



**ECRE Comments on the Commission Proposal to
recast the Reception Conditions Directive
COM(2016) 465**

October 2016

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Summary of views

ECRE makes the following observations and recommendations to the co-legislators on the Commission proposal to recast the Reception Conditions Directive 2013/33/EU:

1. **Article 17a:** The exclusion of applicants who engage in secondary movements from an entitlement to reception conditions should be deleted, as it contravenes the indivisible scope of the Directive as applicable to all asylum seekers.
2. **Article 19:** The modification of withdrawal of reception conditions to concern only financial allowances is welcome. However, punitive restrictions on reception conditions related to failure to comply with the obligations set out in the Dublin Regulation or with integration measures should be deleted, as they are liable to create undesired effects for asylum seekers and Member States in practice.
3. **Article 2(10)-(11):** The definition of absconding raises conceptual problems and unduly imputes moral blame on asylum seekers. The proposal should also exhaustively and restrictively delimitate the legitimate criteria for assessing a risk of absconding, distinguishing cases where an applicant tries to leave a country from cases where he or she is trying to stay in a country.
4. **Article 7(2):** The introduction of restrictions on asylum seekers' freedom of movement for reasons of administrative convenience, namely the swift and effective monitoring of the asylum procedure or the Dublin procedure, contravene the fundamental right to free movement. More broadly, restrictions on free movement should not be mandatory.
5. **Article 8:** Several of the existing and proposed grounds for detention are incompatible with the right to liberty under the Charter, as they are not connected to a concrete obligation incumbent on the applicant or are punitive in nature.
6. **Article 11:** In light of human rights requirements, which find support from a number of Member States' practice, the detention of persons with special reception needs should be unequivocally prohibited.
7. **Article 15:** The reduced maximum time limit of 6 months as a general rule for access to the labour market is a positive development, as is the elaborate rule on the effectiveness of access to employment and of provisions on equal treatment. However, the proposed exclusion of persons falling under accelerated procedures from accessing the labour market contravenes the principle of non-discrimination and undermines clarity and administrative efficiency for Member States.
8. **Article 21:** The improvements to the mechanism for identification of special reception needs are welcome, as they reflect the need for timely and effective identification of vulnerable groups in the asylum process. The assessment of special needs should include proactive detection, as well as the applicant's right to submit his or her observations, in line with the right to be heard under the Charter.
9. **Article 28:** The introduction of a contingency planning provision is welcome. However, as practice has shown that pressure on reception systems may be exerted on Member States regardless of their formal responsibilities under the Dublin Regulation, the assessment of reception capacities should be conducted notwithstanding the operation of the Dublin system and the proposed corrective allocation mechanism.

Introduction*

Directive 2013/33/EU (hereafter “recast Reception Conditions Directive”)¹ governs the standards for reception conditions afforded to persons applying for international protection in the European Union (EU), covering a range of elements from freedom of movement and detention to the provision of food, clothing, housing and to employment, education and health care. This instrument recasts Directive 2003/9/EC,² with the aim of raising minimum standards to a higher level of harmonisation among Member States’ reception systems.

The Commission has proposed another recast of the Directive on 13 July 2016,³ as part of the second package of proposals tabled in the context of a new reform of the Common European Asylum System (CEAS). Contrary to legislative changes to the EU instruments governing qualification and asylum procedures,⁴ which would be transformed from Directives into Regulations,⁵ the alignment of Member States’ reception standards is to remain governed by a Directive: “Considering the current significant differences in Member States’ social and economic conditions, it is not considered feasible or desirable to fully harmonise Member States’ reception conditions.”⁶

From the outset, the Commission identifies the main challenge of the recast Reception Conditions Directive as one of poor implementation of existing standards:

“The persistent problems in ensuring adherence to the reception standards required for a dignified treatment of applicants in some Member States has contributed to a disproportionate burden falling on a few Member States with generally high reception standards which are then under pressure to reduce their standards. More equal reception standards set at an appropriate level across all Member States will contribute to a more dignified treatment and fairer distribution of applicants across the EU.”⁷

Noting the entry into force of the recast Reception Conditions Directive on 20 July 2015, the poor implementation of reception-related standards may also be true for the minimum standards provided

* ECRE thanks the members of its Asylum Systems Core Group for their comments. All errors remain our own.

¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* 2013 L180/96.

² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ* 2003 L31/18.

³ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465, 13 July 2016.

⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), *OJ* 2011 L337/9; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L180/60.

⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereafter ‘Proposal for an Asylum Procedures Regulation’)*, COM(2016) 467, 13 July 2016; *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (hereafter Proposal for a Qualification Regulation)*, COM(2016) 466, 13 July 2016.

⁶ European Commission Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereafter “Explanatory Memorandum”), COM(2016) 465, 13 July 2016, 6.

⁷ Explanatory Memorandum, 3; Recital 5 proposal for a recast Reception Conditions Directive.

by the 2003 version of the Directive. ECRE notes that the current proposal has been tabled before the Commission's assessment of the implementation of the recast Directive, expected by 20 July 2017.⁸

The proposed recast has a number of formal objectives: (1) further harmonisation of reception conditions in the EU; (2) reducing incentives and asserting greater control over secondary movements; and (3) promoting integration and enhancing asylum seekers' self-sufficiency.⁹ Another objective of the reform, not explicitly stated in the Explanatory Memorandum, relates to strengthening the resilience and preparedness of national reception systems,¹⁰ highly pertinent against a backdrop of an overall lack of preparedness and planning on the part of European countries to deal with high numbers of arrival.¹¹

Two preliminary observations should be made in relation to the aims of the proposal. On the one hand, the different objectives promoted through the reform often push the Directive in different directions, some to the benefit of applicants and Member States and others to the detriment of a protective and efficient CEAS. In that respect, ECRE's assessment of the proposal is mixed, along the overall design of the text, which contains a number of welcome improvements but also several issues of severe concern. On the other hand, as far as the prevention and sanction of secondary movements is concerned, mirroring the Commission's vision for the reform of the Dublin III Regulation,¹² the Commission's approach seems to create a conundrum: while acknowledging in **Recital 5** that Member States' poor implementation of the current – lower – reception standards acts as a main driver of irregular movements within the EU, it introduces legislative measures as a means of coercing asylum seekers' compliance, without explaining how the challenge of implementation will be resolved in the future.

ECRE's Comments address specific elements of the proposal, with a view to raising legal objections stemming from the 1951 Refugee Convention and the EU Charter of Fundamental Rights (hereafter "the Charter"), as well as practical concerns, on restrictions and punitive measures related to secondary movements. At the same time, the Comments recommend further improvements to several positive provisions to promote effective integration of asylum seekers and tailored support to persons with special reception needs. Given that the proposal follows the recast approach,¹³ ECRE's comments are mainly limited to the provisions proposed for amendment. However, ECRE notes that several key provisions, which equally raise fundamental rights concerns, have not been proposed for reform by the Commission.

⁸ Article 30 recast Reception Conditions Directive.

⁹ Explanatory Memorandum, 3-4.

¹⁰ See also European Commission, *Proposal for a Regulation of the European Parliament and of the Council for a European Union Agency for Asylum*, COM(2016) 271, 4 May 2016.

¹¹ AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, available at: <http://goo.gl/hqhEzU>.

¹² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 stateless person (recast), OJ 2013 L180/31. See European Commission, *Proposal for a [Dublin IV Regulation]*, COM(2016) 270, 4 May 2016.

¹³ As a result of an interinstitutional agreement between the Council, European Parliament and European Commission of 2001, the provisions that remain unchanged by the Commission proposal can only be amended by co-legislators in specific circumstances. See Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ 2002 C77/1.

