



**ECRE Comments on the Commission Proposal for a
Qualification Regulation
COM(2016) 466**

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Summary of views

ECRE makes the following observations and recommendations to the co-legislators on the Commission proposal for a Qualification Regulation repealing Directive 2011/95/EU and amending Directive 2003/109/EC:

1. **Article 12:** The prohibition of applying a proportionality test and the requirement to treat certain particularly cruel politically motivated acts as serious non-political crimes should be deleted, as they create further legal uncertainty and contradict the spirit of the Convention and general principles of EU law.
2. **Articles 14, 20 and 23:** Provisions requiring the revocation or non-renewal of status, where a person is a threat to public order or a danger to the community following a serious conviction, should be deleted, since they are at odds with the grounds for exclusion set out in the 1951 Refugee Convention.
3. **Articles 15 and 21:** Mandatory review of international protection status should be deleted, as it entails unnecessary administrative costs for Member States' authorities and severely undermines integration prospects for beneficiaries.
4. **Article 8:** The application of the internal protection alternative remains in tension with the 1951 Refugee Convention and European Court of Human Rights case law, and should not be rendered a mandatory criterion for refugee status.
5. **Article 16:** The notion of serious harm stemming from indiscriminate violence should be clarified and adapted to the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights.
6. **Article 5:** The obligation to reject subsequent applications based on *sur place* protection needs is both unnecessary to secure the integrity of asylum systems and liable to deprive of protection those who have *sur place* protection needs, and should thus be deleted.
7. **Articles 26 and 28:** Given that no objective temporal difference can be established in the protection needs of the two categories of international protection beneficiaries, the duration of residence permits should be equal for refugees and subsidiary protection beneficiaries. Similarly, the derogation from the provision of social assistance to beneficiaries of subsidiary protection should be deleted.
8. **Directive 2003/109/EC:** The restart of the requisite time period every time a beneficiary is found in another Member State without authorisation discriminates against beneficiaries of international protection with regard to sanctions for secondary movements and should be deleted. Instead, in order to reflect the most favourable treatment to non-nationals guaranteed by the 1951 Refugee Convention, beneficiaries should be eligible for long-term resident status after 3 years of continuous residence in the Member State that granted protection.

Introduction*

The proposal for a Qualification Regulation was published on 13 July 2016,¹ as part of a second package of reforms of the Common European Asylum System (CEAS). This Regulation would repeal the recast Qualification Directive,² which regulates the criteria for granting refugee status and subsidiary protection, as well as the rights granted to beneficiaries.

As per its Explanatory Memorandum, the proposal pursues the following objectives:³

1. Further harmonisation of qualification criteria;
2. Greater convergence of asylum decisions;
3. Measures to restrict protection status only for as long as grounds for persecution or serious harm persist, and to promote integration;
4. Sanctions for secondary movements;
5. Further harmonisation of content of protection.

One preliminary remark concerns the **coherence of the aims** presented by the reform. More particularly in relation to the integration of beneficiaries of international protection, the proposal seems to assert robust measures to enable beneficiaries to become active members of their host societies, while at the same time rendering protection status in the EU much more precarious. The assumption that this can be done “without affecting persons’ integration prospects”⁴ seems to ignore experience in practice, as well as warnings issued by both Member States and civil society organisations ahead of the proposal.⁵ It should also be noted that the Commission’s Action Plan on Integration,⁶ the recently adopted policy framework for cross-cutting measures to promote the integration of third-country nationals in the EU, does not address this point. Quite to the contrary, integration is further undermined by punitive measures relating to secondary movements, which impose additional obstacles to beneficiaries’ right to move freely within the EU.

A second observation relates to the **means of achieving the aforementioned objectives**. The Commission deems legislative harmonisation as the principal tool for ensuring more convergence in outcomes across the EU. The idea is that, through a Regulation eliminating optional provisions previously applicable under the Directive, Member States would approximate their decision-making practice and recognition rates.⁷ As a direct consequence of the choice of instrument, the *acquis* would no longer allow Member States to apply more favourable standards with regard to the qualification and rights afforded to those in need of protection. **Article 3** and **Recital 9** of the proposal would only allow Member States to grant different rights to persons who do not fall within the scope of the Regulation, insofar as these are not confused with international protection.

