



**ECRE Comments on the Commission Proposal for a
Dublin IV Regulation
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Summary of views

ECRE makes the following key observations and recommendations to the co-legislators on the Commission proposal to recast the Dublin III Regulation (EU) No 604/2013:

1. **Article 3(3)-(5):** The proposed obligation on the Member State of first entry to assess certain grounds for inadmissibility and for the application of the accelerated procedures prior to the application of the Dublin criteria should be deleted, as it (i) disregards protection obligations regarding asylum seekers' family unity, (ii) creates additional onerous layers of procedure for Member States, and (iii) exacerbates distribution inequalities by imposing responsibility upon external border countries for processing all asylum applications falling under "first country of asylum", "safe third country", "safe country of origin" and security grounds.
2. **Article 19:** Restricting the scope of the discretionary clauses should be resisted, as it eliminates pragmatist assumptions of responsibility by Member States, with a view to ensuring efficient processing of applications and contradicts Member States' sovereign right to examine an asylum claim on the merits, as enshrined in constitutional traditions.
3. **Article 30 and former Article 19:** Cessation of responsibility after a period of time, including following the lapse of the deadline for performing a transfer, should be reintroduced, since its deletion places unduly high responsibility on countries of first entry and removes incentives on Member States to swiftly conduct transfers.
4. **Articles 4 and 5:** Provisions related to the obligations of the applicants should be clarified in order to avoid arbitrary practice and diverging interpretation. Provisions related to the sanctions in case of irregular secondary movement of an applicant, such as the mandatory use of the accelerated procedure or the withdrawal of reception conditions, must be deleted as they risk violating fundamental rights and fall outside the scope of the Dublin Regulation. The guarantees of Article 31 of the Refugee Convention against penalisation of irregular entry of refugees must also be explicitly enshrined in the Regulation.
5. **Article 3(2):** The human rights test for suspending Dublin transfers should be amended in accordance with the EU Charter of Fundamental Rights, which does not condition prohibition of removals upon the existence of "systemic flaws" in the asylum procedure and reception conditions, and may extend to violations of human rights other than the prohibition of torture, inhuman or degrading treatment.
6. **Articles 2(g) and 6(1)(d):** The welcomed expansion of the definition of family members in the proposal could be further strengthened to enhance integration prospects and fully comply with the right to family life. To avoid the principle of family unity being undermined in practice by onerous procedural constraints, applicants should retain the right to submit information regarding presence of family members or relatives in the Member States at any stage after the interview.
7. **Articles 8(2), 10(4) and 26:** Transfers of unaccompanied children to the country of first application should not be presumed to be in the best interests of the child. As a rule, unaccompanied children should be allowed to apply in the Member State where they are present, unless their best interests dictate otherwise. In this regard, Article 8(2) should be amended so as to ensure that legal representation and guardianship are provided by each Member State where an unaccompanied child is present and not only where the child is "obliged to be present". Further, ECRE is concerned that in practice, Member States will not be able to uphold their positive obligations under the legislative proposal such as appointing a

guardian, to carry out best interests assessments and to conduct family tracing due to the very short time limits imposed within the context of a take back notification under Article 26.

8. **Article 28:** Limitations on the scope of appeals against transfer decisions are incompatible with the right to an effective remedy under Article 47 of the Charter. As the same right requires time-limits for the applicant to submit an appeal to be reasonable, a deadline of 7 days also contravenes the Charter.

9. **Articles 34-43:** The solidarity mechanism must be an intrinsic component of the Dublin system and should be triggered as soon as the number of asylum applications lodged in one Member State is above its respective share (100%). All applicants should be eligible for the allocation scheme. The decision to cease solidarity mechanisms should be linked to the capacity of the Member State to address the migratory pressure together with a sizeable reduction of the number of asylum applications below the capacity threshold. For the corrective allocation mechanism to have any meaningful effect, its application should also be coupled with a suspension of Dublin transfers to the benefitting Member State.

Introduction*

Regulation (EU) No 604/2013 (hereafter “Dublin III Regulation”),¹ the third iteration of the “Dublin system”, sets out the criteria and mechanisms allocating responsibility between Member States for asylum applications. Through a legislative proposal tabled on 4 May 2016,² the European Commission has triggered a process of negotiation on a fourth version of this instrument.

A key innovative feature of the Dublin reform is that the responsibility allocation system comes as part of a broader strategy to end irregular migration flows into the EU. “Protection in the region and resettlement from there to the EU should become the model for the future, and best serves the interests and safety of refugees.”³ This means that the way in which responsibility for asylum seekers is allocated *within* the EU is defined by an overarching policy framework of preventing entry *into* the EU from the outset. Alongside existing objectives (i.e. rapid access of asylum seekers to the procedure on the one hand, and prevention of multiple applications on the other), the proposal aims at rendering rules simpler and more effective, and ensuring equality of efforts when a state is faced with disproportionate pressure (**Recital 10**).

However, the entire Dublin IV proposal seems all but sensitive to the foundational flaws made evident throughout the two decades of operation of the Dublin system. Volumes of national and European jurisprudence, academic commentary, policy analysis and research have exposed the multifaceted deficiencies of the EU’s responsibility-allocation mechanism, yet the designers of the fourth proposal seem to have ignored the majority of these critical observations.

As a responsibility-sharing system is indispensable to avoid “refugees in orbit” situations, ECRE has consistently held that the current Dublin system should be replaced with a system that respects the fundamental rights of asylum seekers and is based on the fair sharing of responsibilities between Member States.⁴

In this paper, ECRE presents its assessment of the Commission proposal recasting the Dublin Regulation proposed on 4 May 2016. The Comments outline an overview of overarching policy and legal concerns on the proposal, before engaging in a detailed legal analysis of its key provisions and concrete recommendations for further amendments where relevant.

Policy concerns

A reform which engages only superficially with long-standing and well-documented criticisms of the Dublin system, runs a high risk of **perpetuating inefficient and unworkable mechanisms** for allocation of responsibility that are unfair to both asylum seekers and Member States. To avoid the political costs of future ‘crises’, the EU must be able to demonstrate – regardless of the target audience or constituency – that the allocation and fair sharing of responsibility between Member States works in practice. To that end, the proposal must take into account the lack of fairness underpinning the Dublin system, which creates different incentives for Member States to disregard the responsibility rules. While a number of countries perceive the mechanism as placing disproportionate

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

¹ 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.

² European Commission, *Proposal for a [Dublin IV Regulation]*, COM (2016) 270, 4 May 2016.

³ Explanatory Memorandum, 2.

⁴ See in particular ECRE, *The Way Forward; Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <http://goo.gl/Rj7TQg>; *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, available at: <http://goo.gl/Ew9cYE>.

responsibility on external borders, others deem the absence of a fair responsibility-sharing rule problematic for failing to prevent the majority of asylum applications from being processed by a handful of Member States.

Moreover, the absence of trust from the people directly affected by the allocation of responsibility mechanism has already prompted the EU to adapt its conception of the Dublin system, but in a regrettably short-sighted and counter-productive manner. The Commission proposal – as the Dublin III Regulation to some extent – engages with asylum seekers rather than treating the process as one strictly between states, as done previously. However, **it does so through sanctions and discipline and does nothing to make the rules fairer and easier to comply with** for asylum seekers. Individuals will be told to apply in the first Member State of entry; and, where they engage in secondary movements in search of better conditions, be returned to that first country under worse conditions than before, ranging from withdrawal of reception conditions to the applicability of truncated asylum procedures. Yet, threatening asylum seekers with punishment for failing to subscribe to an unfair system is likely to only trigger more contestation, more irregularity and more creative avoidance strategies and **undermine the objective of asserting state control over migration flows**.

ECRE deplors the fact that the proposal does not take into consideration the individual circumstances of the applicant – beyond family links - nor the applicant's profile or integration perspectives as a key factor for determining the responsible Member State.⁵ Combined with a punitive approach, the new system is primarily built on coercion. Twenty years of Dublin have demonstrated that such a system is doomed to failure as it tends to push people into irregularity. ECRE calls for a **fundamental re-think of the underlying logic of the recast Dublin Regulation** in order to establish a responsibility allocation mechanism that is fair and enhances legal certainty for both Member States and asylum seekers. Responsibility sharing should never equate to a blind mechanical dispersal of asylum seekers across Europe.

Legal critique: tension with Dublin jurisprudence and primary EU law

As a mechanism entailing coercive transfers and other forms of detrimental treatment to asylum seekers, the Dublin system is one of the most heavily litigated aspects of the CEAS. Post-Lisbon, judicial intervention from national and European courts affects the Dublin Regulation more than any other instrument in the Common European Asylum System.⁶

Alongside countless national rulings and fact-laden assessments of the legality of Dublin transfers by the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) has interpreted provisions of the Regulation in **twelve different judgments** as of September 2016.⁷

⁵ See Recital 23 and Article 6(1).

⁶ For a compilation of cases, see the European Database of Asylum Law (EDAL).

⁷ On the **suspension of transfers** on human rights grounds and the use of the sovereignty clause: CJEU, Joined Cases C-411/10 *N.S. v. Secretary of State for the Home Department*, Judgment of 21 December 2011; Case C-528/11 *Halaf*, Judgment of 30 May 2013; Case 4/11 *Bundesrepublik Deutschland v Kaveh Puid*, Judgment of 14 November 2013; Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, Judgment of 10 December 2013. On the **humanitarian clause**, CJEU, Case C-245/11 *K v Bundesasylamt*, Judgment of 6 November 2012. On responsibility criteria relating to **unaccompanied children**, CJEU, Case C-648/11 *M.A. v Secretary of State for the Home Department*, Judgment of 6 June 2013. On the **scope of reception conditions**, CJEU, Case C-179/11 *Cimade and Gisti*, Judgment of 27 September 2012. On the interplay of “**safe third country**” provisions, CJEU, Case C-695/15 PPU *Mirza*, Judgment of 17 March 2016. On **time limits**, CJEU, Case C-19/08 *Migrationsverket v Petrosian*, Judgment of 29 January 2009. On the **withdrawal of applications**, CJEU, Case C-620/10 *Migrationsverket v Kastrati*, Judgment of 3 May 2012. On the **scope of the right to an effective remedy**, CJEU, Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, Judgment of 10 December 2013; Case C-63/15 *Ghezelbash* and Case C-155/15 *Karim*, Judgments of 7 June 2016.

Four more preliminary rulings are pending in the cases of *Shiri* on the scope of the right to an effective remedy; *Amayry* and *Al Chodor* on the detention provisions,⁸ and *Aziz Hasan* on time limits.⁹

These judgments have been critical in addressing protection gaps, often identifying issues of compatibility between the Regulation and fundamental rights prescribed in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (“Charter”). From the outset, co-legislators should bear in mind the constitutional architecture of EU law, which gives primacy to the rights enshrined in the ECHR and the Charter over secondary legislation.¹⁰ The Charter must also be interpreted and applied as at least mirroring the content and meaning of rights protected by the ECHR.¹¹

The Commission proposal, however, attempts at various instances to overturn principles established by the ECtHR and CJEU or to maintain persisting incompatibilities with human rights, namely by: (i) retaining a narrow *non-refoulement* guarantee, including “systemic flaws” as a precondition for suspending transfers, contrary to the ECtHR’s judgment in *Tarakhel v Switzerland* (ii) reversing the CJEU’s *M.A.* ruling on the responsibility of the Member State in which an unaccompanied child is present to process his or her claim; (iii) ignoring the requirements set by the CJEU’s judgment in *Cimade and Gisti* on asylum seekers’ entitlement to reception conditions throughout the Dublin procedure; and (iv) reversing the CJEU’s *Ghezelbash* and *Karim* rulings by limiting the scope of Dublin appeals. Inconsistencies with guidance provided by national jurisprudence are also noted throughout.

Analysis of key provisions

1. Scope of Dublin

The related provision of the Dublin III Regulation spells out the right of any Member State to send an applicant to a third country, independently of the Dublin responsibility provisions. In *Mirza*, the CJEU took a broadly permissive reading of Article 3(3) of the Dublin III Regulation, finding that any Member State may apply the “safe third country” provision at any point in the process without time limitations.¹² The interplay of this concept in the application of the Dublin system already raises critical protection concerns, given that safe country concepts *per se* are liable to violate international obligations, as discussed by ECRE in its comments on the proposals on the Asylum Procedures Regulation.¹³

Conversely, beyond critiques of the “safe third country” and “first country of asylum” concepts, the proposed **Article 3(3)** entails a critical restriction in the scope of the Dublin system. The responsibility criteria and allocation procedure may only be applied in respect of asylum seekers whose claims are not inadmissible on “first country of asylum” or “safe third country” grounds, or channelled into an accelerated procedure on the basis of the “safe country of origin” ground or a danger to public order or public security.¹⁴ The justification behind this amendment is provided in **Recital 17** and seeks “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”.

⁸ CJEU, Case C-201/16 *Shiri*, Reference of 12 April 2016; Case C-60/16 *Amayry v Migrationsverket*, Reference of 3 February 2016; Case C-528/15 *Al Chodor*, Reference of 18 December 2015.

⁹ CJEU, Case C-360/16 *Bundesrepublik Deutschland v Aziz Hasan*, Reference of 29 June 2016.

¹⁰ Articles 6(1) and (3) Treaty on European Union (TEU).

¹¹ Article 52(3) Charter.

¹² CJEU, Case C-695/15 PPU *Mirza*, Judgment of 17 March 2016, paras 40-42.

¹³ ECRE, *Comments on the Commission proposal for an Asylum Procedures Regulation*, Forthcoming.