Analysis of key provisions

1. Preventive and punitive measures

ECRE expresses concern about the punitive approach adopted in the reform, as part of a broader effort to discipline the conduct of persons seeking protection in Europe through preventive restrictions and sanctions. The need to provide asylum seekers with **positive incentives rather than coercive treatment** is not reflected in the Commission proposal, despite calls from the European Parliament and civil society in consultations.¹⁴

Beyond policy concerns on the effectiveness of a punitive approach, the introduction of sanctions raises tensions with international law. While international refugee law does not introduce a right for refugees to choose their country of asylum or an obligation to seek protection in a specific place, **sanctions on refugees are constrained by international refugee law**. Authoritative commentary explains that Article 31 of the Refugee Convention does not purport to dictate or limit the choice of an asylum seeker as to where to seek protection.¹⁵ It only offers refugees a layer of protection against penalisation for irregular entry, subject to certain conditions. When interpreted in line with the object and purpose of the Treaty and by reference to additional interpretative guidance from the *travaux préparatoires* of the Convention, the protection of **Article 31 must “be accorded to any refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.”** Given that the Preamble of the Convention promotes international cooperation in sharing responsibility for refugees, it would be **contrary to that purpose to read Article 31 in a way that concentrates “reception burdens” in countries of first entry.**¹⁶

Failure to incorporate Article 31 of the Convention into the EU asylum *acquis*, as indicated by the CJEU in *Qurbani*,¹⁷ presents a critical gap in the EU’s faithful reliance on the Convention as the “cornerstone” of the CEAS.¹⁸ Member States are bound by this provision both under their international obligations and Article 18 of the Charter.

ECRE notes that the protection of Article 31 of the Convention is explicitly acknowledged by **Recital 20**, which however only relates to the prohibition of detention for the sole reason of seeking international protection. In order for the proposal to be fully in line with the Refugee Convention and Member States’ obligations stemming from international law as per **Recital 9**, the principle of **non-penalisation of asylum seekers** – who are presumptive refugees and should therefore benefit from the protection of the Convention – **must be codified as a provision applicable to the entire Directive.**

ECRE recommends inserting an Article 4a in Chapter II of the Directive, and relevant cross-references thereto throughout the Directive:

¹⁴ Explanatory Memorandum, 7.

¹⁵ For an analysis with reference to the Vienna Convention on the Law of Treaties and relevant jurisprudence, see Gregor Noll, ‘Article 31’ in Andreas Zimmermann (ed), *The 1951 Convention on the Status of Refugees and its 1967 Protocol – A Commentary* (OUP 2011), paras 39-51.

¹⁶ For an analysis with reference to the Vienna Convention on the Law of Treaties and relevant jurisprudence, see Gregor Noll, ‘Article 31’ in Andreas Zimmermann (ed), *The 1951 Convention on the Status of Refugees and its 1967 Protocol – A Commentary* (OUP 2011), paras 39-51.

¹⁷ CJEU, Case C-481/13 *Qurbani*, Judgment of 17 July 2014.

¹⁸ CJEU, Case C-604/12 *H.N. v Minister of Justice, Equality and Law Reform*, Judgment of 8 May 2014, para 27.

Article 4a: Non-penalisation of irregular entry or stay

1. Member States shall not impose sanctions on an applicant for the sole reason of irregularly entering or being present on their territory, including for not complying with the obligation to make an application in the first Member State of entry as set out in [Article 4(1) of the Dublin IV Regulation] or to be present in another Member State in accordance with [the Dublin IV Regulation], where the following criteria are satisfied:

(a) There are serious reasons to believe that the applicant comes directly from a territory where his or her life or freedom was threatened in the sense of [Article 9 of the Qualification Regulation] or [Article 16 of the Qualification Regulation];

(b) The applicant presents him or herself without delay to the authorities and shows good cause for his or her irregular entry or presence.

1.1. Scope of reception conditions: Articles 17a and 19

Article 17a of the proposal excludes asylum seekers who are not in the Member State designated as responsible by the Dublin Regulation from reception conditions. This contradicts the principle of entitlement to reception conditions as a corollary of asylum seeker status, elaborated in the *Cimade and Gisti* ruling of the CJEU.¹⁹ The Court explained in *Cimade and Gisti* that reception conditions are made available to a person as long as he or she is an asylum seeker with a right to remain on the territory, and that **asylum seekers are an indivisible class of persons**.²⁰ This principle seems to be maintained, since the provisions on the scope of the Directive remain unchanged in **Article 3** of the proposal, as does the right to move freely within the territory in **Article 7(1)**.²¹

The derogation introduced by **Article 17a** is in contravention with the reasoning of the CJEU in *Cimade and Gisti*, as it attempts to exclude certain asylum seekers from benefits which are made available by the Directive to individuals as a corollary of their asylum seeker status in the Reception Conditions Directive. Beyond *Cimade and Gisti*, the proposal seems to contradict the overall spirit of the “common procedure for international protection in the Union” proposed under the **Asylum Procedures Regulation**, since it would fragment the individual’s legal status depending on whether he or she has reached the Member State designated as responsible by the Dublin Regulation. From a practical perspective, this would also result in penalising applicants who fully comply with the Dublin rules and may be awaiting a transfer to the responsible country on family unity grounds, for instance. Until the transfer has taken place, these asylum seekers would be deprived of reception conditions.

In practical terms, for this category of applicants, the proposal allows double penalisation by excluding reception conditions in the Member State conducting a Dublin procedure under **Article 17a**, and also restricting reception conditions in the Member State responsible for the application under **Article 19**.

ECRE notes that the Commission has attempted to reconcile its approach with the Charter by introducing the obligation to provide a “dignified standard of living” to persons falling under **Article**

¹⁹ CJEU, Case C-179-12 *Cimade and Gisti v Ministre de l’Intérieur*, Judgment of 27 September 2012. On national jurisprudence from **Italy**, see Administrative Tribunal of Veneto, Decision No 919, 5 August 2015.

²⁰ According to the CJEU, the EU asylum *acquis* as it currently stands does not allow for a legal distinction between asylum seekers who applied for international protection in the responsible Member State and those who applied in another Member State in terms of entitlement to rights. It held that “no provision can be found in the directive such as to suggest that an application for asylum can be regarded as having been lodged only if it is submitted to the authorities of the Member State responsible for the examination of that application” and that “asylum seekers are allowed to remain not only in the territory of the Member State in which the application for asylum is being examined but also in that of the Member State in which that application was lodged, as required by Article 3(1) of Directive 2003/9”: CJEU, *Cimade and Gisti*, paras 39-40 and 46-48.

²¹ It should be noted that **Article 9(1) of the Asylum Procedures Regulation** has been amended to restrict the right to remain to the Member State responsible, however.

17a. However, current practice in Member States shows that applicants deprived of reception conditions are often driven to destitution. In addition, as recalled from *Cimade and Gisti*, the rights to dignity and asylum under Articles 1 and 18 of the Charter warrant the applicability of the Directive to all asylum seekers who have a right to remain on the territory of the Member States.²² Carving divisions in the scope of the Directive on the basis of the Dublin Regulation therefore undermines the compliance of its scheme with fundamental rights.