* ECRE thanks the members of its Asylum Systems Core Group, as well as Professor Guy S. Goodwin-Gill and Professor Cathryn Costello for their comments. All errors remain our own.

¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents* (hereafter “proposal for a Qualification Regulation”), COM(2016) 467, 13 July 2016.

² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of protection granted, OJ 2011 L339/7.

³ Explanatory Memorandum, 4-5.

⁴ *Ibid*, 5.

⁵ *Ibid*, 10-11.

⁶ European Commission, *Action Plan on the integration of third-country nationals*, COM(2016) 377, 7 June 2016.

⁷ *Ibid*, 8.

However, the prescriptive harmonisation design of the proposal raises critical risks of both practical feasibility and protection. On the one hand, **Member States have generally doubted the desirability and efficiency of further legislative harmonisation** as a way of achieving convergence in decisions. Asylum administrations could well continue to reach different outcomes under the same rules, in the absence of practical cooperation and guidelines.⁸ On the other hand, ECRE notes that the majority of reforms of the criteria for granting refugee status or subsidiary protection promote ‘harmonisation downwards’, by undermining access to protection and creating greater possibilities for exclusion.

As enshrined in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU),⁹ the EU’s policy on asylum “must be in accordance with” the Refugee Convention and other international treaties. Yet, many of the proposed reforms maintain, or even exacerbate, inconsistencies between the EU asylum *acquis* and the 1951 Refugee Convention in the effort to further harmonise qualification criteria. The proposal imposes the application of the “internal protection alternative”, a concept exceeding the Convention. It also unduly broadens exclusion possibilities by conflating the different grounds for exclusion under Article 1F of the Convention, and by expanding on grounds of exclusion beyond the Convention through the notion “revocation or non-renewal” of status. These inconsistencies could lead to **legal challenge of the validity of the Regulation** before the CJEU, which may have far-reaching consequences similar to challenges of other EU legislative acts.¹⁰

ECRE’s Comments address specific elements of the proposal, with a view to raising legal objections stemming from the 1951 Refugee Convention and fundamental rights as interpreted by the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). At the same time, practical concerns on integration-related measures and punitive measures related to secondary movements are discussed.

Analysis of key provisions

1. Harmonisation of qualification criteria

1.1. Burden of proof: Article 4

Article 4 of the proposal rearranges the obligations of the applicant and the Member State’s determining authority as regards the submission of elements and assessment of the claim. Whereas the current Directive allows Member States to require asylum seekers to submit all the elements available to them “as soon as possible”,¹¹ **Article 4(1)** holds that the “applicant shall submit all the elements available to him or her”, while deleting the reference to “as soon as possible”. ECRE welcomes this deletion, as it addresses concerning Member State practices whereby late submission of evidence is read against the applicant’s credibility.¹²

The corresponding duty on the authorities to examine the application is mentioned in **Article 4(3)**, which cross-refers to Article 33 of the Asylum Procedures Regulation. However, one element missing

⁸ *Ibid*, 10. See also EASO, *The Implementation of Article 15(c) QD in EU Member States*, July 2015, available at: <https://goo.gl/w5n3Rw>. For similar observations in the US, see Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYU Press 2011).

⁹ OJ 2012 C326/47.

¹⁰ See e.g. the annulment of a provision of Directive 2004/113/EC in CJEU, Case C-236/09 *Test Achats*, Judgment of 1 March 2011.

¹¹ Article 4(1) recast Qualification Directive.