¹⁴ The proposed Article 3(3) cites Article 33(2)(b)-(c) and Article 31(8) of 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) (“recast Asylum Procedures Directive”), OJ 2013 L180/60.

This clause raises substantial protection concerns and is in stark contradiction with both efficiency and solidarity, the two reform objectives explicitly set out by the Commission proposal.

a. *Protection considerations*

Tying the applicability of Dublin rules only to asylum seekers whose claims cannot be shifted to third countries or cannot be rapidly processed on the basis of a presumption of safety in the country of origin or security concerns means that access to protection in European countries situated away from external borders will become near impossible. Article 3(3) confirms the Commission's intention to move to a model of "protection in the region"¹⁵ and to shut off access for irregularly arriving refugees. This proposal appears to be capitalising on the political momentum generated following the EU's agreement with Turkey on 18 March 2016,¹⁶ which comes into direct conflict with the asylum *acquis* as it results in sending asylum seekers to far more precarious protection conditions, in particular for non-Syrians. It is acknowledged that the recast Asylum Procedures Directive lays down procedural safeguards for the implementation of the "safe third country" and "first country of asylum" concepts. However, the legal guarantees to ensure that the third country will readmit the applicant are formulated in a rather ambiguous manner in the Directive as the safe third country concept may be applied where "there are grounds for considering that the applicant will be admitted or re-admitted to that country".¹⁷ **Article 45 of the Asylum Procedures Regulation proposal** more firmly requires that a inadmissibility decision on such ground must be revoked and access to the procedure granted where the third country in question does not "admit or readmit" the applicant to its territory. However, such assessment is only to be made after a negative decision has been taken and does not necessarily require a guarantee that the person will have access to a fair and substantive examination of their request for international protection.

It should be reiterated that from an international law perspective, the safe country concepts are highly controversial, as they lack a clear legal basis in the 1951 Refugee Convention. The "safe third country" and "first country of asylum" concepts in particular are equally premised on a flawed interpretation of the 1951 Refugee Convention as not allowing any choice for the refugee with regard to the state of refuge but requiring the refugee to request such protection at the earliest opportunity, which underlies the Dublin system. However, whereas the Refugee Convention does not provide for an unfettered right to refugees to choose their host state, no obligation to apply in the first country refugees reach after fleeing their country can be derived from international refugee law either. ECRE is concerned that the Commission proposal for an Asylum Procedures Regulation includes important changes to the current provisions in the recast Asylum Procedures Directive with regard to the mandatory use of such concepts. The reform of this instrument raises a number of concerns from a fundamental rights perspective, covered in ECRE's related comments cited above.

Nevertheless, even if the "safe third country" or "first country of asylum" provisions were to be properly applied, the proposed amendment to Dublin would still be incompatible with fundamental legal principles.

The asylum seeker's family unity in responsibility-allocation processes has been underpinned as the primordial criterion in the hierarchy as early as in the Dublin Convention.¹⁸ As stated in **Recital 16**, the

¹⁵ European Commission, *Explanatory Memorandum*, 2.

¹⁶ European Council, *EU-Turkey statement*, 18 March 2016.

¹⁷ According to Recital 44 of the recast Asylum Procedures Directive, Member States should not be obliged to assess the substance of an application where the applicant can reasonably be expected to seek protection in a third country and there are "grounds for considering that the applicant will be admitted or re-admitted to that country". This is at variance with Recital (43) which lays down a clear obligation that the "applicant will be readmitted to that country" in the case where the applicant comes from a country deemed to be a 'safe country of origin'. The same wording is used in Recital 37 of the Commission Proposal for an Asylum Procedures Regulation relating to the safe third country concept.

¹⁸ Article 4(1) Dublin Convention. See also Articles 8-11 Dublin III Regulation.

right to be reunited with family members is enshrined in Article 7 of the Charter, mirroring the content and meaning of Article 8 ECHR. However, by requiring the first Member State in which the application for international protection is made to examine whether the application is inadmissible or can be treated in an accelerated procedure on the basis of specific grounds before applying the responsibility criteria in accordance with Chapters III and IV, which include the family provisions, renders exercise of this right impossible for a potentially large group of asylum seekers. Therefore, if adopted, **Article 3(3)** would **breach family life by preventing** all asylum seekers coming to an external border Member State from a “first country of asylum”, a “safe third country” or a “safe country of origin”, or presenting security risks, **from joining family members** in another Member State.¹⁹

b. Streamlining and efficiency

The objective of efficient procedures ensuring rapid access to asylum procedures is severely undermined by what undoubtedly appears as an undue fragmentation of responsibility rules. Whereas under the current framework states conduct a Dublin procedure prior to checking admissibility and then examining the merits of a claim, under arguably already burdensome layers of procedural complexity, a Member State would have to follow complex procedural steps when faced with an asylum application if the proposed Article 3(3) is adopted:

- (a) Apply only two of the admissibility grounds in Article 33(2) of the recast Asylum Procedures Directive to examine the admissibility of the claim on “first country of asylum” and “safe third country” grounds;
- (b) If the claim is not inadmissible on these grounds, apply only two of the grounds in Article 31(8) of the Directive to process the claim in an accelerated procedure if the person comes from a presumed “safe country of origin” or presents a threat to public security or public order;
- (c) If these provisions are not applicable, conduct a Dublin procedure;

A Member State may also conduct additional procedural steps according to optional provisions of the Asylum Procedures Directive:

- (d) If found to be the responsible Member State, it may conduct an admissibility procedure to examine whether the remaining three inadmissibility grounds in Article 33(2) of the Directive apply;
- (e) If the claim is deemed admissible, it may verify whether any of the remaining grounds of Article 31(8) are applicable so as to channel the claim into an accelerated procedure;
- (f) If no such ground is applicable, examine the application on the merits under the regular procedure.

In **Article 36(5) of the Asylum Procedures Regulation** proposal, the Commission proposes a possibility for Member States to forgo the admissibility procedure where they may *prima facie* declare an application manifestly unfounded on some of the grounds listed in **Article 40** of that proposal. In this context, this possibility could permit asylum authorities to directly reject a claim on the basis of the “safe country of origin” concept without prior examination of “first country of asylum” or “safe third country” grounds. In practice, Member States would therefore be able to follow swifter procedures only for a limited number of asylum seekers.

This overly complex design of asylum procedures can only mean a **dramatic increase in workload for asylum authorities, to the detriment of both national administrations / courts and asylum seekers**, whose access to a full examination of the substance of their claim will be severely delayed and who will likely face severe difficulties in properly understanding the complexities of the procedure

¹⁹ On the right to family life, see ECtHR, *Senigo Longue v. France*, Application No 19113/09, Judgment of 10 July 2014; *Tanda-Muzinga v. France*, Application No 2260/10, Judgment of 10 July 2014.

proposed. An increase in legal aid costs is also expected to ensue. The proposal also lacks legal certainty vis-à-vis admissibility and accelerated procedures, as it requires certain grounds to be checked at earlier stages than others without any adequate justification for such differential treatment. The paradox of efficiency is stretched even further by requiring Member States to assess certain questions relating to the merits of an application – namely Article 31(8)(b) and (j) – before questions of admissibility falling under Article 33(2)(a), (d) and (e). In sum, the suggested provision envisages an **unworkable, unduly bureaucratic procedure**.

c. Solidarity and fairness

Beyond its procedural complexity, the proposed Article 3(3) runs contrary to the Commission's solidarity agenda by **intensifying the very distribution inequalities** ostensibly targeted by the reform. **Article 3(4)** provides that the Member State declaring an application inadmissible on "first country of asylum" or "safe third country" grounds or applying the accelerated procedure on "safe country of origin" or public order grounds becomes responsible for the application. **Article 3(5)** adds that this responsibility encompasses any potential subsequent application made by the asylum seeker.

According to the proposed provision, **the Member State of first entry will be responsible from the outset** for all asylum seekers coming from a "safe third country", a "first country of asylum", a "safe country of origin" or presenting a security threat. In sharp contrast to its previous design, the Dublin IV Regulation would therefore allocate responsibility *only* for those asylum seekers who do not fall within any of the aforementioned categories.

Defeating any solidarity-based logic possible, the proposed **Article 3(4)** places an extremely heavier burden on external border Member States compared to its – heavily criticised thereon – predecessors. Such a rule not only contravenes one of the foundational aims of the Dublin reform but also invites more perverse effects in Member State compliance with the responsibility rules than those witnessed throughout the life of Dublin. Countries of first entry will only be further **encouraged to defect from the precepts of Article 3(3)-(5) so as to evade responsibility**, by likely avoiding thorough admissibility, "safe country of origin" and security assessments vis-à-vis asylum seekers entering their territory. The proposed provision seems to be entirely distanced from the deeper reasons why Member States have not faithfully followed the Dublin rules so far.

In sum, ECRE finds there to be ample grounds from both principle and practicality against such a proposal. Article 3(3)-(5) circumscribes access to asylum for the overwhelming majority of refugees to countries of first arrival, entails an unworkably complex procedure creating undue administrative burden for states and protracted limbo for asylum seekers, as well as a fundamentally unfair rule likely to prompt external border countries to defect from its application in order to evade responsibility.

Even the current formulation of Article 3(3) of the Dublin III Regulation, deleted by the proposal, raises similar protection risks in the light of the *Mirza* ruling. As the CJEU in *Mirza* found that any Member State may apply the "safe third country" provision at any point in the process,²⁰ possibly prior to assessing the Dublin criteria, asylum seekers continue to run the risk of being returned to a third country without due consideration being paid to their right to family life. Accordingly, ECRE supports the deletion of this clause by the proposal.

For the abovementioned reasons relating to protection, procedural efficiency and solidarity between Member States, ECRE recommends **deleting the proposed paragraphs 3, 4 and 5**.

²⁰ CJEU, Case C-695/15 PPU *Mirza*, Judgment of 17 March 2016, paras 40-42.

2. Hierarchy of criteria

2.1. Examination of responsibility allocation: Article 9(1)

The proposal introduces a substantial limitation to the assessment of responsibility by requiring the application of the responsibility criteria to be conducted “only once” in **Article 9(1)**. Similar to the aforementioned prior examination of safe country and security provisions in **Article 3(3)-(5)**, this is liable to bring about detrimental effects in terms of protection of the asylum seeker and fairness between Member States.

Recalling the observations above, ECRE highlights that a ‘one shot’ rule on the application of the responsibility criteria renders the risk of erroneous assessments of responsibility by the Member State of first entry becoming irreversible for the applicant; an example of this can be seen in the facts leading to the cases of *Ghezelbash* and *Karim*. As discussed below in relation to the scope of appeals against Dublin decisions, the fact that the application of the criteria cannot be contested by the applicant transpires as an additional protection gap in this regard.

At the same time, the definitive nature of the examination of the responsibility criteria by the Member State of first entry would entail **much higher pressure on that country’s administration in examining the criteria**, thereby exacerbating the uneven distribution of obligations introduced by the Regulation. States situated at the external border would need to invest even greater resources in Dublin procedures since their first – and only – examination of responsibility criteria will become irreversibly binding EU-wide. In practice, the perverse effects likely to emerge in relation to the implementation of the proposed Article 3(3)-(5) are equally pertinent in this context.

Further, this rule is unfair to countries that do comply with their obligation to return rejected asylum seekers under the Return Directive as their responsibility would be irreversible even if the applicant is returned to his or her home country or country of habitual residence. It is also unfair to the asylum seekers whose personal situation may have changed in the meantime, as the principle of a permanent responsibility could eventually result in undermining the principles of family unity and of the best interests of the child.

For those reasons, ECRE recommends **deleting the reference to “only once” in Article 9(1) and reverting to the original text of the Dublin III Regulation.**

2.2. Unaccompanied children: Articles 8 and 10, Recital 20

Legal representation and guardianship

Article 8(2) of the proposal poses a substantial restriction on the obligation of Member States to ensure representation and assistance to unaccompanied children on their territory vis-à-vis the Dublin procedure, by limiting this duty to the country “where an unaccompanied minor is obliged to be present”. No justification is provided by the Commission in the Preamble or Explanatory Memorandum for this restriction. Such a restrictive approach is in contradiction with the provisions of the proposed **Articles 21 and 22 of the Asylum Procedures Regulation** proposal which aim at improving procedural guarantees for minors.²¹

ECRE deems this provision highly ill-founded and unworkable. Firstly, the **determination of the Member State responsible for an unaccompanied child is inextricably linked to that child’s best interests**, which are reiterated as a primary consideration in the Dublin procedure in **Article**

²¹ ECRE, *Comments on the Commission Proposal for an Asylum Procedures Regulation*, Forthcoming.

8(1). The principle requires a careful assessment of best interests by state authorities in cooperation with the child. In this cooperation, a representative is necessary to “ensuring the best interests of the child and exercising legal capacity for the minor where necessary”, as per the definition of “representative” in **Article 2(k)**. The proposal therefore assumes that an unaccompanied child is able to communicate with state authorities without representation in order to determine his or her best interests, and consequently designate the responsible Member State. Beyond perverting the best interests’ principle in a way that contravenes Article 24(2) of the Charter, this provision would also lead to highly unworkable best interests determination procedures in Member States, where adequate communication and information provision will be hampered due to the absence of qualified representatives to accompany children.²²

Article 8(2): ECRE recommends the deletion of the words “where an unaccompanied minor is obliged to be present” and revert back to the original text.