Finally, the reference to “suitable educational activities” for children is equally problematic, insofar as it restricts their right to education. ECRE notes that the right to education must be secured in all cases, including detention as per **Article 11(2)**, bearing in mind that children should only be detained for as short a period as possible. On the contrary, **Article 17a(3)** provides a restriction on the right to education for the period “pending the transfer”. Under **Article 30 of the Dublin IV Regulation** proposal, time limits for performing a Dublin transfer are no longer binding on Member States, as there is no consequence for failing to transfer an applicant within the specified deadlines. As far as children are concerned, this could therefore entail disproportionate restrictions on education.

ECRE recommends the deletion of Article 17a, in accordance with the principle of applicability of the Directive to all applicants for international protection who have a right to remain on the territory of Member States.

With regard to restrictions on or withdrawal of reception conditions for applicants who are not in the Member State responsible, **Article 19(1)** brings about a significant improvement by only allowing Member States to replace financial allowances with in-kind provisions of material reception conditions, or to withdraw daily allowances in exceptional and justified cases. This indicates that material reception conditions provided in kind may not be withdrawn by Member States. **Article 19(1)** also clarifies that health care may not be restricted or withdrawn.

However, ECRE notes with concern that the proposal introduces wide-ranging grounds for the replacement of reception conditions or the withdrawal of financial allowances. In addition to the four grounds contained in Article 20(1) and (3) of the current Directive, **Article 19(2)** adds:

- Serious breaches of the rules of the accommodation centre or seriously violent behaviour, which a number of Member States have sanctioned under the current Directive;
- Failure to attend compulsory integration measures;
- Failure to comply with the obligation to apply in the first country of entry under the Dublin IV Regulation;
- Having been transferred from another country after absconding to another Member State.

ECRE reiterates its opposition to the punitive restriction of reception conditions for reasons related to the Dublin system. Insofar as reception conditions are an instrument to ensure that an applicant remains in a designated place to follow his or her asylum procedure, the existing ground, now provided in **Article 19(1)(a)**, is a sufficient tool to discourage asylum seekers from leaving reception centres or designated areas of residence. In that respect, the grounds in **Article 19(2)(g)** and **(h)** have a predominantly punitive character, **liable to create more irregularity than it resolves**. Lowering an asylum seeker’s living conditions for failing to stay in one country – likely due to poor living conditions, as acknowledged by **Recital 5** – creates little prospects for him or her not to move onwards again.

At the same time, providing Member States with the power to sanction against asylum seekers who do not follow compulsory integration measures opens up risks of arbitrary restrictions on their living conditions. ECRE finds this provision to promote an unprincipled and counter-productive vision of

²² CJEU, *Cimade and Gisti*, para 42.

integration. An integration strategy based on **incentives and collaborative measures rather than penalties would be far more effective and desirable** for both asylum seekers and Member States.

ECRE recommends the deletion of Article 19(2)(f), (g) and (h), as a punitive approach to enforcing the provisions of the Dublin system or coercing integration is counterproductive as it will create undesired effects for asylum seekers and Member States in practice.

1.2. *Absconding: Article 2(10)-(11), Recital 19*

The definition of absconding

Whereas the concept of “risk of absconding” has been codified in the Dublin III Regulation,²³ the notion of “absconding” *per se* is defined for the first time in the EU asylum *acquis* in **Article 2(10)** of the proposal. Absconding is defined as an action by the applicant with the intention to avoid asylum procedures, which may consist of:

- Leaving the territory of the country where he or she is required to be present under the Dublin Regulation; or
- Failing to remain available to the competent authorities or courts of that country;

Recital 19 supports the proposed cumulative criteria for the definition of absconding, given the far-reaching consequences of absconding as regards an applicant’s entitlement to reception conditions. As discussed below, absconding may trigger a number of restrictions on asylum seekers’ freedom of movement or deprivation of their liberty.

However, ECRE finds conceptual problems in the way **Article 2(10)** frames the intentions of the applicant in the definition of “absconding”. Firstly, the term “**absconding**” **connotes morally blameworthy conduct**, implying that a person leaves “hurriedly and secretly, typically to escape from custody and avoid arrest.”²⁴ The proposal seems to adopt a hasty analogy between asylum law and criminal law, where those facing criminal charges are already considered answerable for some form of wrong-doing, and flee to evade justice.²⁵ On the contrary, an asylum seeker is not obliged to stay in the designated Member State and follow the asylum procedure there on account of wrong-doing. Rather paradoxically, “where a person [...] intends to make an application for international protection”, the fundamental right to asylum enshrined in Article 18 of the Charter is turned by the proposed reform of the Dublin system into an obligation to apply in the first country of entry,²⁶ as recalled by **Recital 13. Article 2(10)** seems to suggest that “asylum procedures” act as a disciplining factor to impute blame on asylum seekers who want to exercise their right elsewhere.

Secondly, the proposal uses “absconding” in a catch-all fashion, even though the term has different connotations depending on the situation of the asylum seeker. In the cases contemplated in **Article 7(2)(d) third indent** and **Article 8(3)(b)**, the applicant would be absconding if he or she evades the asylum procedure in the country where he or she is present – **absconding here means trying to evade the procedure so as to refrain from having the application processed in the country**. On the other hand, the cases envisaged in **Article 7(2)(d) first and second indents** and **Article 8(3)(g)** refer to a different form of “absconding”: the applicant would be absconding if or she evades the transfer to another country – **absconding here means trying to stay and having the application processed in the country of presence**.

²³ Article 2(n) Dublin III Regulation.

²⁴ Oxford Dictionary, Definition of “abscond”, available at: <http://goo.gl/1izdTe>.

²⁵ See Cathryn Costello, ‘Immigration Detention: The Grounds beneath our Feet’ (2015) 68:1 CLP 143. On the position of individuals facing prosecution, see Robin Duff, ‘Pre-trial Detention and the Presumption of Innocence’ in Andrew Ashworth *et al* (eds), *Preventive Justice* (OUP 2014).

²⁶ Article 4(1) proposal for a Dublin IV Regulation.

Thirdly, the assumption that people move on to “avoid asylum procedures” exposes the flaws of the proposed reform of the Dublin system. Persons moving beyond the first country of entry to reach other European countries do not intend to “avoid asylum procedures” altogether – they usually move with the very intention of pursuing asylum procedures, yet in another country. Asylum seekers may have very legitimate reasons for seeking asylum in a country other than that which the Dublin system has assigned him or her to be present in: **escaping from a dysfunctional asylum process or substandard living conditions,²⁷ or exercising the fundamental right to leave any country,²⁸ are not morally reprehensible actions.** The link between secondary movements and Member States’ own failure to adhere to their standards is expressly acknowledged in **Recital 5**:

“The persistent problems in ensuring adherence to the reception standards required for a dignified treatment of applicants in some Member States has contributed to a disproportionate burden falling on a few Member States with generally high reception standards.”

The risk of absconding

The “risk of absconding” is defined by **Article 2(11)** in accordance with the definition in the Dublin Regulation, clarifying that the objective criteria are defined in “national law”. However, experience from the implementation of the Dublin system has shown that the wide margin of discretion left to Member States has led to **open-ended definitions of the criteria for determining the “risk of absconding”**, which increase risks of arbitrary deprivation of liberty by national authorities. Examples of problematic criteria in national law include the existence of social ties or resources in **Austria**, the payment of significant amounts of money to irregularly enter the country in **Germany**, or the demonstration of conduct in the country or abroad that allows the authorities to believe that a person will not comply with orders in **Switzerland**.²⁹

Given the far-reaching consequences of the determination of a “risk of absconding” acknowledged by **Recital 19**, the proposal should circumscribe the legitimate criteria for such an assessment, which should be **conducive to a risk assessment of a person’s future conduct** and not merely assume a risk based on past conduct. These **criteria should distinguish cases where an applicant is at risk of attempting to leave the country, from cases where an applicant is at risk of attempting to stay in the country**.³⁰

Since the risk of absconding is to be assessed against the intention to avoid the asylum procedure, this also implies that no such risk can be assumed as long as an applicant remains at the disposal of the determining authority. It would be highly arbitrary, *a fortiori* with respect to an applicant present in the responsible Member State, to assume such a risk before it has been properly established that the applicant is no longer at the disposal of said authority and has in fact abandoned the procedure. The relevance in practice of such notion with respect to asylum seekers present in the responsible Member State would be highly questionable as a result.