¹² ECRE, *Comments on the European Commission proposal to recast the Qualification Directive*, March 2010, available at: <http://goo.gl/SuxckF>, 14; *Information Note on Directive 2011/95/EU*, October 2011, available at: <http://goo.gl/0VFHzd>, 5.

in the formulation of the obligations by the Commission proposal is the duty on the determining authority to assess and ascertain the relevant facts in cooperation with the applicant. This is highlighted by the case law of the ECtHR, finding that, in a situation where human rights are systematically violated in the country of origin, the onus is on the authorities “to find out about the treatment to which the applicants would be exposed after their return.”¹³

Whereas the recast Qualification Directive provides that “in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements”,¹⁴ neither **Article 4(3)** nor **Article 33 of the Asylum Procedures Regulation** incorporate the duty to cooperate with the applicant for the purpose of establishing the facts. The corollary obligation of the applicant to cooperate with the authority has been codified in **Article 4(1)**. ECRE is concerned that the balance struck by the proposal could **adversely affect the burden of proof** by relieving Member States from their obligation to assess the asylum application in cooperation with the individual asylum seeker, rather than solely on the basis of available elements. Such an omission would ignore jurisprudence from the ECtHR confirming the shared duty of an asylum-seeker and the authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings.¹⁵ Clarifying the wording of **Article 4(3)** could ensure that a collaborative process between both parties is maintained in the asylum procedure, thereby remaining in line with ECtHR standards.

ECRE proposes the following amendment to Article 4(3):

Article 4(3): In cooperation with the applicant, the determining authority shall assess the relevant elements of the application in accordance with Article 33 of [the Procedures Regulation].

Finally, in relation to the “benefit of the doubt” principle,¹⁶ ECRE recalls its previous position against **Article 4(5)(b) and (d)**, as the applicant’s credibility should not be adversely affected by the lack of elements or documentation at his or her disposal, or the late submission of an application.¹⁷ In *A, B and C*,¹⁸ the CJEU confirmed that while the Qualification Directive refers to the applicant submitting all elements as soon as possible to substantiate his or her claim, it is incumbent on the national authorities to cooperate with the applicant when assessing the relevant elements of the case and to have regard to the sensitive nature of the claim. Therefore, not declaring homosexuality at the outset to the relevant authorities cannot result in a conclusion that the individual’s declaration lacks credibility.¹⁹ The Court further clarified that all fundamental rights, including dignity and privacy, must be respected in the process.²⁰

ECRE recommends an amendment to Article 4(5) and the introduction of **Recital 21a** to incorporate the “benefit of the doubt” principle as provided in the UNHCR Handbook:

Article 4(5): Where aspects of the applicant’s statements are not supported by documentary or other evidence, no additional evidence shall be required in respect of those aspects **and the applicant shall be given the benefit of the doubt** where the following conditions are met:

¹³ ECtHR, *Hirsi Jamaa v Italy*, Application No 27765/09, Judgment of 23 February 2012, para 133.

¹⁴ Article 4(1) recast Qualification Directive.

¹⁵ ECtHR *J.K. and Others v Sweden*, Application No 59166/12, Judgment of 23 August 2016, para 96; *F.G. v Sweden*, Application No 43611/11, Judgment of 23 March 2016, para 122. Both cite UNHCR’s Handbook, cited below, to support their conclusion.

¹⁶ UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status* (hereafter “UNHCR Handbook”), Reissued December 2011, para 196.

¹⁷ ECRE, *Comments on the European Commission proposal to recast the Qualification Directive*, March 2010, 14; *Information Note on Directive 2011/95/EU*, October 2011, 6.

¹⁸ CJEU, Joined cases C-148/13, C-149/13 and C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, Judgment of 2 December 2014.

¹⁹ *Ibid*, para 69-70.

²⁰ *Ibid*, para 53.

- (a) the applicant has made a genuine effort to substantiate his or her application;
- (b) all relevant elements at the applicant's disposal have been submitted **[deleted text]**;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
[deleted]
- (d) the general credibility of the applicant has been established.

