legal systems and it was considered preferable to use the terms “documented” and “undocumented”.