ECRE recommends the objective criteria for the assessment of a risk of absconding to be exhaustively and restrictively defined in Article 2(11) and the corollary provision in the Dublin Regulation.

²⁷ Crucially, the proposal for a Dublin IV Regulation does not relieve applicants of the obligation to be present in a country which violates their fundamental rights, whereas their transfer to that country may be halted on human rights grounds. The protection of Article 31 of the Refugee Convention can be relevant in these cases.

²⁸ Article 2(2) Protocol 4 ECHR; Article 12(2) International Covenant on Civil and Political Rights.

²⁹ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, September 2015, 85-86.

³⁰ ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 19.

1.3. *Restrictions on free movement: Article 7, Recitals 13-18*

Article 7(2) obliges Member States in some cases (“shall where necessary”) to confine asylum seekers to a specific place of residence, which can be a reception centre, private house or flat or other adapted structure as per **Recital 16**. The reasons for such restrictions include existing grounds (a) public order and (b) swift processing of the application, while the proposal inserts (c) swift processing of the Dublin procedure, and (d) “effective” prevention of absconding in cases where the person is required to have applied or be present in another Member State.

On a preliminary remark, ECRE notes that the general principle of free movement in **Article 7(1)** already introduces restrictions to movement, by referring to applicants’ freedom to move “within the territory of the host Member State or within an area assigned to them by that Member State.” In light of Article 26 of the Refugee Convention, which should apply to asylum seekers given the declaratory nature of refugee status, assigning an applicant to a particular area in the country would amount to a restriction, which need be objectively justified.³¹ On the other hand, deciding on an applicant’s residence “in a specific place” under **Article 7(2)** is liable to amount to deprivation of liberty in the light of Article 5 ECHR, if the applicant is not allowed to freely leave that designated place.³²

Furthermore, ECRE is particularly alarmed by **Article 7(2)**, which seems to encourage a **blanket application of residence restrictions in cases where the Dublin Regulation is applicable**. To be compliant with fundamental rights guaranteed by the Charter and Article 2 of Protocol 4 ECHR, restrictions on movement may only be imposed for reasons of national security, public order, crime prevention, the protection of health or morals, the protection of the rights of others, or where it is justified by the public interest in a democratic society. In that respect, restrictions on free movement could be justifiable by reference to public order or rights of others in cases where there is a risk of the applicant’s absconding from a Dublin procedure, as contemplated in **Article 7(2)(d)**.

However, the objective of effective monitoring of an asylum procedure under **Article 7(2)(b)** or of the Dublin procedure listed under **Article 7(2)(c)** do not seem to be convincingly linked to questions of public order or rights of others. Whereas **Recital 14**, dealing with the application of the Dublin Regulation, mentions a broad and abstract objective “of ensuring a well-functioning Common European Asylum System”, this points more to an aim of promoting administrative convenience for Member States, beyond what is permitted by Article 2 of Protocol 4 ECHR.

Moreover, restrictions on free movement cannot be systematic, and should be prescribed by law, necessary and proportionate.³³ It is however stressed that this measure is applicable even in the absence of a demonstrated risk of absconding, though it must be applied “when necessary” and subject to proportionality as per **Article 7(7)**.

Article 7(3) states that where there is a risk of absconding, Member States are obliged “where necessary” to impose reporting obligations. ECRE recalls that, as a restriction on free movement, reporting requirements must also be scrutinised against the requirements of fundamental rights under the Charter and the ECHR. This includes an individualised assessment, as well as necessity and proportionality of such measures.

³¹ On this point, see CJEU, Joined Cases C-143/14 and C-144/14 *Alo and Osso*, Judgment of 1 March 2016.

³² See e.g. ECtHR, *Louled Massoud v Malta*, Application No 24340/08, Judgment of 27 October 2010, discussing deprivation of liberty through confinement within an island.

³³ See ECtHR, *Luordo v Italy*, Application No 32190/96, Judgment of 17 July 2003.

ECRE recommends a “may” clause in Article 7(2), as well as the deletion of Article 7(2)(b) and (c), which impose an unlawful restriction on applicants’ fundamental right to free movement solely for reasons of administrative convenience.

1.4. Detention grounds: Article 8, Recitals 20-23

ECRE notes a positive development in the Commission’s reasoning on the legal basis for detaining asylum seekers under the right to liberty guaranteed by the Charter. While the European Court of Human Rights (ECtHR) has yet to firmly address the issue of whether applicants may be lawfully detained for reasons of “preventing an unauthorised entry” under Article 5(1)(f) of the European Convention on Human Rights (ECHR), developments in the Court’s case law have cast serious doubts on the legality of detaining asylum seekers on this ground. In the case of *Suso Musa v. Malta*, the Court held that where a State goes beyond its obligations under the Convention by enacting legislation pursuant to EU law explicitly authorising the entry or stay of asylum seekers, “an ensuing detention for the purpose of preventing unauthorised entry may raise an issue as to the lawfulness of the detention under Article 5(1)(f).”³⁴ Under an appropriate reading of human rights requirements, asylum seekers, who have a right to remain on the territory of Member States, **may not be detained for immigration reasons as making an “unauthorised entry”, under Article 6 of the Charter,³⁵ but only for the purpose of “securing the fulfilment of an obligation prescribed in law” in line with Article 5(1)(b) ECHR.**

This is implicitly acknowledged by the Commission proposal on more than one occasion. Firstly the Explanatory Memorandum refers to compatibility with international law but singles out the issue of compatibility of Article 6 of the Charter with Article 5 ECHR.³⁶ Secondly, **Recital 21** discusses a ground for detention referring to the need for an obligation to be fulfilled, thereby seemingly reflecting the terms of Article 5(1)(b) ECHR. In that respect, the ground for detaining asylum seekers under the ECHR and the Charter could have important implications for the detention grounds prescribed in **Articles 8(3)(a), (b), (c) and (e)** of the proposal.

In accordance with the jurisprudence of the ECtHR,³⁷ recalled in a ruling delivered on 5 July 2016 in *O.M. v Hungary*, detention imposed to fulfil an obligation prescribed by law in accordance with Article 5(1)(b) ECHR must meet a number of guarantees:³⁸

- There must be **an unfulfilled obligation incumbent on the person** concerned;
- The arrest and detention must be for the purpose of securing its fulfilment and **not be punitive in character**;
- This obligation should not be given a wide interpretation. It has to be **specific and concrete**;
- The arrest and detention must be truly **necessary** for the purpose of ensuring its fulfilment;

³⁴ See ECtHR, *Suso Musa v Malta*, Application No 42337/12, Judgment of 23 July 2013, para 97; *O.M. v Hungary*, Application No 9912/15, para 47, Judgment of 5 July 2016; Note that the CJEU has not resolved the inconsistency between the Charter and the ECHR in Case C-601/15 PPU *J.N.*, Judgment of 15 February 2016. For an analysis, see ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015, available at: <http://goo.gl/gSCynS>; *Information Note on Directive 2013/33/EU*, July 2015, 12-13.