First country of application rule

In the proposed **Article 10(5)** concerning unaccompanied children with no family member or relative in a Member State, the Commission retracts from its earlier position taken in the June 2014 proposal amending the Dublin III Regulation in line with the *M.A.* judgment of the CJEU, where it had proposed that the country of most recent application is responsible,²³ to hold that the Member State responsible for an unaccompanied child is that where the child has first lodged his or her asylum application, “unless it is demonstrated that this is not in the best interests of the minor.”

In the *M.A.* ruling, the CJEU adopted a teleological interpretation of the ambiguous Article 6 of the Dublin II Regulation, given that the terms of the provision did not conclusively point to a clear rule on the Member State responsible.²⁴ While the 2014 Commission proposal would have resolved this ambiguity in favour of the Member State of presence, the 2016 proposal takes the opposite view. In that respect, it is important to clarify that a **rule expressly designating the first country of application as responsible is prima facie not prohibited** by the *M.A.* judgment.

What is prohibited, however, is any **transfer of unaccompanied children which would be contrary to their best interests**, and thus to Article 24(2) of the Charter. The CJEU in *M.A.* has also analysed this point, reasoning that:

“Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.”²⁵

On the basis of the efficiency aim of the Regulation and the principle of effectiveness enshrined in the Charter, the ***M.A.* presumption is that transfers to another country are not in children’s best interests**. Where the Commission proposal infringes the Charter is in **reversing the presumption** against the applicant, and placing upon him or her a disproportionate burden of proof to demonstrate that a transfer is not in line with best interests. The reversal of the *M.A.* presumption may be politically motivated by deterrence but lacks legal justification against the best interests’ principle. The

²² See to that effect ECRE, The AIRE Centre and ICJ, *Third party intervention in Sh.D. v. Greece*, Application No 14165/16, 12 August 2016, available at: <https://goo.gl/lKfKfQ>, para II.

²³ European Commission, *Proposal for a Regulation amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*, COM(2014) 382, 26 June 2014, 7.

²⁴ CJEU, *M.A.*, paras 48-50 and 52.

²⁵ CJEU, *M.A.*, para 55.

Commission only explains in **Recital 20** that this responsibility rule would “discourage secondary movements of unaccompanied minors, which are not in their best interests”. ECRE does not find this argument relevant or persuasive to substantiating a rule that, in order to discourage a child from travelling irregularly to another country, *prima facie* subjects that child to unnecessary transfers to another country.

ECRE recommends amending Article 10(5) as follows:

Article 10(5): In the absence of a family member, a sibling or a relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that where the unaccompanied minor *[deleted provision]* has lodged his or her application for international protection and is present, *[deleted provision]* provided that this is in the best interest of the minor.

Operationalisation of the best interests’ principle

ECRE welcomes the provisions of the proposed **Article 8(4)** and **Recital 20** which clearly spell out a detailed obligation on the transferring State:

“Before transferring an unaccompanied minor to the Member state responsible or, where applicable, to the Member State of allocation, the transferring State shall make sure that the Member State responsible or the Member State of allocation takes the measures referred in Article 14 and 24 of the Directive 2013/33/EU and Article 25 of Directive 2013/12/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 qualifications and expertise to ensure that the best interests of the minor are taken into consideration.”

These elements could provide useful guidance in ensuring that unaccompanied children are only – voluntarily – transferred when the country of destination can guarantee appropriate representation and care. In such a situation, the obligations of both the sending and receiving Member State should be further clarified, with guidance provided from the reasoning of the ECtHR on the obligation to obtain individualised guarantees in the *Tarakhel v Switzerland* judgment.²⁶ It is essential to establish clear rules and standard protocols for transnational cooperation regarding the best interests of the child assessment as well as best interests’ determination. The co-legislators should **operationalise the provisions of Article 8(4) of the proposal through delegated acts as provided under Recital 48**. The views and opinions of the child should be heard and taken into account when determining the child’s best interests.²⁷

ECRE proposes the following amendments to that end:

Article 8(4): Before transferring an unaccompanied minor to the Member state responsible or, where applicable, to the Member State of allocation, the transferring State shall **obtain individualised guarantees** that the Member State responsible or the Member State of allocation takes the measures referred in Article 14 and 24 of the 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 qualifications and expertise to ensure that the best interests of the minor are taken into consideration.

²⁶ ECtHR, *Tarakhel v Switzerland*, para 115.

²⁷ UNICEF, *Dublin Reform: Effective Access to an asylum Procedure within Europe*, May 2016.

Recital 20: In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion. **[deleted provision]** In the absence of a family member or a relative, the Member State responsible should be that where the unaccompanied minor **[deleted provision]** has lodged **an** application for international protection **and is present, provided [deleted provision]** that this would be in the best interests of the child. Before transferring an unaccompanied minor to another Member State, the transferring Member State should **[deleted provision] obtain individualised guarantees from** that Member State **that it** will take all necessary and appropriate measures to ensure the adequate protection of the child, and in particular the prompt appointment of a representative or representatives tasked with safeguarding respect for all the rights to which they are entitled. Any decision to transfer an unaccompanied minor should be preceded by an assessment of his/her best interests by staff with the necessary qualifications and expertise.

Recital 48: In order to provide for supplementary rules, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of the identification of family members or relatives of an unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of an unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State; the elements for assessing a dependency link; the criteria for assessing the capacity of a person to take care of a dependent person; **standard operating protocols for transnational cooperation regarding the best interests of the child assessment and best interests determination** and the elements to be taken into account in order to assess the inability to travel for a significant period of time. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 8 of this Regulation.

2.3. Family members: Articles 2(g) and 18, Recital 16

ECRE welcomes a number of proposed changes to the recast Dublin Regulation aiming at ensuring the primacy of the right to family life (**Recital 16**) and compliance with the principle of the best interests of the child under the 1989 United Nations Convention on the Rights of the Child.

Article 2(g) expands the definition of family members beyond the concept of “nuclear family” and clearly includes sibling(s) of an applicant, bringing about a very important improvement to the scope of the family provisions of the Regulation. The proposal also includes family relationships which were formed after leaving the country of origin, as laid down in the case law of the ECtHR.²⁸ This expansion is to be welcomed, as the narrow interpretation of the definition of family members has torn apart families and fuelled litigation in many European countries. In this regard, the proposal **reflects the interpretation developed by many national courts** under recent rulings in relation to family members and the evidentiary assessment that states need to carry out to comply with family unity under the Dublin III Regulation.²⁹

²⁸ ECtHR, *Hode and Abdi v. UK*, Application No 22341/09, Judgment of 6 November 2012.

²⁹ See ECRE/ELENA, *Information Note on Family Reunification for Beneficiaries of International Protection in Europe*, June 2016; EDAL blog, ‘The formulation of the right to family life beyond ZAT & Others in recent UK jurisprudence’, 15 June 2016

However, it should be noted that this enlarged definition is not adequately reflected under the provisions of **Article 18(1)** on dependent persons, which still refers to the earlier definition of family members: “[deleted text] provided that family ties existed in the country of origin.”

ECRE recommends **aligning the provisions of Article 18(1) with Article 2(g)** in order to include family ties formed outside the country of origin.

Although the expansion of the personal scope of **Article 2(g)** is to be welcomed, ECRE is concerned with the margin of discretion left to Member States in relation to **unmarried partners in a stable relationship and same sex partners**.³⁰ Such a discretion may create legal tension with the case law of the ECtHR as there is no static and pre-determined family model for the purpose of family life under Article 8 ECHR or Article 7 of the Charter. The ECtHR supports an expansive interpretation of family based on actual ties rather than legal relationships.³¹ The existence of family links should be examined cautiously, as the CJEU jurisprudence indicates that Member States must consider each case on its merits.³² Even where national legislation does not offer equal rights to unmarried couples in a stable relationship or to same sex partners, national authorities cannot apply a blanket exclusion and should, by way of an individualised assessment, take into account all relevant factors, in line with the right to dignity and to respect of private and family life guaranteed by Articles 1 and 7 of the Charter.

Similarly, family reunification between parents and adult children is excluded from the scope of the family definition under **Article 2(g)**. Whilst such form of family reunification might happen under **Article 18(1)** and under **Article 19 (discretionary clause)**, **these situations are left at Member States’ discretion**. ECRE is concerned that the incoherence between the definitions of family members included in the proposal will further fuel existing divergences in practice. In many cases, restrictive practices have prevented family unity including in cases where the child is an adult,³³ hindering the ability of the Regulation to provide opportunities for effective integration as set out in **Recital 19**. The definition of family members in other EU legislative instruments such as the Free Movement Directive provides a good illustration of efforts to include adult children in this regard,³⁴ and could inform a more protective definition in the Dublin Regulation with a view to meeting the objective set out in **Recital 19**.

Co-legislators should address the fact that the nuclear family concept does not sufficiently account for the special circumstances of forced displacement, the practical and social realities in countries of origin or transit, or the wide cultural divergences in the concept of a family.³⁵ Family unity plays an essential role in providing “social, psychological, and economic support needed for effective

³⁰ UNHCR and NGOs have documented overly restrictive practice from Nordic countries in cases where a wedding has only been celebrated under customary or religious grounds as it is often the case in conflict situations and in particular Syria

³¹ ECtHR, *Lebbink v. the Netherlands*, Application No 45582/99, Judgment of 1 June 2004, para 36; *Schalk and Kopf v. Austria*, Application No 75/1995/581/667, Judgment of 22 April 1997.

³² CJEU, Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, Judgment of 4 March 2010, para 43.

³³ See ECRE and others, *Dublin II Regulation: Lives on Hold*, February 2013; See Sir Stanley Burnton in *Singh v. Secretary of State for the Home Department* [2015] EWCA Civ 630, Judgment of 24 June 2015, para 24, available at: <http://bit.ly/23hbWNE>.

³⁴ Which includes in the definition of family members the “direct descendants who are under the age of 21 or are dependants and those of the spouse or partner”. See Article 2(c) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive), *OJ 2004 L158/88*.

³⁵ Red Cross EU and ECRE: *Disrupted Flight*, 11.

integration” in the host country.³⁶ As such, the Regulation should be amended to take into account other family members who perform a similar or same function as a nuclear family member³⁷ or where family reunification is essential to ensure the best interests of the child³⁸ and the right to asylum.

Recalling its support for the inclusion of siblings in the scope of family members under the proposal, ECRE recommends the following improvements to **Article 2(g)**:

Article 2(g): ‘family members’ means, insofar as the family already existed before the applicant arrived on the territory of the Member States, the following members of the applicant’s family who are present on the territory of the Member States:

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the **[deleted provision]** children of couples referred to in the first indent or of the applicant, **[deleted provision]** regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- **[deleted provision]** the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,
- **[deleted provision]** the father, mother or another adult responsible for **[deleted provision] the beneficiary of international protection** whether by law or by the practice of the Member State where the beneficiary is present,
- the sibling or siblings of the applicant;

In any case, Member States shall always assess personal ties on a case-by-case basis and take into account the individualised circumstances of the applicant in order to expand the benefit of the principle of family unity beyond members of the nuclear family.

2.4. Dependent persons: Article 18 and Recital 20

Under **Article 18(1)**, the notion of dependency is primarily defined on account of health related grounds (pregnancy, serious illness, severe disability) and age (new born child, old age). The existence of a relationship of dependency opens a right for the applicant to be reunited with siblings, children or parents legally residing in a Member State provided that the “family ties existed in the country of origin or the applicant” is “able to take care of the dependent person” and that both parties have expressly agreed to be reunited. As previously indicated in our comments on Article 2, the personal scope of Article 18 needs to be clarified.

ECRE recommends **aligning the provisions of Article 18(1) with Article 2(g)** in order to include family ties formed outside the country of origin.

As **Article 18(3)** empowers the European Commission to adopt delegated acts in order to specify the elements to be taken into account in order to assess the dependency link and the criteria for assessing the capacity of the person concerned to take care of the dependent person, ECRE would like to submit the following observations. The concept of ‘dependency’ is a determinative factor to expand the scope of family unity beyond the legal definition and take into consideration the critical

³⁶ UNHCR, EXCOM Conclusions No. 1(XXVI) 1975 (f); No9 (XXVIII) 1977; No 24 (XXXII) 1981; No 84 (XLVIII) 1997; UNHCR ‘Integration - A Fundamental Component in Supporting Diverse Societies’ January 2016. See also ECtHR, *Maslov v. Austria*, Application No 1638/03, Judgment of 23 June 2008, para 62.

³⁷ This was the approach taken in a family reunification case by the Constitutional Court of Slovenia in January 2015. The case related to a recognised refugee from Somalia whose request for family reunification with her dependent minor sister was rejected. See Constitutional Court of the Republic of Slovenia, 14 January 2015, Judgment U-1-309/13, Up-981/13 available here <http://bit.ly/1VwZJ4G>.

³⁸ Administrative Court of Hannover, Judgment of 7 March 2016, Az. 1 B 5946/15.

humanitarian situation of an applicant. Both ECRE and UNHCR advocate for a broad conception of dependency which covers financial, physical, emotional and psychological dependency taking into consideration cultural norms and is not necessarily limited to blood ties. Economic and emotional relationships should be given equal weight.³⁹ Such a broad approach has been supported by some domestic courts.⁴⁰ For instance, this was the approach taken in the above-cited family reunification case by the Constitutional Court of **Slovenia** in January 2015 relating to a recognised refugee from Somalia whose request for family reunification with her dependent minor sister was rejected.⁴¹ National courts have particularly taken into consideration the trauma suffered in order to assess the emotional relationship. Under the current wording, Article 18 only refers to severe illness, a concept that might be too narrow to cover cases of severe trauma.

Article 18(1) should be amended in order to cover “severe trauma”.