Recital 21a: *While the burden of proof in principle rests on the applicant to substantiate his or her application, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the determining authority. Where aspects of the applicant's statements are not supported by documentary or other evidence, he or she should be given the benefit of the doubt if he or she has made a genuine effort to substantiate his or her application and has submitted all relevant elements at his or her disposal, and his or her statements are found to be coherent and plausible.*

Inclusion criteria

1.2. International protection needs sur place: Article 5

Article 5(3) removes the discretion left by the Directive²¹ to Member States to provide that persons filing a subsequent application “shall not normally be granted international protection” if the risk of persecution or serious harm is based on circumstances they have created since leaving the country of origin. ECRE recalls that the Refugee Convention does not attach any conditions to refugee status related to the conduct of the applicant, except where exclusion clauses apply; the necessary focus is on the risk of persecution or serious harm. This is echoed by the CJEU's interpretation of the Qualification Directive as not requiring the applicant to act discreetly in order to avoid persecution in cases such as *X, Y and Z*.²² Far from resolving the questionable incorporation of a standard irrelevant to the assessment of a person's protection needs, maintained in the recast Qualification Directive, the proposal therefore seeks to render it a mandatory rule for Member States.

Through **Article 5(3)**, the proposal runs the risk of denying international protection to persons who have a well-founded fear of persecution or risk serious harm through a legally irrelevant and by definition highly subjective assessment of whether they attempted to create conditions of eligibility for international protection. Against that backdrop, ECRE considers **Article 5(3)** both unnecessary to secure the integrity of asylum systems and liable to deprive of protection those whose protection needs arise *sur place*.

ECRE proposes deletion of Article 5(3).

1.3. Actors of protection and internal protection alternative: Articles 7-8, Recital 24

The proposal entails a far-reaching reform of the qualification criteria by obliging Member States to assess the internal protection alternative under **Article 8(1)**. ECRE recalls that this concept does not stem from the 1951 Refugee Convention, while it is deemed inconsistent with regional refugee norms in other parts of the world.²³ Accordingly, ECRE questions whether the mandatory introduction of the

²¹ Article 5(3) recast Qualification Directive.

²² See CJEU, Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Judgment of 5 September 2012; Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, Judgment of 7 November 2013.

²³ See e.g. Article 1(2) OAU Convention 1969.

internal protection alternative test is “fully in line with the Geneva Convention”, as presented in the Explanatory Memorandum.²⁴

According to civil society organisations’ research, the interpretation of the internal protection alternative across the EU is subject to wide disparities.²⁵ The preliminary findings of the Evaluation commissioned by the Commission also revealed a great disparity in the use of the concept in the Member States where it is applied. At the same time, **Article 8(2)** provides important guarantees in the application of the concept, as the internal protection alternative is considered only following the assessment of the qualification criteria. This means that, contrary to most Member States’ practice to date,²⁶ the assessment of the internal protection alternative is to be conducted by the determining authority, and not by the applicant.

Moreover, **Article 8(4)** requires the determining authority to assess the effectiveness and durability of protection, and to have due regard to the personal circumstances of the applicant.

Article 8(3) also requires determining authorities to ensure that all relevant information is obtained from all relevant sources, including EU-level country of origin information and analysis prepared by the EU Agency for Asylum, and UNHCR guidance. A similar requirement is imposed with regard to the assessment of actors of protection under **Article 7(3)**.

Despite the improvements of related procedural guarantees, ECRE remains opposed to the application of the concept, as it adds an additional criterion to eligibility for refugee status beyond the criteria foreseen in Article 1A of the Refugee Convention. To that end, imposing mandatory application of the internal protection alternative would run the risk of leaving applicants, entitled to protection under the Convention, short of protection under EU law.

Moreover, ECRE urges the co-legislators to exclude the possibility of applying an internal protection alternative where persecution or serious harm emanates from the State or agents associated with the State. Recent research has revealed that most Member States rarely or never apply the internal protection alternative when the State is the persecutor.²⁷ Building on the strong presumption that effective protection is not available in such cases, already incorporated in UNHCR Guidelines and the recast Qualification Directive,²⁸ the opportunity should be seized to rule out the application of the internal protection alternative where persecution or serious harm emanates from the State in the EU asylum *acquis*. **Recital 25** of the proposal should be amended accordingly.

ECRE recommends reverting to a “may” clause in Article 8(1), and the following changes to Recital 25:

Recital 25: Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant, **and the internal protection alternative should not be applied**. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.