³⁵ Article 6 of the Charter mirrors Article 5 ECHR in that respect. Note that **Article 9(1) of the Asylum Procedures Regulation** provides that applicants only have a right to remain in the Member State responsible for their application.

³⁶ Explanatory Memorandum, 10: “The proposal is also fully compatible with Article 6 of the EU Charter of Fundamental Rights, read in the light of Article 5 of the European Convention on Human Rights and relevant jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.”

³⁷ See e.g. ECtHR, *Vasileva v Denmark*, Application No 52792/99, Judgment of 25 September 2003; *Ostendorf v Germany*, Application No 15598/08, Judgment of 7 March 2013.

³⁸ *O.M. v Hungary*, paras 42-43.

- The “obligation prescribed by law” **cannot be fulfilled by milder means**, and **proportionality** must also be ensured.

The different grounds for detention listed in **Article 8(3)** should be scrutinised against that yardstick. Bearing in mind that the existing grounds remain a “white provision” falling outside of the recast approach, the precepts of Article 6 of the Charter must be respected by all seven grounds. In light of this, ECRE notes that **a number of grounds in the Directive and the recast proposal do not necessarily fulfil the criteria of “fulfilment of an obligation prescribed by law”**. This is namely the case for:

- Detention to determine or verify identity or nationality as per **Article 8(3)(a)**, and detention to determine “those elements on which the application” is based in the presence of a risk of absconding as per **Article 8(3)(b)**, where the elements required to be provided under **Article 4(1) of the Qualification Regulation** and **Article 28(4) of the Asylum Procedures Regulation** are not provided by the applicant. Both grounds allow for detention of an asylum seeker in order for Member States to carry out a specific action. In certain cases, detention for that purpose would be justified if the applicant has not complied with his or her obligation to provide the necessary elements at his or her disposal to establish identity, nationality or the main elements of the claim. However, as currently formulated, the use of these grounds could also be contemplated in the event where an applicant has in fact complied with his or her obligation to provide the necessary elements to substantiate identity, nationality and the application for international protection. In such cases, **Articles 8(3)(a) and (b)** would include the possibility to detain an asylum seeker, without there being an unfulfilled obligation incumbent upon him or her.

The European Commission has attempted to extend the applicability of detention in such cases by requiring applicants to “be present and available to the competent authorities in the Member State of application” under **Article 4(3)(b) of the Dublin IV Regulation**. Yet such an obligation is not sufficiently clear and precise to comply with the Article 5(1)(b) ECHR scrutiny outlined above. In that respect, **Article 8(3)(b)** would enable Member States to detain asylum seekers who have fully complied with their obligation to substantiate their claim, if a risk of absconding is deemed to be present.

- Detention to ensure compliance with the obligation to remain within a designated residence, where the applicant has not complied with a residence restriction and there is a risk of absconding, under the newly introduced **Article 8(3)(c)**. Together with **Recital 21**, this provision constructs an artificial legal obligation to comply with residence restrictions, which are already an interference with the right to freedom of movement to fulfil a different purpose, as discussed above. In that sense, whereas the residence restriction under **Article 7(2)** is imposed to prevent absconding, for reasons of public order or for administrative convenience, detention under **Article 8(3)(c)** is imposed to serve the same purposes. It does not therefore concern the fulfilment of a clear and precise obligation incumbent on the applicant, as required by Article 5(1)(b) ECHR and Article 6 of the Charter.

At the same time, the express reference to a failure to comply with that obligation as a requirement to trigger **Article 8(3)(c)** indicates a punitive character to detention, which also contravenes Article 5(1)(b) ECHR and Article 6 of the Charter and is liable to abuse against applicants.

- Detention in the context of a border procedure under **Article 8(3)(d)**, given that in such case the purpose of detention is the assessment of an application’s admissibility or merits by the authorities, rather than the fulfilment of an obligation by the asylum seeker. In this regard,

ECRE reiterates its position that detention in the context of a border procedure cannot be construed as being for the purpose of preventing unauthorised entry under the first limb of Article 5(1)(f) ECHR either.³⁹ As asylum seekers have the right to remain on the territory as soon as they have made an asylum application and are therefore authorised to stay on the territory during the examination of their claim, detention can in their case no longer serve the purpose of preventing their unauthorised entry. The only exception to the right to remain on the territory pending the examination of the application allowed under the Commission proposal for an Asylum Procedures Regulation is with regard to subsequent asylum applications or in case of extradition or surrender to a third country.⁴⁰ As the border or transit zones are part of the territory of Member States, **Article 41(3) of the Asylum Procedures Regulation** proposal, according to which Member States shall grant entry to the territory to an asylum seeker in case no decision has been taken in the context of a border procedure within four weeks, cannot be interpreted as meaning that until such decision has been taken, the asylum seeker has no right to remain on the territory. Hence, as soon as an asylum seeker has made an application at the border and the exception to the right to remain laid down in Article 9(3) does not apply, it his or her detention cannot serve the purpose of “preventing unauthorised entry” and therefore be at odds with Article 5(1)(f) ECHR, first limb. In that regard, a broadly construed power to detain while deciding “on the applicant’s right to enter the territory” would not be faithful to Article 5(1)(f) and Article 5(1)(b) ECHR.

- Detention where an applicant is making a claim to frustrate a return order under **Article 8(3)(e)**, given there is no concrete and precise obligation incumbent on the applicant to leave the territory of the Member State, as an asylum application has been made and he or she has the right to remain on the territory pending its examination. However, the situation of persons who make a subsequent application is different, given that they may be excluded from the right to remain on the territory. In cases where the applicant makes a subsequent application, detention could therefore be applicable for immigration reasons under Article 5(1)(f) ECHR as the right to remain may be revoked.⁴¹
- Detention for reasons of public order under **Article 8(3)(f)**, given that there is no concrete and precise obligation incumbent on the applicant. Whereas the CJEU’s reading of detention related to public order in *J.N.* did not scrutinise compatibility with the ECHR, this ground is not justified by the need for the individual to fulfil a clear and precise legal obligation.

ECRE proposes the following amendments to the grounds for detention of asylum seekers:

Article 8(3): An applicant may be detained only:

[deleted provision]

[deleted provision]

[deleted provision]

(a) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she **had** already **[deleted text] accessed** the asylum procedure, that there are reasonable grounds to believe that he or she is making **[deleted text] a subsequent** application **in the meaning of [Article 42 of the Asylum Procedures Regulation]** for international protection merely in order to delay or frustrate the enforcement of the return decision;

[deleted provision]

(b) in accordance with [Article 29 of the Dublin Regulation].

³⁹ See ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 17-18.

⁴⁰ See Article 9(3) Commission Proposal for an Asylum Procedures Regulation.

⁴¹ Article 9(3)(b) proposal for an Asylum Procedures Regulation.

1.5. Detention of persons with special reception needs: Article 11, Recital 24

The proposal regrettably maintains the possibility to detain persons with special needs during the asylum procedure. In its ruling in *O.M. v Hungary*, the ECtHR pays due regard to the “person being detained” in the assessment of legality of detention to fulfil an obligation prescribed by law.⁴² In the case of LGBTI persons, for example, the Court noted that detention bears a risk of reproducing “the plight that forced these persons to flee in the first place.”⁴³

In respect of children, the “best interests of the child” principle militates strongly against any resort to detention, whatever the context.⁴⁴ The ECtHR’s rulings in *A.B. v France* and related cases have confirmed that the conditions inherent in detention facilities are a source of anxiety and exacerbate vulnerability of children, leading to a violation of Article 3 ECHR.⁴⁵

Several Member States have introduced exemptions from detention for persons presenting vulnerabilities in their national law. The detention of unaccompanied children is prohibited in **Belgium**, **Italy**, the **Netherlands** and **Poland**.⁴⁶ Conversely, **Austria** and **Switzerland** prohibit the detention of children below the age of 14 and 15 respectively,⁴⁷ while **Cyprus** and the **Netherlands** prohibit detention of children more generally.⁴⁸ Victims of violence or persons with disabilities are also exempted from detention in **Poland**.⁴⁹

In light of human rights requirements, ECRE recommends a modification of Article 11 and Recital 24 to impose an unequivocal exemption of persons with special reception needs from detention, as is already the case in a number of Member States.