2.5. Residence documents, irregular entry and cessation of responsibility: Articles 14, 15 and former Article 19

The proposal expands the responsibility attached to the issuance of residence permits or visas by applying the criterion also to recently expired documents in **Article 14(1)-(2)**, namely residence permits having expired less than two years or visas having expired less than six months of the person’s first asylum application. **Article 14(4)** deletes a clause which provided for cessation of responsibility relating to documents or visas where the applicant had left the territory of the Member States. At the same time, the rules proposed in relation to the irregular entry criterion effectively exacerbate the already disproportionate responsibility lying with Member States situated at the external borders. **Article 15(1)** aims to remove the 12-month time-limit after which entry-related responsibility ceases under the current Regulation. Adding to this, **Article 15(2)** providing for a responsibility shift on grounds of a 5-month stay in a Member State is also deleted. Finally, the **former Article 19** providing for a cessation of responsibilities incumbent on the receiving state where the applicant has left the EU for a period exceeding 3 months is also deleted. The reasoning behind these amendments is presented as part of a streamlining agenda, with a view to simplifying the responsibility criteria.⁴² However, the desired deterrent effect of these rules is set out in **Recital 25**, where clauses on cessation of responsibility are perceived as an incentive for asylum seekers to abscond.

Quite to the contrary, however, the removal of time limitations to entry-related responsibility will only exacerbate two strong incentives to disregard the Dublin principles, discussed above. On the one hand, Member States of first entry located at the external land and sea borders of the EU, which may already have little interest in faithfully following responsibility rules they do not perceive to be fair, will

³⁹ UNHCR Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC) available here: <http://bit.ly/23v9R0v> at section 2; UNHCR Resettlement Handbook (reissued 2011) available at: <http://bit.ly/1SYbizN> at p.178 and p. 273; ECRE, Submission from the European Council on Refugees and Exiles in response to the Commission’s Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC).

⁴⁰ Irish High Court, *Ducale & Anor v Minister for Justice & Ors [2013] IEHC 25*, 22 January 2013, para 47-56 available at: <http://bit.ly/1qB9VgT>; Slovenian Constitutional Court, 14 January 2015, Judgment U-1-309/13, Up-981/13, available at: <http://bit.ly/1VwZJ4G>.

⁴¹ See Slovenian Constitutional Court, 14 January 2015, Judgment U-1-309/13, Up-981/13. CJEU jurisprudence interprets dependency as a factual situation characterised by legal, financial, emotional or material support focusing on the personal circumstances of the applicant at the time of the application, taking into account factors such as the extent of economic or physical dependence and the degree of relationship. See for example, CJEU Case C-316/85, *Lebon*, 18 June 1987, para 21-22; Case C-200/02, *Zhu and Chen*, 9 October 2004, para. 43; C-1/05, *Jia*, 9 January 2007, paras. 36-37; Case C-83/11, *Rahman and Others*, 5 September 2012, paras. 18-45; Joined Cases C-356/11 and C-357/11 *O. & S.*, 6 December 2012, para. 56.

⁴² Explanatory Memorandum, 16.

have much greater obligations attached to their geographical location, since an applicant's entry into their territory will translate into perpetual responsibility for that person's potential asylum claim. If the architecture of the **mechanism becomes more unfair on external border countries, it may be even less likely to be complied with** than under the current Regulation. On the other hand, removing any possibilities for such access through a perpetual obligation on applicants to return to the first country of entry will also be understood as a **more unfair rule to applicants**. As a result, contrary to the Commission's intention to tackle absconding, the amendments to **Articles 14, 15** and the deletion of **Article 19** is likely to lead to **less compliance in practice**, as it creates perverse incentives both for Member States of first entry to refrain from fulfilling their identification and registration obligations and to invest in reception systems, as well as for asylum seekers to resort to irregularity so as to avoid being identified and confined to these countries.

ECRE opposes the deletion of clauses on cessation of responsibility in Articles 14, 15 and the former Article 19, which exacerbates unfairness on both Member States situated at the external borders and applicants and will therefore create incentives for irregularity and less compliance.

2.6. Eliminating discretion: Articles 19, 24(1), 26(1) and 30(1), Recital 21

Another far-reaching modification proposed by the Commission relates to the curtailment of both discretionary provisions existing under the Dublin III Regulation: the "sovereignty clause" enabling a Member State to decide to examine an asylum application itself, and the "humanitarian clause" enabling a Member State to request another country to take charge of the applicant for family, cultural or humanitarian reasons. The interplay of the two provisions has been ambiguous to date, leading to situations where Member States often conflate the clauses or do not lay down specific criteria for their application in practice.⁴³

The elimination of discretion is also manifested in the proposed **Articles 24(1) and 26(1)**, which are termed as "shall" rather than "may" clauses, thereby obliging Member States to issue "take charge" or "take back" requests. **Article 30(1)** also obliges Member States to conduct a transfer.

Article 19(1)-(2) purports to turn both clauses into a solely family-related discretionary mechanism in order to complement the gaps left by the definition of family members in **Article 2(g)**. Member States will therefore only be able to undertake the examination of a claim, or request another Member State to do so, in order to reunite family members. The proposal also imposes a temporal limitation on their applicability, which must be triggered before the Member State responsible has been determined. The Commission reasons that the voluntary assumption of responsibility "may undermine the effectiveness and sustainability of the system and should be exceptional" in **Recital 21**.

The assumption seems to be that voluntarily undertaking responsibility for an asylum application rather than serving the effectiveness of the Dublin system will prevent Member States from handling their responsibilities under the CEAS with pragmatism. The **Dublin procedure is not an end in itself, but a means towards a clear process enabling asylum seekers to rapidly access the asylum procedure**. Very often, the most effective way to ensure such access is to examine the claim *in situ* rather than subject the applicant to a transfer. This reasoning is evident in the CJEU's ruling in *M.A.* and *K*,⁴⁴ when looking at unaccompanied children and family members in particular.

Throughout the life of the Dublin system, the "sovereignty clause" has been the main means at the disposal of Member States to ensure that refugees may swiftly access asylum procedures *in situ* rather than undergoing lengthy and cumbersome transfer procedures before being able to have their

⁴³ For an overview, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, 82-84.

⁴⁴ CJEU, *M.A. v Secretary of State for the Home Department*, para 55; *K v Bundesasylamt*, paras 44-46.

claims examined on the merits. The sovereignty clause may not be explicitly used often, as conceded by the Dublin III evaluation,⁴⁵ yet its logic has *de facto* underpinned practice in most countries receiving asylum seekers.⁴⁶ Beyond the announced applicability of the clause to Syrians in the summer of 2015,⁴⁷ Germany has refrained from conducting systematic Dublin procedures for many other nationalities. Similarly, authorities and courts such as France, Sweden, the United Kingdom or Belgium have opted for a **pragmatist approach** by undertaking responsibility for examining the majority of asylum claims made on their territory.⁴⁸ Removing that discretion would compel Member States to apply Dublin procedures liable to incur administrative resources and subject asylum seekers to unnecessary legal limbo, and therefore prove **counter-intuitive to the very aim of efficiency** targeted by the Commission proposal.

Legal and constitutional constraints are also raised by such a limitation. Under the 1951 Refugee Convention, as well as constitutional provisions in countries such as France or Germany,⁴⁹ states **retain the sovereign right to examine an asylum application on the merits**. It is precisely for this reason that the sovereignty clause has been part and parcel of the responsibility allocation system since the Dublin Convention.⁵⁰ To ensure compliance with the right to asylum as enshrined in Article 18 of the Charter and as a general principle stemming from Member States' common constitutional traditions,⁵¹ the Dublin Regulation must always permit Member States to derogate from the responsibility criteria where they deem it appropriate to undertake the examination of an asylum claim.

As for the humanitarian clause, **Article 19(2)** of the proposal narrows the scope of requests for another Member State to voluntarily undertake responsibility by deleting references to "humanitarian grounds based in particular on family or cultural considerations". It should be noted that, albeit a rarely used provision in practice,⁵² the family component – examined by the CJEU in *K* – is an important but not exclusive benefit of this provision. Bearing in mind that Dublin procedures must be instrumental towards an objective of effective and rapid access, states should remain entitled to resort to the humanitarian clause when vulnerability or health grounds are applicable. Given its **voluntary character**, the clause in no way imposes on Member States responsibilities they would oppose.

ECRE opposes any amendments to the discretionary clauses and **recommends reverting to the original Article 17 of the Dublin III Regulation**, as well as reverting to a "may" clause in **Articles 24(1), 26(1) and 30(1)**.

3. Procedural guarantees and obligations

3.1. *Non-refoulement* and suspension of transfers: Article 3(2), Recital 28

Article 3(2) regrettably leaves the test for preventing a transfer to another Member State in cases of human rights risks intact, by maintaining the previous formulation:

⁴⁵ ICF, *Evaluation of the implementation of the Dublin III Regulation*, March 2016, 20, 34.

⁴⁶ *Ibid*, 20.

⁴⁷ AIDA, 'Germany: Halt on Dublin procedures for Syrians', 24 August 2015, available at: <http://goo.gl/OrQjgg>.

⁴⁸ Beyond the countries mentioned, Germany is by far the main operator of the Dublin system, with 44,288 outgoing requests in 2015, and examined as many as 249,280 applications that year. France, another main 'Dublin sender' with 11,657 outgoing requests, examined as many as 77,910 applications. Norway issued 3,471 outgoing requests and examined 9,475 applications: Eurostat: migr_dubro; migr_asycdfsta. As of 21 June 2016, statistics for 2015 were not available for at least 14 countries.

⁴⁹ See Article 53-1 of the French Constitution, which expressly recognises this right.

⁵⁰ Article 3(4) Dublin Convention.

⁵¹ Article 6(3) TEU.

⁵² CF, *Evaluation of the implementation of the Dublin III Regulation*, March 2016, 35.

“[I]t is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union”.

Personal scope

In its current formulation, the scope of Article 3(2) does not cover beneficiaries of international protection – who are explicitly covered by the proposal in particular under Articles 26 and 30 - as the wording ‘applicant’ only refers to asylum seekers as per Article 2(c). This narrow interpretation of the principle of non-refoulement is found to be in breach of Member States’ obligations as highlighted by recent jurisprudence of domestic courts that have halted the transfers of holders of international protection status where there is a risk of violation under Article 3 ECHR.⁵³

Material scope

This wording incorporates the ratio of the *N.S.* ruling, referring to systemic flaws triggering risks of a violation of Article 4 of the Charter as the requisite threshold for preventing a Dublin transfer to another country.⁵⁴ This restrictive threshold is incompatible with primary EU law, insofar as it does not properly reflect the scope of the principle of *non-refoulement* as enshrined in human rights law. Two observations are crucial in this regard: Firstly, *non-refoulement* may arise in relation to violations of Article 3 ECHR and Article 4 of the Charter, regardless of whether these are caused by systemic or non-systemic flaws in the asylum system. As the ECtHR has clarified in *Tarakhel v Switzerland*,⁵⁵ the source of the risk is irrelevant to the level of protection guaranteed by human rights; this is also echoed in Article 19(2) of the Charter. *Tarakhel* clarifies that the orthodox assessment for *non-refoulement* in relation to inhuman or degrading treatment is a “**real risk of a serious violation**”. **Such violations are not covered by Article 3(2) in its current formulation.**

Secondly, the principle of *non-refoulement* is broader than violations of Article 4 of the Charter, as hinted by the wording of **Recital 28**. Human rights jurisprudence has also protected individuals from deportation when other fundamental rights are at risk of being gravely violated.⁵⁶ A relevant example is the **right to a fair trial**, guaranteed by Article 47 of the Charter and Article 6 ECHR. In exceptional cases where a person faces a “flagrant denial of justice” upon return, the Court has halted deportation to protect this right in *Othman, El Haski* and *Al Nashri*.⁵⁷ Situations where asylum seekers may face flagrantly unfair trials following a Dublin transfer from European countries are far from unfathomable. The severe contravention of fair trial guarantees in criminal trials of irregular entrants in Hungary⁵⁸ are likely situations where Article 47 of the Charter may be engaged vis-à-vis the

⁵³ German Constitutional Court, Decision 2 BvR 273/16, 21 April 2016; Osnabrück Administrative Court, Decision of 4 January 2016, Az.5 A 83/15; Saarland Administrative Court, Decision of 4 January 2016, Az. 3K 86/ 15; Oldenburg Administrative Court, Decision of 4 November 2015, 12 A 498/15; Osnabrück Administrative Court, Decision of 17 December 2015, 5 B 432/15;

⁵⁴ CJEU, *N.S.*, para 94.

⁵⁵ ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014, para 104.

⁵⁶ For a detailed discussion, see Cathryn Costello, ‘The Search for the Outer Edges of Non-Refoulement in Europe: Exceptionality and Flagrant Breaches’ in Bruce Burson and James Cantor (eds), *Human Rights and the Refugee Definition* (Brill 2016), 180-209.

⁵⁷ ECtHR, *Othman (Abu Qatada) v United Kingdom*, Application No 8139/09, Judgment of 9 May 2012; *El Haski v Belgium*, Application No 649/08, Judgment of 25 September 2012; *Al Nashri v Poland*, Application No 28761/11, Judgment of 24 July 2014. In relation to transfers within the EU, see Irish High Court, *Minister for Justice and Equality v Magdalena Rostas* [2014] IEHC 391.