²⁴ Explanatory Memorandum, 3.

²⁵ ECRE, Asylum Aid, Dutch Council for Refugees and Hungarian Helsinki Committee, *Actors of protection and the application of the internal protection alternative (hereafter ‘APAIPA study’)*, October 2014, available at: <http://goo.gl/thWSQc>.

²⁶ ICF, *Evaluation of the application of the Qualification Directive*, June 2016, 5.

²⁷ ECRE *et al*, APAIPA study, October 2014, 99.

²⁸ UNHCR, *Guideline on International Protection No 4: Internal Flight or Relocation Alternative*, HCR/GIP/03/04, 23 July 2003, para 7; Recital 29 recast Qualification Directive.

1.4. Reasons for persecution: Article 10, Recitals 27-29

Article 10(1)(d) of the proposal maintains a cumulative test for the concept of “membership of a particular social group” as a reason for persecution, requiring the group members to share an innate characteristic that cannot be changed *and* to be perceived as a distinct group by the surrounding society. As highlighted previously,²⁹ an accurate reading of international refugee law requires that the concept of a “particular social group” should be interpreted in an inclusive manner by determining that it exists on the basis of either an innate or common characteristic of fundamental importance i.e. the protected characteristics approach (*ejusdem generis*) or social perception, rather than requiring both.³⁰ This interpretation is espoused by UNHCR,³¹ and adopted in the transposition of the Directive in **Ireland** and **Greece**, for instance.³²

Maintaining the cumulative test for the definition of a particular social group is liable to lead to common categories of particular social groups potentially being excluded from the Qualification Regulation; young men facing military recruitment could be an example.³³ ECRE therefore urges for the definition of particular social group to be adapted accordingly.

ECRE recommends amending “and” to “or” in Article 10(1)(d).

Furthermore, with the introduction of **Article 10(3)**, the proposal prohibits determining authorities from expecting an applicant to behave discreetly in order to avoid a risk of persecution in the country of origin, thus incorporating the principle clarified by the CJEU in cases relating to religion and sexual orientation.³⁴ ECRE welcomes the codification of the Court’s jurisprudence, which should also inform the approach taken with respect to *sur place* claims under **Article 5**.

Recital 29 codifies the Court’s ruling in *A, B and C* in relation to methods for assessing an applicant’s credibility, prohibiting resort to stereotyped notions or detailed questioning or tests relating to his or her sexual practices. While undoubtedly a positive step, the recital could be expanded to cover issues beyond the context of homosexuality where questioning could jeopardise an applicant’s dignity under the Charter. An appropriate formulation of **Recital 29** should refer to sexual orientation and gender identity more widely for that purpose.

ECRE recommends the following amendment to Recital 29:

Recital 29: In accordance with relevant case law of the Court of Justice of the European Union, when assessing applications for international protection, the competent authorities of the Member States should use methods for the assessment of the applicant’s credibility in a manner that respects the individual’s rights as guaranteed by the Charter, in particular the right to human dignity and the respect for private and family life. Specifically as regards **[deleted text] sexual orientation or gender identity**, the individual assessment of the applicant’s credibility should not be based on stereotyped notions concerning **[deleted text] lesbian, gay, bisexual, transsexual or intersex**

²⁹ ECRE, *Comments on the Commission proposal to recast the Qualification Directive*, March 2010, 5; *Information Note on Directive 2011/95/EU*, October 2013, 9.

³⁰ UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, para 11.

³¹ UNHCR, *Guideline on International Protection No 2: Membership of a Particular Social Group*, HCR/GIP/02/02, 7 May 2002, para 11.

³² Section 8(d) Irish International Protection Act; Article 10(d) Greek Presidential Decree 141/2013.

³³ High Court of Australia, *S v Minister for Immigration and Multicultural Affairs*, Judgment of 27 May 2004.

³⁴ See CJEU, Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z*, Judgment of 5 September 2012; Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, Judgment of 7 November 2013.

persons and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices **or gender**.