2. Alignment of standards and enhanced preparedness

2.1. Content of material reception conditions: Articles 2(7) and 17, Recital 41

ECRE welcomes the clarification of the definition of material reception conditions in **Article 2(7)**, which includes essential non-food items such as sanitary items with the aim of reflecting the protective principles of the Directive, as explained in **Recital 41**.

With regard to housing, **Article 17(1)** clarifies that all forms of accommodation must “supply an adequate standard of living”, which the current Directive only requires for accommodation centres. ECRE supports this clarification as it ensures that **all forms of housing and shelter comply with reception standards**. This is particularly important in light of the frequent use of substandard accommodation in transit zones or at border locations, arguably in a state of detention, in countries

⁴² *O.M. v Hungary*, para 44.

⁴³ *O.M. v Hungary*, para 53.

⁴⁴ See ECRE, AIRE Centre and ICJ, *Third Party Intervention in ShD v Greece*, 12 August 2016, available at: <http://goo.gl/u07J9l>, para 21; Inter-American Court of Human Rights, *Advisory Opinion OC-21/14*, 19 August 2014, para 157.

⁴⁵ ECtHR, *A.B. v France*, Application No 11593/12, Judgment of 12 July 2016. See EDAL case summaries at: <http://goo.gl/rW2hTh>.

⁴⁶ AIDA Country Report Belgium: Fourth Update, December 2015, 78; Article 19(4) Italian Legislative Decree 142/2015; AIDA Country Report Netherlands: Fourth Update, November 2015, 67; AIDA Country Report Poland: Fourth Update, November 2015, 65.

⁴⁷ AIDA Country Report Austria: Fourth Update, December 2015, 77; AIDA Country Report Switzerland: First Update, October 2015, 79.

⁴⁸ AIDA Country Report Cyprus: Second Update, November 2015, 66; AIDA Country Report Netherlands: Fourth Update, November 2015, 67.

⁴⁹ AIDA Country Report Poland: Fourth Update, November 2015, 65.

such as **Germany**, the **Netherlands**, **France** and **Hungary**, as well as in the “hotspots” established in **Greece** and **Italy**.⁵⁰

The proposal also strengthens the guarantees applicable in cases where Member States exceptionally set different modalities for material reception conditions under **Article 17(9)**, in particular where normal housing capacities are temporarily exhausted. In these cases, Member States must guarantee a “dignified standard of living” and health care, as opposed to a coverage of “basic needs” as per the current Directive. The strengthened provisions will ensure closer scrutiny of exceptional accommodation measures taken by Member States in times of emergency, which have been systematically resorted to for a sizeable number of applicants in Member States including **Greece**, **Italy**, **Sweden** and **Austria**.⁵¹

The legal difference between the “adequate standard of living” in **Article 17(1)** and the “dignified standard of living” in **Article 17(9)** is not clear in the proposal. However, the reference to dignity reflects the applicability of the Charter as explained in the jurisprudence of the CJEU in *Saciri*, which clarifies that a dignified standard of living and adequate for the health of the applicants and capable of ensuring their subsistence” is required.⁵²

2.2. Contingency planning: Article 28, Recitals 44-45

To respond to the lack of preparedness in the majority of Member States to deal with increases in the number of arrivals,⁵³ **Article 28** introduces a contingency planning obligation. Member States must submit to the Asylum Agency their contingency plans for ensuring adequate reception conditions when faced with disproportionate pressure. The scope of and follow up to these plans relates closely to elements in the proposals on the Dublin Regulation and the Asylum Agency,⁵⁴ but the duty on Member States to proactively assess the capacities of their reception systems is a welcome measure with a view to ensuring greater preparedness towards large-scale arrivals in the future.

Nevertheless, **Article 28(1)** introduces a degree of speculation in the aforementioned contingency plans by deeming the number of asylum seekers to be received by a Member State as those for whom it is responsible under the Dublin Regulation, taking into account the corrective allocation mechanism proposed in that Regulation. ECRE does not see the practical value of this clause, as it conditions Member States’ reception planning to the functioning of the Dublin system. Practice has shown, however, that pressure on reception systems may be exerted on Member States regardless of their formal responsibilities under the Dublin Regulation. In light of this, an adequate contingency planning mechanism would need to **prepare Member States for increased numbers of arrivals, notwithstanding whether these occur in accordance or not with the precepts of the Dublin system**. At the same time, a simpler planning process, detached from the mechanisms for allocation of responsibility, would also be more straightforward for national administrations.

ECRE proposes the following amendment to the contingency planning provision:

⁵⁰ AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, 12-14.

⁵¹ AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, 31-32.

⁵² CJEU, Case C-79/13 *Saciri*, Judgment of 27 February 2014. See ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 30.

⁵³ AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016.

⁵⁴ On the role of the Agency, see ECRE, *Comments on the Commission proposal for a European Union Agency for Asylum*, July 2016, 11-13.

Article 28(1): Each Member State shall draw up a contingency plan setting out the planned measures to be taken to ensure an adequate reception of applicants in accordance with this Directive in cases where the Member State is confronted with a disproportionate number of applicants for international protection *[deleted text]*.

3. Employment

The provision of clearer and more harmonised rules on asylum seekers' access to national labour markets in the proposal has a twofold aim. On one hand, it embodies a welcome effort to ensure more rapid and effective integration of refugees into host societies,⁵⁵ building on positive experiences of Member States which have enabled asylum seekers more rapid access to employment.⁵⁶ On the other hand, the Commission aims to reduce "employment-related asylum-shopping" by aligning rules on access to the labour market.⁵⁷ ECRE stresses that the latter objective of the proposal does not seem to coherently build upon evidence from practice, as the assumption that Member States with generous rules on asylum seekers' employment have been more attractive to applicants is often dispelled in reality. **Spain** and **Greece** provide asylum seekers with immediate labour market access,⁵⁸ yet are not among the main destination countries for those seeking protection.⁵⁹ At the same time, as acknowledged in the stakeholder consultations conducted by the Commission, the effects of rapid formal access to the labour market "should not be overestimated as other hurdles to effective access are significant."⁶⁰

3.1. *Waiting periods for access to the labour market: Article 15(1), Recital 35*

Article 15(1) of the proposal lowers the maximum waiting period for allowing asylum seekers to access the labour market from 9 to 6 months. ECRE reiterates its support for a maximum time limit of 6 months as a general rule, while promoting access to the labour market as soon as possible, in the interest of both the asylum seeker and the Member State.⁶¹

However, the proposal introduces discriminatory treatment vis-à-vis certain categories of asylum seekers in two respects:

- ❖ **Article 15(1)** excludes applicants channelled into an accelerated procedure, under certain grounds, from labour market access;⁶²
- ❖ **Recital 35** encourages, though does not bind, Member States to lay down a time limit of 3 months for allowing applicants with claims "likely to be well-founded" to find employment. Although it does not define the notion of likely well-founded claims, the Recital makes reference to prioritised caseloads in accordance with the Asylum Procedures Regulation as an example warranting earlier labour market access.⁶³

The proposed categorisation of applicants with regard to employment rights, which enables certain asylum seekers to have faster access while excluding certain categories from the labour market

⁵⁵ Explanatory Memorandum, 14-16.