⁵⁸ For an illustration of trials, see ECRE, *Crossing Boundaries: The new asylum procedure at the border and restrictions to accessing protection in Hungary*, October 2015, <http://goo.gl/k7gix2>, 23; Migszol, ‘Show trial in Hungary: solidarity with the accused in Röske’, 28 June 2016, available at: <http://goo.gl/Uz2IG>. Note

application of the Dublin Regulation. Similar possibilities of *non-refoulement* protection have been expressly acknowledged by the ECtHR in respect of flagrant breaches of the **prohibition of slavery** under Article 4 ECHR (Article 5 of the Charter),⁵⁹ the **right to liberty** under Article 5 ECHR (Article 6 of the Charter),⁶⁰ the **right to private life** under Article 8 ECHR (Article 7 of the Charter),⁶¹ and **freedom of religion** under Article 9 ECHR (Article 10).⁶²

The assessment of compatibility of transfers with any of the fundamental rights protected by the Charter or other human rights instruments must be conducted independently by the courts. In that respect, a legislative limitation on the scope of protected rights apt to prevent a Dublin transfer is an undue restriction on the Charter, and should be removed to ensure compliance with primary law and legal certainty.

Bearing in mind that this is a “**white**” provision falling outside the scope of the recast approach,⁶³ ECRE recommends the following amendment to Article 3(2):

Article 3(2): Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant for **or beneficiary of international protection** to the Member State primarily designated as responsible because there are substantial grounds for believing that the applicant would be subjected to **a real risk of a serious violation of [deleted provision]** fundamental rights, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible, **provided that this does not prolong the procedure for an unreasonable length of time.**

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

3.2. Obligations of the applicant and sanctions: Articles 4-5 and 20, Recital 22

Article 4 introduces a new provision setting out the obligations of asylum seekers in the Dublin procedure. The ambiguous and often repetitive formulation of the text raises issues of legal certainty, especially insofar as it reiterates existing obligations laid down in the EU asylum *acquis*. For example, the obligation to cooperate with the Member State examining the application as per **Article 4(3)(b)** is already prescribed by Article 13(1) of the recast Asylum Procedures Directive. In essence, the obligations laid down by Article 4 are the following:

- ❖ To apply in the first Member State of entry or stay;

that the Commission’s 2015/2201 infringement procedure against Hungary relates *inter alia* to those issues.

⁵⁹ ECtHR, *Ould Barar v Sweden*, Application No 42367/98, Judgment of 19 January 1999. This provision could be relevant to victims and potential victims of trafficking. See ECtHR, *Chowdhury v Greece*, Application No 21884/15, Case Communicated on 9 September 2015.

⁶⁰ ECtHR, *Tomic v United Kingdom*, Application No 17387/03, Judgment of 14 October 2003.

⁶¹ ECtHR, *F v United Kingdom*, Application No 17341/03, Judgment of 22 June 2004.

⁶² ECtHR, *Z and T v United Kingdom*, Application No 27034/05, Judgment of 28 February 2006. Notably, this case is cited by Advocate-General Bot in Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, Judgment of 5 September 2012, para 71 on the concept of persecution for reasons of religion.

⁶³ Following 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.

- ❖ To submit as soon as possible or at the latest during the interview all the ‘elements’ and ‘information’ relevant for determining the responsible country;
- ❖ Cooperate and be at the disposal of authorities during the procedure; and
- ❖ Comply with a transfer decision.

In light of shortcomings in relation to the obligation to provide information (see below comments on Article 6), ECRE believes that Articles 4 and 5 place a disproportionate burden on applicants and will further fuel deficient practice and trigger litigation. ECRE is concerned that concepts such as “elements” and “information” to be submitted by the applicant during the interview are not properly defined in the proposal and may undermine other procedural safeguards aiming at strengthening the legal certainty of the applicant. In particular, the proposal relies on the assumption that the applicant will proactively provide all decisive pieces of information, in particular in relation to the presence of family members. The absence of any definition of the duty to ‘cooperate’ and ‘to be at the disposal of the authorities’ could lead to diverging and arbitrary Member State practice with adverse effects for the applicant.

ECRE recommends amending **Article 4** so as to clearly circumscribe the “duty to cooperate” and to “be at the disposal of authorities” within the context of the Dublin procedure. The proposal should provide a detailed definition of the “elements” and “information” that the applicant is expected to submit during the interview and require Member States to proactively inform applicants of all aspects of the procedure immediately after the asylum application has been lodged.

Compliance with the aforementioned obligations is purported to be secured through a number of sanctions introduced in **Article 5**. These include, where the applicant does not stay in the Member State of first entry: (1) the mandatory use of the accelerated procedure upon return to the responsible Member State; (2) withdrawal of reception conditions save for emergency health care if the applicant absconds; and (3) inadmissibility of information submitted after the Dublin interview. **Recital 22** presents those sanctions as “appropriate and proportional procedural consequences” aimed at ensuring that the aims of the Dublin Regulation are achieved and that obstacles thereto are prevented.

Article 20 provides more clarity on the procedural treatment afforded to persons “taken back”, through a number of important modifications to the current design of the Regulation. Firstly, **Article 20(1)(e)** introduces an obligation on the Member State responsible to take back a beneficiary of international protection who has irregularly moved to or applied in another country. One element absent from both the Dublin III Regulation and the proposal relates to the obligations of the responsible Member State concerning the registration and lodging of the asylum application once the person is transferred thereto. Some of the implications of the uncertainty left by the proposal concern the operation of the corrective allocation mechanism, as discussed further below. To provide further clarity, **Article 20** should specify the steps to be taken by the receiving Member State to register and enable a person to lodge an application, possibly through a corresponding clarification in the **Asylum Procedures Regulation**.

The same Article outlines a number of provisions on the procedural treatment of persons after the “take back” transfers, which largely incorporate the Commission’s aim of sanctions against asylum seekers and refugees who engage in irregular secondary movements, announced in **Recital 22**. These punitive procedural consequences involve:

- ❖ **Article 20(3)**: The mandatory examination or completion of an open asylum application under an accelerated procedure, in what appears a reiteration of **Article 5(1)**;
- ❖ **Article 20(4)**: The treatment of further representations following a discontinued application as a subsequent application, contrary to the rule of the current Article 18(2) of the Dublin III Regulation requiring Member States not to treat such claims as subsequent;

- ❖ **Article 20(5)**: The exclusion of the applicant whose claim has been rejected from the right to appeal the negative first instance decision taken by the responsible Member State.

ECRE expresses deep concern as to the legality of the proposed punitive measures. All three aforementioned sanctions raise critical tensions with procedural safeguards enshrined in the Charter. These are outlined in more detail below.

a. Non-penalisation for irregular entry

International refugee law has not regulated the distribution of responsibility between states and does not thereby constrain or expressly permit the choice of an asylum seeker as to the country where he or she may seek asylum. In that respect, the Dublin system would not be prevented from laying down rules requiring refugees to apply for protection in a particular country.

Articles 5 and 20, however, enumerate a number of sanctions in the event that this obligation is not complied with. Contrary to the obligation, **sanctions thereon 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.⁶⁴ 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.**⁶⁵

Failure to incorporate Article 31 of the Convention into the EU asylum *acquis*, as indicated by the CJEU in *Qurbani*,⁶⁶ presents a critical gap in the EU’s faithful reliance on the Convention as the “cornerstone” of the CEAS.⁶⁷ Member States are bound by this provision both under their international obligations and Article 18 of the Charter. The automatic application of sanctions listed in **Article 5(1) and (3) and Article 20(3)-(5)** is not permissible insofar as an applicant may invoke the safeguards provided by Article 31 of the Refugee Convention.

b. Procedural fairness and human rights

On substance, **Articles 5(1) and 20(3)** presume a connection between secondary movements and the well-foundedness of an asylum seeker’s claim, since the accelerated procedure is designed to facilitate the processing of manifestly unfounded claims, according to Recital 20 of the recast Asylum Procedures Directive, whereas in reality there is none. An applicant’s **secondary movement to another than the responsible Member State is as such unrelated to that person’s well-founded fear of persecution or real risk of serious harm** in his or her country or origin or habitual residence.

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ CJEU, Case C-481/13 *Qurbani*, Judgment of 17 July 2014.

⁶⁷ CJEU, Case C-604/12 *H.N. v Minister of Justice, Equality and Law Reform*, Judgment of 8 May 2014, para 27; Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, Judgment of 9 November 2010, para 71.

Therefore it should under no circumstances impact on the assessment of a person's international protection needs nor the type of procedural safeguards provided in such case. In any event, any decision to channel an application into an accelerated procedure cannot be applied automatically, an assessment would need to be carried out in order to assess the applicant's special needs, as currently required by Articles 24(3) and 25(6) of the Directive.

Article 20(4), dealing with discontinued applications, reverses the rationale of effective access to the asylum procedure behind the current rule in the Dublin III Regulation, while the Commission offers no explanation as to how this objective would be achieved through such a reversal of principle. This would result in removing states' discretion to reopen an application so as to enable asylum seekers to have their claims examined. On the other hand, **Article 20(5)** envisages wholesale exclusion of applicants from the right to an effective remedy for the sole reason that they have been subject to a "take back" Dublin procedure. This is also a measure immaterial to an individual's right to challenge a negative substantive decision and entails a clear-cut dereliction of Article 47 of the Charter on the **right to an effective remedy**.

Article 5(3), for its part, entails a mandatory withdrawal of reception conditions for reasons of absconding, with the exception of emergency health care. The articulation between Article 5(3) and **Recital 22** is unclear as Recital 22 imposes a duty on Member States to act in compliance with the Charter and "to ensure that the immediate material needs of that person are covered". The concept of "immediate material need" – which should cover at a minimum an obligation to provide housing, food and education in addition to medical care – is not defined under the proposed Regulation and such obligation is not adequately reflected under Article 5(3). ECRE has detailed the need for Member States to meet a very onerous threshold in order to withdraw reception conditions from asylum seekers, given the precepts of the **right to dignity** under Article 1 of the Charter.⁶⁸ Automatically stripping an applicant of reception conditions throughout and after a Dublin procedure is incompatible with this right, and would directly **contradict the CJEU's ruling in *Cimade and Gisti***.

It should, in any event, be noted that the recast Reception Conditions Directive **already provides Member States with possibilities** to withdraw reception conditions *inter alia* where the applicant absconds from his or her place of residence or does not comply with reporting duties without adequate justification. Beyond legal constraints, policy considerations should also bear focus on the pragmatism of the sanctions proposed in Articles 5 and 20, as they also risk creating unnecessary situations of destitution and legal limbo of asylum seekers who have a right to remain on the territory as a matter of EU law pending the examination of their claim, which may trigger considerable societal costs.

ECRE proposes the following amendments to Articles 5 and 20 of the proposal:

Article 5: An applicant shall not be sanctioned for entering a Member State other than the Member State in which he or she is obliged to be present where Article 31 of the Geneva Convention applies.

[Deleted provision] 2. 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 for the competent authorities of that Member State.

[Deleted provision] 3. The competent authorities shall take into account elements and information relevant for determining the Member State responsible **[deleted provision]** insofar as these were submitted within the deadline set out in Article 4(2), **unless non-compliance with that deadline can be objectively justified by the applicant.**

⁶⁸ ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 32-33.

Article 20: 1. The Member State responsible under this Regulation shall be obliged to:

- (a) take charge, under the conditions laid down in Articles 24, 25 and 30, of an applicant who has lodged an application in a different Member State;
- (b) take back, under the conditions laid down in Articles 26 and 30, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document;
- (c) take back, under the conditions laid down in Articles 26 and 30, a third-country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;
- (d) take back, under the conditions laid down in Articles 26 and 30, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.;
- (e) take back, under the conditions laid down in Articles 26 and 30 a beneficiary of international protection, who made an application in another Member State than the Member State responsible which granted that protection status or who is on the territory of another Member State than the Member State responsible which granted that protection without a residence document.

2. In a situation referred to in point (a) of paragraph 1, the Member State responsible shall examine or complete the examination of the application for international protection.

[Deleted provisions]

3. Where a Member State issues a residence document to the applicant, the obligations referred to in paragraph 1 shall be transferred to that Member State.

4. The Member State responsible shall indicate in the electronic file referred to in Article 22(2) the fact that it is the Member State responsible.

Recital 22: In order to ensure that the aims of this Regulation are achieved and obstacles to its application are prevented, in particular in order to avoid absconding and secondary movements between Member States, it is necessary to establish clear obligations to be complied with by the applicant in the context of the procedure, of which he or she should be duly informed in a timely manner. Violation of those legal obligations should lead to appropriate and proportionate procedural consequences for the applicant **[deleted provision], in full compliance with fundamental rights as guaranteed by the Charter of Fundamental Rights of the European Union and international law, in particular Article 31 of the Geneva Convention.**

3.3. Information and interview: Articles 6-7, Recital 23

Effective and understandable information provision

Article 6(1) of the proposal only adapts the right of asylum seekers to information in order to include reference to their obligations and corresponding sanctions for non-compliance. It also details in **Article 6(1)(f)-(g)** that the applicant will be informed of the processing of his or her personal data by the EU Asylum Agency and of the categories of data concerned. However, the succinct character of the information provided to the applicant as to the elements he or she needs to submit to the authorities seems to create scope for less clarity and cooperation. **Article 4(2)** requires the asylum seeker to provide “all the elements and information relevant for determining the Member State responsible [...] as soon as possible and at the latest during the interview pursuant to Article 7”.

Article 6(1)(d) outlines these elements as far as family members and relatives are concerned, but places a heavier burden of proof on the applicant to submit and “substantiate” information on family members or relatives in other Member States. No justification is provided in the proposal for imposing what appears to be an **unreasonable burden of proof on the individual, contrary to the right to**

good administration enshrined in Article 41 of the Charter.⁶⁹ ECRE is deeply concerned that a narrow interpretation of Article 6(1)(d) – read in conjunction with Article 4(2) – will undermine the principle of family unity where the applicant does not proactively inform the authorities of the presence of family members. Under its current form, Article 6(1)(d) is ambiguous about the possibility for an applicant to submit official documents proving family links after the interview.