⁵⁶ Explanatory Memorandum, 7.

⁵⁷ Explanatory Memorandum, 4.

⁵⁸ AIDA Country Report Spain, April 2016, 42; AIDA Country Report Greece: Fourth Update, November 2015, 85.

⁵⁹ In 2015, Spain and Greece registered only 14,780 and 13,197 applications respectively: AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, 14.

⁶⁰ Explanatory Memorandum, 8.

⁶¹ ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 29.

⁶² Only cases falling within the grounds listed in Article 40(1)(a)-(f) are excluded from employment.

⁶³ The notion of prioritised examination of well-founded cases is mentioned in Article 33(5)(a) of the proposed Asylum Procedures Regulation.

altogether, seems to build on reforms adopted in 2015 in **Germany**, following which persons coming from “safe countries of origin” are not allowed access to the labour market.⁶⁴

However, the blanket exclusion of a category of asylum seekers from labour market access **contravenes the principle of non-discrimination of refugees laid down in Article 3 of the Refugee Convention** and exacerbates the ill-fitted normative distinction of ostensibly deserving and undeserving applicants before their claim has been heard on the merits. Against this background, ECRE opposes the proposed limitation of the personal scope of employment rights under the Directive. A **uniform rule** on labour market access for all categories of asylum seekers would also ensure **more clarity and administrative efficiency for Member States**. However, ECRE is in favour of early access to the labour market for asylum seekers as this enhances their integration prospects and self-sufficiency. Therefore, **Recital 35** should be deleted and early access to the labour market for all asylum seekers should be encouraged in **Recital 34**.

From a practical perspective, it should also be highlighted that asylum seekers channelled into an accelerated procedure would have their applications examined within a deadline of 2 months, thereby well before the maximum time limits set by **Article 15(1)** and **Recital 35**. Therefore the **risks the proposal seeks to avoid** through the proposed exclusion of these cases from labour market access **do not seem to have a significant impact in practice**.

On the other hand, this exclusion would create important difficulties for Member States given their obligation, under the proposed **Article 29(2)(f) of the Asylum Procedures Regulation**, to issue a document upon the lodging of the application, “stating whether the applicant has permission to take up gainful employment.” For countries such as **Sweden, Spain or Greece**, where labour market access is directly granted upon the lodging of the claim, authorities would not be able to comply with their duty to issue such a document before having concluded on the applicability of the accelerated procedure to the examination of the application concerned.

Knowledge of the national language is essential in order to enable asylum seekers to effectively access the labour market. However, this is often impeded by the lack of language courses available to asylum seekers. Member States should therefore be encouraged to provide for language courses as part of a holistic approach to encouraging self-sufficiency of asylum seekers through enhanced access to the labour market.

ECRE recommends the deletion of the second paragraph of Article 15(1) in order to maintain the right to employment applicable to all applicants.

ECRE recommends deleting Recital 35 and adding the following provision to Recital 34: ***In order to increase integration prospects and self-sufficiency of applicants, early access to the labour market before 6 months from the date when the application for international protection was lodged and to language courses is encouraged.***

3.2. *Effectiveness of access and equal treatment: Article 15(2), Recital 34*

The current Directive requires asylum seekers’ access to the labour market to be effective, without however providing clear guidance as to the challenge of guaranteeing such effectiveness in practice. Contrary to the finding of the EASO mapping exercise that “the majority of Member States do not apply any specific restrictions with regard to the applicants’ access to the labour market”,⁶⁵ practice

⁶⁴ AIDA Country Report Germany: Fourth Update, November 2015, 61.

⁶⁵ Explanatory Memorandum, 9.

reveals a **wide range of hindrances to asylum seekers' access to employment**. The AIDA Annual Report 2014/2015 documents diverse legal and administrative restrictions in this regard,⁶⁶ including:

- Labour market test, applied in **Germany, Austria, France, Hungary** and previously **Greece**,⁶⁷
- Sector restrictions, applied in the **UK, Germany, Austria** and **Cyprus**;
- Working time restrictions, applied in the **Netherlands** and **Austria**;
- Administrative formalities such as a job offer, required in **France** and the **Netherlands**.

Against this backdrop, **Article 15(2)** entails a much needed elaboration of the principle of effectiveness governing asylum seekers' access to employment. The proposal deletes the previous reference to Member States' right to "decide the conditions for granting access to the labour market." **Recital 34** explains that effectiveness prohibits Member States from "imposing conditions that effectively hinder an applicant from seeking employment" and clarifies that the labour market test must equally be subject to the requirements of effectiveness.

While welcoming the approach of the proposal, ECRE suggests **further clarification of the relevance of the principle of effectiveness in the context of labour market access** by expressly referring to employment restrictions other than the labour market test, including sector restrictions, working time restrictions and unduly strict administrative formalities.

ECRE proposes the following amendment to Recital 34:

Recital 34: In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market and to ensure that such access is effective, by not imposing conditions, **including sector restrictions, working time restrictions or unreasonable administrative formalities**, that effectively hinder an applicant from seeking employment. Labour market tests used to give priority to nationals or to other Union citizens or to third-country nationals legally resident in the Member State concerned should not hinder effective access for applicants to the labour market and should be implemented without prejudice to the principle of preference for Union citizens as expressed in the relevant provisions of the applicable Acts of Accession.

3.3. *Employment conditions and equal treatment: Article 15(3), Recitals 36-40*

Article 15(3) spells out the right of asylum seekers to be treated equally to nationals in relation to a number of labour rights. Together with a corollary provision in the instrument dealing with beneficiaries of international protection,⁶⁸ this provision elaborates on the right to equal treatment in the asylum *acquis*, drawing inspiration from different instruments in the labour migration *acquis* such as the Blue Card Directive,⁶⁹ the Intra-Corporate Transferees Directive⁷⁰ and the Seasonal Workers Directive.⁷¹

⁶⁶ AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, September 2015, available at: <http://goo.gl/DBIYnO>, 93 et seq.

⁶⁷ In **Greece**, the previously applicable labour market test vis-à-vis asylum seeker is no longer applied as of April 2016: Article 71 Greek Law 4375/2016.

⁶⁸ Articles 30 and 32-33 proposal for a Qualification Regulation.

⁶⁹ Article 14 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ* 2009 L155/17.

⁷⁰ Article 18 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ* 2014 L157/1.

⁷¹ Article 23 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, *OJ* 2014 L94/375.

The elaboration of labour rights is a positive element of the proposal, as is its sensitivity to peculiar challenges faced by asylum seekers such as difficulties to provide documentary evidence; this is acknowledged in **Article 15(3)(d)** and **Recital 37**. Nevertheless, the scope of the right to equal treatment afforded to asylum seekers in the proposal differs from that guaranteed to beneficiaries in the proposed Qualification Regulation. Asylum seekers are treated less preferentially with regard to:

- Freedom of association, as they may be excluded from holding public office under **Article 15(3)(i)**;
- Education and vocational training, which may be conditioned upon a direct link to a specific employment activity under **Article 15(3)(ii)**,⁷² and which excludes equal treatment vis-à-vis grants and loans under **Article 15(3)(c)**;
- Advice services afforded by employment offices,⁷³ which are not available to applicants;
- Social security, as they may be excluded from family and unemployment benefits under **Article 15(3)(iii)**.⁷⁴

As explained in **Recital 39**, several of these restrictions relate to the “possibly temporary nature of the stay of applicants”. Yet, insofar as the proposal differentiates the treatment of applicants from that of beneficiaries of international protection in the area of labour rights, it **fails to afford asylum seekers** – who are presumptive refugees throughout the examination of their claim – “**the most favourable treatment** accorded to nationals of a foreign country in the same circumstances” as prescribed by Article 17 of the Refugee Convention. ECRE recalls that the proposal must be fully compliant with international obligations such as the rights enshrined in the Refugee Convention.