At the same time, no provision is included with a view to making information on the procedure more easily understandable for the individuals concerned. Article 6(2) largely builds on existing practice where national authorities have a primary obligation to provide the information in writing “in a language that the applicant is reasonably supposed to understand”, with some scope for supplying the information orally “where necessary for the proper understanding of the applicant”. **Comprehension of information on the Dublin procedure has proved to be a central challenge in the majority of Member States.** In the context of the Evaluation of the Dublin III Regulation, feedback by practitioners in as many as seven countries (**Germany, Greece, Italy, Luxembourg, Malta, Poland and Slovenia**) noted that applicants are not likely to comprehend the information given to them due to the complexity of the Dublin procedure.⁷⁰ This is also the case in **Bulgaria**.⁷¹ In other countries, information provided to applicants is incomplete. In **France**, asylum seekers are informed of the conduct of Dublin procedures but not on the countries contacted or the criteria applied by the Prefectures in the Rhone department.⁷² In **Hungary**, the parts of the Dublin leaflet which should contain information specific to Hungary have been left blank.⁷³ Conversely, information on the Dublin procedure is not systematically provided in the **UK** until the person is detained for the purposes of transfer.⁷⁴

ECRE highlights that clear and understandable information to asylum seekers is a **necessary precondition for building trust and maximising cooperation in the Dublin procedure.** Stronger investment by Member States in information provision will be catalytic to reducing individuals’ uncertainty and frustration vis-à-vis the complexity of the process, and therefore to remedying one of the principal reasons for non-compliance with the Dublin rules.⁷⁵ To that end, the proposal should contain more detailed elements and **stronger guarantees relating to the level of language and mode of communication in which information is conveyed**, with the aim of streamlining Dublin procedures to the benefit of both asylum seekers and Member States. Some of these guarantees have been introduced by the Commission in the proposal to recast the Eurodac Regulation.⁷⁶ Effective modes of information provision are also paramount to building trust. Member States should **avoid over-reliance on written communication** and introduce more engaging and easily comprehensible communication tools for applicants. Access to early legal advice and interpretation are crucial to ensuring that individuals are properly informed and develop trust in the process.

ECRE recommends amending certain elements of Article 6 as follows:

Article 6(1)(c): of the criteria and the procedures for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, **including the specific criteria applied and Member States requested or notified in the individual case;**

⁶⁹ For a discussion, see ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 109 et seq.

⁷⁰ ICF, *Evaluation of the implementation of the Dublin III Regulation*, March 2016, 11.

⁷¹ AIDA Country Report Bulgaria: Fourth Update, October 2015, 36.

⁷² AIDA Country Report France: Fourth Update, December 2015, 54.

⁷³ AIDA Country Report Hungary: Fourth Update, November 2015, 35.

⁷⁴ AIDA Country Report UK: Fourth Update, November 2015, 46.

⁷⁵ On the relevance of information to building trust in the Dublin system, see JRS, *Protection Interrupted*, July 2013.

⁷⁶ European Commission, *Proposal for a [Eurodac Regulation] (recast)*, COM(2016) 272, 4 May 2016, Article 30(1).

Article 6(1)(d): of the personal interview pursuant to Article 7 and the obligation of submitting **[deleted provision]** information regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information; where related documents are not available at the time of the interview, the applicant shall have the right to submit them subsequently.

Article 6(1)(e): The possibility to challenge a transfer decision **[deleted provision]** and, where no transfer decision is taken **[deleted provision]**, to an effective remedy before a court or tribunal in accordance with Article 28(5). Member States shall notify applicants of the right to an effective remedy in accordance with Article 28(5) at the moment when the application for international protection is lodged.

Article 6(2): The information referred to in paragraph 1 shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand **[deleted provision] in a concise, transparent, intelligible and easily accessible form, using clear and plain language.** Member States shall use the common leaflet drawn up pursuant to paragraph 3 for that purpose **[deleted provision]. In addition,** the information shall always be supplied orally for example in connection with the personal interview as referred to in Article 7.

Personal interview

The proposal reduces the guarantees set out by its predecessor relating to the individual's right to a personal interview. **Article 7(1)** provides that an interview may be omitted where the applicant has absconded or where the information provided is sufficient for the determination of the responsible Member State. The provision in the Dublin III Regulation, requiring Member States in the latter case to allow the person to present information at a later stage in order to correctly identify the responsible country, has been deleted in the proposal, ostensibly as a result of the impossibility to submit any information after the personal interview and with a view to avoiding delays in the procedure.⁷⁷ The proposal does not include any obligation for national authorities to proactively question the applicant about the presence of relatives or family members or about any other elements that would trigger primary responsibility criteria. Similarly, **Article 7(2)** implicitly excludes applicants subject to now truncated "take back" procedures from the right to a personal interview.

Barring asylum seekers from the possibility of a personal interview where the administration deems the information available sufficient to take a decision is **incompatible with the right to be heard**, enshrined in Article 41 of the Charter and as a general principle of EU law.⁷⁸ The principles of effectiveness and, where relevant, best interests of the child are also foundational elements of EU law that could be infringed by such a rule.⁷⁹

ECRE recommends amending the proposed elements of Article 7 as follows:

Article 7(1): In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. ***The determining Member State shall proactively ask questions on all aspects of the claim that would allow for the determination of the Member State responsible. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 6.***

⁷⁷ Explanatory Memorandum, 15.

⁷⁸ CJEU, Case C-277/11 *M.M. v Minister for Justice, Equality and Law Reform*, Judgment of 22 November 2012, paras 85-89.

⁷⁹ For a discussion, see ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 72 et seq.

Article 7(1a): The Member State may omit the personal interview where the applicant has absconded or the information provided by the applicant pursuant to Article 4(2) is sufficient for determining the Member State responsible. ***The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determining the Member State responsible before a decision is taken to transfer the applicant to the Member State responsible pursuant to Article 30(1).***

Article 7(2): The personal interview shall take place in a timely manner and, in any event, before any take charge request pursuant to Article 24 **or take back notification pursuant to Article 26** is made.

3.4. Requests, notifications and time-limits: Articles 24, 25, 26, 30, Recitals 25, 26

The proposal envisages a significant shift vis-à-vis the “take back” procedure in **Article 26**, by abandoning the process of take back requests. Instead, a Member State will only be able to make a “take back” notification solely on the basis of a Eurodac hit. In that respect, “take back” procedures are to be inextricably linked to the use of Eurodac and may not be initiated on the basis of circumstantial evidence, thereby leading to the proposed deletion of **Article 26(2)**. This amendment is explained as a “significant tool to address secondary movements”, “given that it is clear which the responsible Member State is”.⁸⁰

The proposal generally aims to streamline the application of the Dublin system through an overall reduction of time-limits for completing the procedure. The suggested deadlines are the following:

- **Article 24(1):** One month instead of three for issuing a “take charge request”, and two weeks instead of two months in case of a Eurodac or VIS hit. Given the shorter deadlines, the urgent procedure is deleted from **Articles 24(2) and 25(6)**;
- **Article 25(1)-(2):** One month instead of two for replying to a “take charge request”, and two weeks for replying to requests based on a Eurodac or VIS hit;
- **Article 26(1):** Two weeks for making a “take back” notification in case of a Eurodac hit, which does not require a reply;
- **Article 30(1):** One week from the acceptance of the “take charge” request or from the “take back” notification for taking a transfer decision;
- **Article 30(1):** Four weeks to carry out a transfer.

Under these shortened time-limits, the absolute maximum duration of the entire Dublin procedure would be approximately 4 months, in cases where an applicant would also lodge an appeal against the decision. The proposed pace of the process illustrates the Commission’s objective to streamline and accelerate the allocation of responsibility and distribution of asylum seekers, expressed in **Recital 26**. In principle, shorter time-limits should lead to faster access to asylum procedures. Yet where the applicant is an unaccompanied minor, the time limit foreseen in the proposal seems to be incompatible with Member states’ positive obligations to appoint a guardian under Article 8(2), to conduct a best interests assessment under Article 8(4) and to initiate family tracing under Article 8(5).

ECRE recommends to adjust the time-limits for initiating a take back notification procedure in light of Member States’ positive obligations towards unaccompanied minors. Time-limits should be calculated once all the procedural steps foreseen under Article 8 are completed.

However, the binding character of the aforementioned time-limits seems to have **little meaning in practice, insofar as no consequences are attached to failure by the sending Member State to observe them**. The Commission has deleted the provision which imposed responsibility on the requesting Member State if a transfer was not conducted within 6 months, 12 months if the person is

⁸⁰ Explanatory Memorandum, 16.

imprisoned or 18 months in cases of absconding. The removal of this clause of cessation of responsibility is explained in **Recital 25** as an effort to discourage asylum seekers from absconding until the country of their residence becomes responsible by default. In practice, however, the removal of this rule is liable to lead to cumbersome and lengthy procedures, as sending Member States will have no incentive to comply with the deadlines for performing a transfer set out by the Regulation.

If the deleted provision is aimed at enhancing the efficiency and rapidity of access to asylum by deterring applicants from absconding, it **creates ample space for Member States to disregard the stricter time-limits by removing the consequences of non-compliance**. The Dublin IV proposal is therefore likely to repeat the perverse effects of its first iteration, the Dublin Convention. In its evaluation of the Convention in 2001, the Commission explained that the absence of consequences attached to deadlines led to lengthy procedures and eventually to transfers not being carried out, to the detriment of asylum seekers' access to protection.⁸¹

ECRE recommends reintroducing the deleted Article 30(2) as follows:

Article 30(2): Where the transfer does not take place within the **four weeks'** time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of **eight weeks** if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of **twelve weeks** if the person concerned absconds.

3.5. Appeals: Article 28, Recital 24

Time-limits and suspensive effect

Article 28(2) of the proposal replaces the requirement of "reasonable" time-limits with a 7-day deadline to lodge an appeal against a transfer decision, without any principled justification other than what appears to be a harmonisation agenda. The notion of reasonableness in relation to time-limits was examined by the CJEU in *Diouf*,⁸² albeit in the context of accelerated procedures. The Court paid attention to the discretion left to Member States under the Asylum Procedures Directive to apply an accelerated procedure if specific grounds justified this.⁸³ It found that a 15-day time-limit for appealing a decision in an **accelerated procedure** "appears **reasonable and proportionate in relation to the rights and interests involved**".⁸⁴

In the context of the Dublin system, however, the "rights and interests involved" are not identical to those of the accelerated procedure set out in the Directive. Whereas the rationale behind the **accelerated procedure seems to be that an asylum claim is likely to be unfounded or present security concerns**,⁸⁵ **such an assumption is not pertinent in Dublin procedures**. There is therefore no basis in principle to subject applicants to more truncated processes and a less favourable position than applicants in the regular asylum procedure. Given the rights potentially engaged by a transfer decision, as mentioned for instance in **Article 28(4)**, sufficient time and preparation is necessary for an appeal against a transfer.

⁸¹ European Commission, *Evaluation of the Dublin Convention*, SEC(2001) 756, 13 June 2001, 9-11. For a recent discussion, see Constantin Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission', (2016) EU Migration Blog, 17 May 2016, available at: <http://goo.gl/2ucrBF>.

⁸² CJEU, Case C-69/10 *Samba Diouf*, Judgment of 28 July 2011.

⁸³ CJEU, *Diouf*, para 31.

⁸⁴ CJEU, *Diouf*, para 67.

⁸⁵ Recital 20 recast Asylum Procedures Directive.

In addition, practice in Member States is widely divergent as regards the implementation of the Dublin III Regulation rule on “reasonable” time-limits for appeals. The Evaluation of the Regulation does not provide concrete information on the exact national time-limits,⁸⁶ but these are made available in AIDA reports. While a 7-day rule deadline has been introduced in **Austria, Germany, the Netherlands, Bulgaria and Switzerland**,⁸⁷ as many as 13 Member States have more favourable rules. These are:⁸⁸

Time-limit	Country
8 days	Croatia
14 days	Poland, UK
15 days	France, Greece
15 working days	Ireland
20 days	Cyprus
21 days	Sweden
30 days	Belgium, Latvia, Finland
60 days	Italy, Spain

More specifically in **France**, while the initial draft reform envisaged a reduction of the time-limit for appealing Dublin transfers to 7 days,⁸⁹ significant pressure was put by NGOs and by members of the National Assembly to avoid an unduly short time-limit, which would not enable applicants to have sufficient time to prepare evidence on reception conditions and systemic procedural deficiencies in the receiving Member State. The Commission of the National Assembly (*Commission des Lois*) successfully introduced a 15-day time-limit, as a deadline of 7 days was found “insufficient to allow the person to benefit from an ‘effective’ remedy while the country of destination is generally not known until the moment of the notification of transfer.”⁹⁰

ECRE believes that a 7-day time-limit for lodging appeals against transfers is very likely to be unreasonable under the precepts of Article 47 of the Charter, while practice in a significant number of countries points to wider deadlines for contesting a decision. In order to enhance the legal certainty of the applicant, the decision should always be notified in writing. ECRE recommends amending Article 28(2) as follows:

Article 28(2): Member States shall provide for a *reasonable* period of **at least 30** days after the **written** notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

Article 28(3) grants automatic suspensive effect to appeals against transfers. ECRE deems this a welcome clarification in line with the right to an effective remedy under Article 47 of the Charter.

⁸⁶ ICF, *Evaluation of the implementation of the Dublin III Regulation*, March 2016, 76.

⁸⁷ AIDA, Country Report Austria: Fourth Update, December 2015, 33; Country Report Germany: Fourth Update, November 2015, 28; Country Report Netherlands: Fourth Update, November 2015, 30; Country Report Bulgaria: Fourth Update, October 2015, 31; Country Report Switzerland: First Update, October 2015, 30. Switzerland provides a time-limit of 5 working days.

⁸⁸ AIDA, Country Report Croatia: Second Update, December 2015, 27; Country Report Poland: Fourth Update, November 2015, 26; Country Report UK: Fourth Update, November 2015, 31, referring to in-country appeal; Country Report France: Fourth Update, December 2015, 38; Country Report Greece: Fourth Update, November 2015, 51; Country Report Ireland: Fourth Update, November 2015, 34; Country Report Cyprus: Second Update, November 2015, 22 and 27; Country Report Sweden: Third Update, December 2015, 17 and 23; Country Report Belgium: Fourth Update, December 2015, 31; Country Report Italy: Fourth Update, December 2015, 41; Country Report Spain, March 2016, 19, referring to judicial appeal.

⁸⁹ Projet de loi relative à la réforme du droit d’asile, 23 July 2014, INTX1412525L, Article L742-4-I.

⁹⁰ French National Assembly, *Rapport au nom de la Commission des lois constitutionnelles sur le projet de loi (n° 2182) relatif à la réforme de l’asile*, 26 November 2014, available at: <http://goo.gl/YwgWQA>, D.1.

Scope of the appeal

Article 28(4) of the proposal limits the scope of appeals against transfer decisions to the assessment of risks of inhuman or degrading treatment under Article 3(2) or to infringements of the family provisions set out in Articles 10-13 and 18. A restrictive reading of remedies against the Dublin system was advanced by the CJEU in *Abdullahi v Bundesasylamt* in the context of the Dublin II Regulation, which at the time made no reference to the right to an effective remedy. The *Abdullahi* doctrine has been heavily criticised for unduly restricting the scope of the right to an effective remedy, contrary to the scope of Article 47 of the Charter.⁹¹

The CJEU has recently ruled again on the scope of Dublin appeals in the cases of *Ghezelbash* and *Karim*. In *Ghezelbash*, agreeing with the Opinion of Advocate-General Sharpston, the Court clearly dismissed the *Abdullahi* line of reasoning by holding that the **Dublin III Regulation allows an applicant to challenge a transfer decision on the basis of misapplication of the responsibility criteria**.⁹² Such a scope of appeal stems from the respect of rights of defence and the right to be heard under Article 41 of the Charter in “all proceedings likely to culminate in a measure adversely affecting a person.”⁹³ Similar interpretations of the right to an effective remedy have been followed recently by domestic courts in **Germany**,⁹⁴ the **Netherlands**,⁹⁵ **Belgium**⁹⁶ and **Switzerland**.⁹⁷

Strikingly, the **principle of amenability of the application of the criteria to review is conceded by the Commission proposal itself**, since Article 28(4) provides for appeals challenging a misapplication of the family and dependency provisions. The Commission has justified this in **Recital 24** on the basis that an appeal should only be allowed to challenge the compatibility of transfers with fundamental rights,⁹⁸ these being freedom from inhuman or degrading treatment, family life and the best interests of the child. From the outset, it should be recalled that the right to family life under Article 7 of the Charter has broader scope than the family provisions of the Dublin Regulation, as exemplified in the aforementioned ruling of a **German Administrative Court**.⁹⁹ Although the current provisions of the proposal may seem to take into consideration humanitarian concerns and to strengthen the protection of the right to family life, an exemption purely limited to a certain category of applicants would be in blatant contraction with Article 47 of the Charter.

In light of the CJEU judgments in *Karim* and *Ghezelbash*, ECRE recalls that the right to be heard enshrined in Article 41 of the Charter must be ensured with respect to any measure liable to adversely affect an applicant. Therefore the Dublin Regulation may not pose limitations to the scope of the right to appeal a transfer decision.

ECRE recommends **deletion of Article 28(4)**, as any limitation on the scope of the right to appeal a transfer decision is incompatible with the right to be heard and the right to an effective remedy under the Charter.

⁹¹ See e.g. Maria Hennessy, ‘The Dublin system and the right to an effective remedy – The case of C-394/12 *Abdullahi*’, 13 December 2013, available at: <http://goo.gl/J8ze6O>; Daphne Bouteillet-Paquet, ‘The Dublin system and the right to an effective remedy – Observations on *Karim* and *Ghezelbash*’, 1 September 2015, available at: <http://goo.gl/8nc8CC>.

⁹² CJEU, Case C-63/15 *Ghezelbash*, 7 June 2016, paras 46 and 61.

⁹³ CJEU, *Ghezelbash*, AG Sharpston, para 82, citing *mutatis mutandis* CJEU, Case C-277/11, *M.M.*, para 85.

⁹⁴ Hannover Administrative Court, Judgment 1 B 5946/15, 7 March 2016.

⁹⁵ Hague District Court, Judgment No 16/6983, 26 April 2016, available at: <http://goo.gl/uLBk9l>.

⁹⁶ Council of Alien Law Litigation, Judgment No 165 134, 31 March 2016, available at: <http://goo.gl/GsiO4m>.

⁹⁷ Federal Administrative Court, Judgment D-2399/2016, 6 July 2016.

⁹⁸ This reading is echoed by the UK Court of Appeal in *CK (Afghanistan)*.

⁹⁹ Hannover Administrative Court, Judgment 1 B 5946/15, 7 March 2016.

Recital 24 should be amended accordingly in order **to delete the limitation** to the scope of the right to an effective remedy:

“In order to ensure effective protection of the rights of the persons concerned, the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be guaranteed, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union. An effective remedy should also be provided where no transfer decision is taken despite the applicant’s claim that another Member State is responsible, **including** on the basis that he has a family member or, for unaccompanied minors, a relative in another Member State. In accordance with Article 47 EU Charter of Fundamental Rights, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the responsible Member State.”

Article 28(5) of the proposal (and corresponding paragraph of **Recital 24**) expressly sets out the right to appeal a Member State’s failure to issue a transfer decision in cases of family unity. This provision is a welcome clarification of an applicant’s appeal rights in the Dublin procedure, and in line with jurisprudence from countries such as **Germany**.¹⁰⁰ However, in such case the scope of right to an effective remedy is not limited to cases of family unity but, in line with the CJEU’s rulings in *Ghezelbash* and *Karim*, includes any misapplication of the Dublin criteria. Moreover, the enforceability of such a right remains unclear in practice in absence of any notification decision. **Article 28(5)** can only be effectively exercised if there is **an obligation to notify in writing** the applicant about the right to appeal in cases of family unity where no transfer decision is taken, at the moment the application is lodged. Such notification should specify the time limit, in accordance with national law, after which the Member State’s failure to take action to transfer the applicant to the responsible Member State.

ECRE recommends an amendment to Article 6, mentioned above, as well as the following modification to Article 28(5):

Article 28(5): Where no transfer decision referred to in paragraph 1 is taken, Member States shall provide for an effective remedy before a court or tribunal , where the applicant claims that **[deleted provision] another Member State is responsible for examining the application..**

3.6. Detention: Article 29, Recital 27

The proposal envisages a welcomed reduction in the time-limits for completing the Dublin procedure when an applicant is detained. As per **Article 29(3)**, the sending Member State must submit a take charge request or take back notification within 2 weeks and complete the transfer within 4 weeks of the “final transfer decision”. The wording used by the Commission aims not only to render the process more rapid but also to eliminate ambiguity as to the applicable deadlines, compared to the existing provision in the Regulation.

One issue not addressed by the proposal relates to the legality of detention in the Dublin procedure, however. ECRE has argued that asylum seekers may not be detained for reasons of immigration detention under Article 6 of the Charter,¹⁰¹ but **only for the purpose of “securing the fulfilment of an obligation prescribed in law”**.¹⁰² In accordance with the jurisprudence of the ECtHR,¹⁰³ the

¹⁰⁰ Federal Administrative Court; Judgment 1 C 24.15, 27 April 2016; Potsdam Administrative Court, Judgment 6 L 87/16.A, 4 February 2016.

¹⁰¹ Article 6 of the Charter mirrors Article 5(1)(b) ECHR in that respect.

¹⁰² 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>. See also ECtHR, *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

¹⁰³ 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; *OM v Hungary*, Application No 9912/15, Judgment of 5 July 2016.

Charter and ECHR require such an obligation to be sufficiently clear and precise. Detention must include an assessment of necessity and proportionality to the nature of the obligation required, must be imposed as a measure of last resort and cannot be punitive.

The Dublin IV proposal seems to anticipate this point by introducing express obligations on asylum seekers in **Article 4(3)**, which include duties “to comply with a transfer decision” and to “be present and available to the competent authorities”. Yet, to comply with the Charter and the ECHR, detention under the Dublin Regulation cannot be imposed on asylum seekers to ensure compliance with as broadly termed an obligation as a person’s being present and available to or cooperating with the authorities, as this obligation is not sufficiently clear and precise to justify interference with the individual’s right to liberty. For those reasons, ECRE considers that detention of asylum seekers during the determination of the Member State responsible, as is the case in **Germany, Denmark, Latvia, Malta, Netherlands, Slovenia, UK and Norway**,¹⁰⁴ or when a country has accepted responsibility but the transfer decision is not final, which occurs in practice in **Croatia, the Czech Republic, Belgium or Luxembourg**,¹⁰⁵ is not permissible under the Charter. Member States’ divergent practices have also been criticised by the evaluation report commissioned by the European Commission as such practices create legal uncertainty and may lead to extensions of the time spent in detention.

ECRE recommends amending Article 29(2) as follows:

Article 29(2): When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures **after a final transfer decision has been taken** in accordance with **Article 30(1) and notified in accordance with Article 27(4)** of this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

4. Corrective allocation mechanism

4.1. Fair distribution of responsibility: principle or exceptionality?

According to the general principle laid down in **Article 34(1)** and **Recitals 31 and 32** of the proposal, the aim of the corrective allocation mechanism is to complement the current system,¹⁰⁶ so as to remedy situations where a Member State would be faced with a “disproportionate number of applications for international protection”. There is an inherent paradox in the Commission’s approach, however. Rather than ensuring that fair sharing of responsibility between countries runs like a golden thread throughout the Dublin system, the proposal admits from the outset that the Dublin Regulation will in principle lead to distribution inequalities in practice; hence the need for a corrective mechanism to mitigate cases of disproportionate pressure on some countries. This corrective and complementary design **contradicts the precepts of interstate solidarity in Article 80 TFEU, lessons learnt from the effects of Dublin in practice, but also positions taken by the European Parliament and Member States within the Council or other fora.**¹⁰⁷

¹⁰⁴ ICF, *Evaluation of the implementation of Dublin III Regulation*, March 2016, 69.

¹⁰⁵ *Ibid.*

¹⁰⁶ Explanatory Memorandum, 4.

¹⁰⁷ European Parliament, *Report on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI))*, PE575.212v02-00, 23 March 2016; Council of the European Union, *Joint letter by Ministers Alfano and de Maizière and a German-Italian non-paper on “Save Schengen / Beyond Dublin”*, 6797/16, 4 March 2016; Athens Declaration of the 1st Mediterranean EU countries’ Summit, 9 September 2016, bringing together France, Italy, Spain, Portugal, Cyprus and Greece.

Accordingly, when examining the fairness of the proposal, co-legislators should critically evaluate the very principle of sharing of responsibility before delving into the modalities of specific mechanisms. ECRE urges for a fundamental re-think of the underlying logic of the recast Dublin Regulation towards a system allocating responsibility fairly and equitably between Member States in all cases. Such a reform would primarily require an **overhaul of Chapter III on the responsibility criteria** before amending the various responsibility allocation mechanisms and procedures.

Without prejudice to the aforementioned observations on the principle of responsibility-sharing, the following section discusses the corrective allocation mechanism proposed by the Commission and voices concerns on the different elements of its workings. Given the incomplete nature of the proposed system, any amendments proposed below concern specific issues that should be addressed by co-legislators under either of the two policy options made on the allocation mechanism.

4.2. Interplay with Dublin transfers

Suspension of transfers to affected countries

In its current form, the proposal envisions a corrective allocation mechanism aimed at remedying disproportionate pressure on a Member State, which would however run parallel to the general application of the Dublin Regulation. As is currently the case in the interplay of the Dublin system with the implementation of the Relocation Decisions,¹⁰⁸ an assisted Member State could find itself in the absurd position whereby a number of applicants leave for other countries and other applicants return from other countries to that Member State. In practical terms, this would be highly counter-intuitive to the aim of relieving an asylum system of disproportionate pressure, as the country concerned would not necessarily receive lower numbers of asylum seekers. For the corrective allocation mechanism to have any meaningful effect, its application should first and foremost be coupled with a suspension of Dublin transfers to the benefitting Member State.

ECRE proposes the insertion of the following provision:

Article 34(1a): *During the application of the mechanism in accordance with paragraph 1, the benefitting Member State shall be relieved of its obligations under Article 20. The determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.*

4.3. Start and end of the mechanism: Articles 34, 35 and 43

Reference key and threshold

Article 35 details a “reference key” outlining Member States’ respective reception capacities, based on criteria defined through equal weighting of population size and GDP. These criteria are to be reviewed annually on the basis of Eurostat statistics. The Commission proposal has rebranded and significantly simplified the “distribution key” presented in the proposal for the Relocation Decision agreed last year,¹⁰⁹ which included criteria such as unemployment rate and the number of asylum applications. Whereas the aim of the reference key is to delimitate the respective share of each country in light of GDP and population size, however, the proposal does not consider a number of asylum applications exceeding the reference key as disproportionate pressure *per se*.