Beyond the requirements of the Convention, an alignment of the provision on equal treatment in respect of asylum seekers and beneficiaries will be crucial to **guaranteeing consistency in labour rights throughout the asylum process, with a view to rapid and effective integration into host communities**, in accordance with the broader objectives of the reform of the Directive.

ECRE recommends an alignment of the right to equal treatment in Article 15(3) to the provision related to beneficiaries of international protection in Articles 30, 32 and 33 of the Qualification Regulation.

4. Special reception needs

4.1. *The identification of vulnerability: Article 21*

The term “vulnerability” is replaced throughout the text by “special reception needs”, the definition of categories of such asylum seekers being moved to **Article 2(13)**. The proposal reinforces the duty to assess special reception needs in **Article 21(1)**, which requires identification to be carried out “as early as possible” rather than “within a reasonable time limit”. The proposal also requires the assessment of special reception needs to be conducted “systematically”. These welcome improvements to the identification of vulnerabilities echo ECRE’s position on the need for timely and effective identification of vulnerable groups in the asylum process,⁷⁵ which remains a fundamental challenge for asylum systems throughout Europe.⁷⁶

⁷² This also applies to seasonal workers under Article 18(2)(ii) Seasonal Workers Directive.

⁷³ Article 30(2)(d) proposal for a Qualification Regulation.

⁷⁴ This also applies to seasonal workers under Article 18(2)(i) Seasonal Workers Directive.

⁷⁵ ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 34-35.

⁷⁶ AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, 34-35.

Article 21(1) maintains the possibility for Member States to incorporate the assessment of special reception needs within the assessment of special procedural needs under the Asylum Procedures Regulation. In ECRE's view, the two assessments should in fact be conducted as a continuum, with the aim of avoiding additional procedural layers and ensuring a holistic examination of the applicant's needs. Another benefit of carrying out the two assessments as a continuum is the appropriate identification of vulnerabilities which may relate to the grounds for applying for international protection, such as trafficking in human beings, which is currently hindered by the inability of officers conducting reception-related assessments to ask questions on non-objective specific needs in countries such as **France**.

It should be noted, however, that common guidance on assessing special needs of applicants, provided through implementing acts for procedural needs under proposed **Article 19(4) of the Asylum Procedures Regulation**, is not provided in the context of reception.

Article 21(2) introduces concrete elements with a view to enabling this systematic identification to become operational, which include (a) training on detecting "first signs" of special reception conditions; (b) including information on special needs in the applicant's file; (c) referring to specialised medical professionals where there are signs of torture or violence; and (d) tailoring reception support. ECRE welcomes the increased clarity of the provisions on special reception needs, which now contain more detailed and clear obligations on national authorities, with a view to ensuring better identification of vulnerabilities from the first contact with newly arriving persons.

However, despite notable improvements, the provision **continues to omit the applicant's right to be heard in the assessment of special reception needs**. The applicability of the right to be heard, under Article 41 of the Charter and as a general principle of EU law, entails the possibility for the applicant to **submit observations during the identification process so as to explain why they should benefit from special reception conditions**. These observations need in turn be taken into consideration by the national authorities conducting the assessment.⁷⁷ Similarly, decisions relating to special reception conditions which may adversely affect an applicant must give reasons, including where vulnerabilities become apparent at later stages of the asylum procedure.⁷⁸ This right should also be reflected in the assessment of special procedural guarantees under the Asylum Procedures Regulation, which should be conducted together with the examination of special reception needs.

In the absence of a right of the applicant to submit observations, assessments of special reception needs conducted on the basis of questionnaires or summary collection of information, as seen in countries such as **France**,⁷⁹ run the risk of neglecting important vulnerabilities and of thus depriving asylum seekers of necessary support. At the same time, officials should be sufficiently trained to detect signs of vulnerability, notwithstanding the applicant's ability to self-identify those signs.

ECRE proposes the following amendment to Article 21(1)-(2):

Article 21(1): In order to effectively implement Article 20, Member States shall systematically assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs. That assessment shall be initiated as early as possible after an application for international protection is made and **shall** be integrated **[deleted text]** into the assessment referred to in [the Asylum Procedures Regulation], **which may take place within existing national procedures**. Member States shall ensure that those special reception needs are also addressed, in accordance with this Directive, if they become apparent at a later stage in the asylum procedure.

⁷⁷ ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 34.

⁷⁸ *Ibid.*

⁷⁹ For a copy of the questionnaire used by the French Office for Immigration and Integration (OFII), see: <http://goo.gl/HL9cPb>. See AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, 34.

Article 21(2): For the purposes of paragraph 1, Member States shall ensure that the personnel of the authorities referred to in Article 26:

(a) are trained and continue to be trained to **proactively** detect first signs that an applicant requires special reception conditions and to address those needs when identified;

(aa) effectively provide the applicant with the possibility to submit his or her observations on the need to benefit from special reception support;

(b) include information concerning the applicant's special reception needs in the applicant's file, together with the indication of the signs referred to in point (a) **and the applicant's submissions referred to in point (aa)** as well as recommendations as to the type of support that may be needed by the applicant;

(c) refer applicants to a doctor or a psychologist for further assessment of their psychological and physical state where there are indications that applicants may have been victim of torture, rape or of another serious form of psychological, physical or sexual violence and that this could affect the reception needs of the applicant; and

(d) take into account the result of that examination when deciding on the type of special reception support which may be provided to the applicant.

The decision on the provision of special reception support shall be duly motivated.

Conclusion

ECRE welcomes the improvements proposed by the Commission with regard to a clearer, more protective definition of material reception conditions and requisite standards applicable to all forms of accommodation, both relating to regular and exceptional reception measures taken by Member States. The provisions on contingency planning, access to the labour market and identification of special reception needs are equally positive as a general step, though potential improvements thereto could ensure that asylum seekers are more effectively protected in line with the Charter and may integrate faster and better into their host countries. Co-legislators are encouraged to assess these improvements in order to strengthen the potential of the Directive for both applicants and Member States.

On the other hand, ECRE raises severe concerns as to the restrictive and punitive measures aimed at addressing secondary movements, which are acknowledged by the Commission as a phenomenon stemming to a large extent from Member States' own failure to adhere to their reception obligations. The exclusion of applicants from reception conditions for reasons of absconding, as well as a range of preventive and punitive restrictions to the fundamental rights to free movement and liberty create strong tension with primary EU law as enshrined in the Charter, while also contradicting the jurisprudence of the CJEU and ECtHR, relating to the existing EU asylum *acquis*. From a practical perspective, the objectives of compliance with the Dublin system and fostering integration are unlikely to be pursued through a coercive approach; if anything, sanctions are liable to push asylum seekers into more irregularity. To that end, ECRE urges the Council and the European Parliament to assess how best to address the problem of secondary movements, by exploring incentives and ensuring that problems of poor implementation of reception standards are not attributed as moral blame on those seeking protection.