¹⁰⁸ In the first five months of 2016, for example, Switzerland relocated 34 persons out of Italy and carried out 607 transfers to Italy: SEM, *Asylum Statistics May 2016*; European Commission, *Annex to the Fourth report on relocation and resettlement*, COM(2016) 416 ANNEX 2, 15 June 2016.

¹⁰⁹ European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015) 286, 27 May 2015.

For the corrective allocation mechanism to be triggered, a Member State must receive a number of asylum claims higher than 150% of its reference key according to **Article 34(2)**. Similarly, **Article 43** provides that the mechanism ceases to apply as soon as the number of asylum applications for which the benefitting Member State is responsible falls below the 150% threshold. Neither the Preamble nor the Explanatory Memorandum provide any justification for the choice of a 150% threshold instead of one surpassing Member States' capacity.

ECRE deems the 150% rule an arbitrarily set threshold, which contradicts the general objective of the reform to "ensure a fair sharing of responsibility between Member States" set out in **Recital 34** in two main respects. Firstly, if the aim of the proposal is to remedy situations of disproportionate pressure, any situation whereby a Member State is responsible for more asylum seekers than it can cater for under the reference key should warrant activation of the corrective allocation mechanism. To opt for a 150% threshold instead would be to endorse the view that **some degree of disproportionality between different Member States is a feature built-into the CEAS**, and that Dublin would only remedy cases of extremely disproportionate pressure on an individual country.

Secondly, whereas the threshold for assisting a struggling Member State is 150%, **Article 36(1)** provides that other Member States are relieved of any obligation to receive asylum seekers under the mechanism if 100% of their capacity has been reached. This differential approach between Member States **unjustifiably exacerbates inequalities and unfairness in treatment** between asylum systems by applying a selective logic to reception capacity.

This approach is not justifiable against the precepts of solidarity under Article 80 TFEU, recalled by **Recital 34**. If the solidarity premise of the Dublin system is ensuring that asylum seekers are fairly distributed between Member States as long as their capacity has not been reached, **the corrective mechanism should be triggered as soon as a country's capacity is reached**.

Triggering and cessation process

Article 34(4)-(5) envisions the assessment of the trigger and cessation of the mechanism as a continuous, near real-time operation. The review of Member States' capacity is proposed to be conducted once per week, through information received by the automated system. The suggested process of triggering the allocation mechanism is automatic, starting upon notification that a Member State's caseload has reached 150% of its capacity. A similar notification may be issued to cease the application of the corrective allocation mechanism.

The continuous, weekly monitoring of the situation of Member States' asylum systems appears as an ambitious process aimed at automatic activation and deactivation of solidarity measures to remedy disproportionality in the distribution of asylum seekers. However, ECRE is concerned that the proposed mechanism neglects important pragmatic considerations which are liable to render its application on the ground overly impractical, if not impossible. On the one hand, if the situation is liable to fluctuate from one week to another, requiring different asylum administrations to be aware of the state of play of the mechanism at all times, it would entail heavy investments in financial and human resources. Although under **Article 44** the monitoring of the process and the allocation of applicants entrusted on an automated system operated by EU-LISA and national infrastructures operated by Member States, **an allocation mechanism liable to change from one week to another would pose severe challenges to the work of asylum authorities**, not least those in charge of providing information to asylum seekers. There is a high risk that, if the state of distribution across the EU is liable to change in such short periods, applicants receive incorrect information on the procedure, on possible countries of destination or even on the applicability of the corrective mechanism. Increased dangers of giving inaccurate or outdated information to individuals would

create confusion and frustration, thereby undermining trust-building and the objective of streamlined procedures.

On the other hand, the automaticity underpinning the start and end of the corrective allocation mechanism seems to **avoid any meaningful investment with a view to building sustainable and resilient asylum systems**. The Commission proposal is premised on the need to avoid situations where individual Member States face disproportionate pressure, yet in no way engages in depth with the reasons which may drive such pressure.

Though a ‘dead letter’ provision in practice, the early warning and preparedness mechanism laid down in Article 33 of the Dublin III Regulation acknowledges the need for a **proactive approach to detecting risks of pressure and to taking meaningful steps towards long-term alleviation** thereof. It is under this line of reasoning that the current Regulation allows for preventive action plans, crisis management action plans and quarterly processes of reporting to the relevant EU institutions and agencies. Conversely, while the proposed Regulation establishing an EU Asylum Agency foresees a process of monitoring Member States’ preparedness,¹¹⁰ nothing in the Dublin IV proposal seems to be tailored towards sustainable measures vis-à-vis countries facing pressure. **Article 43** instead crystallises the ill-fitted assumption that a national asylum system stops being in need of assistance as soon as its number of asylum claims falls below 150% of its capacity.

In order to enable a Member State’s asylum system to build sufficient capacity so as to sustainably deal with high numbers of claims, the corrective allocation mechanism should not cease before a substantial period of time, such as six months, has elapsed and there has been a sizeable reduction in the number of asylum applications below the capacity threshold, in order to enable that Member State to take structural measures to address such pressure.¹¹¹

ECRE proposes the following amendments to Articles 34 and 43 and a corresponding change to Recital 32:

Article 34(2): Paragraph 1 applies where the automated system referred to in Article 44(1) indicates that the number of applications for international protection for which a Member State is responsible under the criteria in Chapter III, Articles 3(2) or (3), 18 and 19, in addition to the number of persons effectively resettled, is higher than **100%** of the reference number for that Member State as determined by the key referred to in Article 35.

Article 43: The automated system shall notify the Member States and the Commission as soon as the number of applications in the benefitting Member State for which it is the Member State responsible under this Regulation is below **100%** of its share pursuant to Article 35(1).

Upon the notification referred to in paragraph 2, the application of the corrective allocation shall **only** cease for that Member State **where:**

(a) A period of at least six months has elapsed since the start of the allocation mechanism for that Member State; and

(b) The number of applications in the benefitting Member State for which it is the Member State responsible under this Regulation is below 100%.

¹¹⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency on Asylum*, COM(2016) 271, 4 May 2016, Article 13(3).

¹¹¹ See Article 8 Council Decision 2015/1523, referring to adequate measures on asylum and reception, and Recital 18 of Council Decision 2015/1601 referring to “structural solutions” in the context of emergency relocation.

4.4. Scope of the corrective allocation mechanism: Article 36

Similar to the limitation on the scope of the Dublin Regulation set out in **Article 3(3)** and discussed above, **Article 36(3)** excludes applicants who fall within “first country of asylum”, “safe third country”, “safe country of origin” or security grounds from the scope of the corrective allocation mechanism. For the same reasons outlined in relation to Article 3(3) relating to protection, procedural efficiency and fairness between Member States, ECRE recommends deletion of this provision.

ECRE recommends deletion of Article 36(3).

4.5. The allocation process: Articles 36-42

Who applies the Dublin criteria? The “back loading” procedure

The proposal presents the allocation process as a separate procedure to the examination of the responsibility criteria under the “normal” Dublin procedure. According to **Articles 36(2) and 39(c)**, as soon as the corrective allocation mechanism is triggered, asylum seekers are to be transferred to a “Member State of allocation”, which will then determine the “Member State responsible” for the application under the responsibility criteria (“back loading”). This design is liable to render the mechanism inefficient for a number of reasons.

Firstly, the proposal adds an unnecessary procedural layer to the process by turning what was a bilateral procedure under the Relocation Decisions to a tripartite arrangement, involving a benefitting Member State, a Member State of allocation and a Member State responsible. Under the proposal, an asylum seeker would apply in one country, undergo a transfer to a second country where he or she would have a personal interview, and possibly undergo a subsequent transfer to a third country where his or her application would be examined. In line with its observations on the discretionary clauses above, ECRE recalls that the **allocation process and the Dublin procedure are not an end in itself, but a means towards enabling asylum seekers to rapidly access the asylum procedure**, as is made evident in the reasoning of the CJEU’s ruling in *M.A.*¹¹² The ostensible efficiency of this automatic allocation process in reality creates more procedural complexity than it aims to resolve, and may result in unnecessary transfers of asylum seekers. The administrative and human costs for Member States and asylum seekers stemming from such complexity clearly advocate against such a mechanism.

Secondly, **Article 39(d)-(e)** unduly restricts the scope of applicable responsibility criteria in the assessment of the Member State responsible by excluding the residence documents / visas and entry criteria set out in **Articles 14 and 15**. Fragmenting the hierarchy of Dublin criteria does not seem appropriate from the viewpoint of legal certainty or principle – especially as far as residence permits are concerned – and is liable to complicate the implementation of the corrective allocation mechanism by introducing further complexity.

Thirdly, even if the discretionary clauses in **Article 19** are maintained in their existing form as recommended by ECRE, **Article 39(c)** could run the risk of taking away the possibility for a Member State of allocation to voluntarily undertake responsibility for an applicant, given that there is no explicit requirement on the Member State of allocation to register an application for international protection; the country would only “receive the applicant and carry out the personal interview pursuant to Article 7”. As the sovereignty clause may only be applied in respect of a person who has lodged an asylum application in that country, the “back loading” procedure could prevent the applicability of the sovereignty clause.

¹¹² CJEU, *M.A. v Secretary of State for the Home Department*, para 55.

Finally, **Article 38(a)** enables the benefitting Member State to accept responsibility for the applicant in cases where the clauses on family unity or dependent persons are applicable. This possibility implies that a Dublin check will be carried out to some extent by the benefitting Member State before the process of allocation.

Buy-out option

Article 37(1) introduces a ‘buy-out’ option for Member States, allowing them to “temporarily” refrain from taking part in the corrective allocation mechanism as Member States of allocation, though **Article 37(2)** clarifies that the temporary buy-out has a duration of 12 months. For each applicant that would have been allocated to it, the Member State in question is required to make a solidarity contribution to the Member State responsible, according to **Article 37(3)**; the modalities of this process are to be spelt out in a Commission implementing act.

ECRE is particularly alarmed by the proposed discretion to buy-out involvement in the corrective allocation mechanism. Firstly, in contrast to the exceptional nature of similar derogations under the Relocation Decisions, which were only allowed at the initial stage of the relocation scheme,¹¹³ **Article 37(1)** envisages buy-out as an unfettered discretion of Member States. Crucially, the rationale behind this discretionary power is not further explained in **Recital 35** or the Explanatory Memorandum.

Secondly, the spirit of **Article 37** squarely contradicts the Commission’s intention to substantially curtail national discretion to undertake responsibility outside the framework of the criteria in **Article 19**. Through the buy-out option, the proposal implies that, from a policy perspective, **responsibility for asylum seekers may not be voluntarily assumed but may legitimately be repudiated through financial compensation.**

Thirdly, as far as the objective of fair sharing of responsibility is concerned, a blanket buy-out rule only confirms the ill-founded premise that **countries may avoid any meaningful engagement with their obligations under the CEAS if they possess the financial means to do so.** Through this premise, the provision turns the very notion of fair distribution of responsibility in the EU on its head: whereas under the reference key of **Article 35** a country’s respective responsibility is commensurate to its wealth, wealthier Member States are enabled to shift responsibility to other countries under **Article 37**. In practice, this rule will **intensify Member States’ perception of Dublin as an unfair mechanism** and create greater scope to disregard the responsibility rules, as outlined in ECRE’s general observations above.

For those reasons, ECRE recommends the following amendments:

ECRE recommends the deletion of Articles 37 and Recital 35, as well as the following amendments:

Article 36(2): Applicants who lodged their application in the benefitting Member State after notification of allocation referred to in Article 34(5) **and for whom that Member State would otherwise be responsible under Chapter III** shall be allocated to the Member States **[deleted provision]**

Recital 33: When the allocation mechanism applies, the applicants who lodged their applications in the benefitting Member State **and for whom that Member State would otherwise be responsible under this Regulation** should be allocated to Member States which are below their share of applications on the basis of the reference key as applied to those Member States. **[deleted provision]**

¹¹³ Article 5(5) Council Decision 2015/1601.

Conclusion

The proposal for a Dublin IV Regulation presents two main characteristics of serious concern. On the one hand, far from rethinking the fundamentally flawed principles underpinning the EU's mechanism for allocating responsibility for asylum applications across the continent, the proposal reinforces many of the mechanism's flawed premises. With some limited exceptions, applicants face stricter and unfair rules, including far-reaching sanctions for secondary movements, limitations on their right to an effective remedy, and a high likelihood of having their claim rejected before ever reaching the Dublin system due to the possibility of transfer to third countries. Member States, for their part, would see their distribution inequalities heavily exacerbated under the Dublin IV Regulation: countries of first entry would be required to conduct admissibility and merit-related assessments before applying the Regulation, face perpetual responsibility and have no means of relief from their obligation when a transferring country is not complying with time limits for transferring an applicant.

While providing detailed input on the various provisions of the proposed recast, ECRE urges co-legislators to adopt a holistic, pragmatic review of the Dublin system, and to engage with deeper, bolder reform options going beyond the proposals made by the Commission. Not least in relation to measures of solidarity and fair sharing of responsibility, the proposal regrettably presents an insufficient mechanism and leaves inequality and unfairness as key tenets of the Union's system for distribution of responsibility. To generate understanding, trust and compliance – from both Member States and applicants – the Dublin system must be protective and fair to all parties involved in the asylum process.