1.5. Serious harm: Article 16, Recitals 32-36

The proposal makes an effort to clarify the obvious contradiction within the indiscriminate violence ground for subsidiary protection,³⁵ which refers to a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” However, this is done through **Recital 36** rather than through a clear-cut amendment of the wording of **Article 16(c)**.

With regard to the standard of proof applicable to the indiscriminate violence limb of serious harm, **Recital 36** codifies the *Elgafaji* ruling of the CJEU,³⁶ which clarified that:

- (a) Indiscriminate violence alone is exceptionally sufficient to trigger subsidiary protection when it reaches “such a high level that there are substantial grounds for believing that” a civilian would be exposed to it solely on account of presence on the territory; while
- (b) The requisite level of indiscriminate violence is lower when the applicant is able to show that he or she is specifically affected by reason of factors particular to his or her personal circumstances.

On the one hand, *Elgafaji* clarifies that the indiscriminate violence limb of serious harm does not require an “individual” threat to trigger subsidiary protection. For the purposes of legal certainty, ECRE recommends clarifying the wording of **Article 16(c)**.

On the other hand, the *Elgafaji* interpretation of the indiscriminate violence limb needs to be reconciled with the case-law of the European Court of Human Rights on Article 3 ECHR, mirrored in the ground foreseen in **Article 16(b)**. The Grand Chamber of the Strasbourg Court has firmly stated that “in the most extreme cases” where a person would face a real risk of ill-treatment simply by virtue of being present on the territory, Article 3 ECHR would be triggered.³⁷ Accordingly, **Article 16(b)**, which must reflect Article 3 ECHR, applies to all cases where the Article 3 ECHR test applies, and also covers extreme situations whereby violence is of such degree as to put any person present on the territory at risk.

Based on the principle of *effet utile*, the content and meaning of **Article 16(c)** must differ from that of **Article 16(b)**.³⁸ Accordingly, the protection of **Article 16(c)** would apply to asylum seekers who face a real risk of serious harm stemming from indiscriminate violence, which need not be as high as to trigger Article 3 ECHR – and thereby to fall under **Article 16(b)**. The Qualification Regulation should reflect the dialogue between the Strasbourg and Luxembourg Courts, since both courts’ interpretation of fundamental rights should inform the EU asylum *acquis*. In the light of ECtHR case law, **Article 16(c)** should extend subsidiary protection to serious threats stemming from indiscriminate violence, yet of lower intensity than that contemplated in *Sufi and Elmi v. United Kingdom* or *J.K. v. Sweden*.

ECRE recommends the following amendments:

³⁵ On this issue, see e.g. UNHCR, *Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, July 2011, available at: <http://goo.gl/TYfRCD>; G Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (OUP 2007), 327.

³⁶ CJEU, Case C-465-07 *Elgafaji*, Judgment of 17 February 2009.

³⁷ ECtHR, *Sufi and Elmi v. United Kingdom*, Application Nos 8319/07 and 11449/07, paras 216 and 218; *F.G. v. Sweden*, Application No 43611/11, Judgment of 23 March 2016, para 116; *J.K. v. Sweden*, Application No 59166/12, Judgment of 23 August 2016, para 86.

³⁸ See CJEU, *Elgafaji*, Opinion of Advocate-General Maduro, para 11.

Article 16(c): a serious *[deleted text]* threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Recital 36: As regards the required proof in relation to the existence of a serious *[deleted text]* threat to the life or person of an applicant, in accordance with relevant case law of the Court of Justice of the European Union *and the European Court of Human Rights*, determining authorities should not require the applicant to adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances. ***The required level of harm need not be equivalent to torture or inhuman or degrading treatment or punishment.*** *[deleted text]* However, the level of indiscriminate violence required to substantiate the application is lower if the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstance. Moreover, the existence of a serious *[deleted text]* threat should *[deleted text]* be established by the determining authorities solely on account of the presence of the applicant on the territory or relevant part of the territory of the country of origin provided the degree of indiscriminate violence characterising the armed conflict taking place reaches such a *[deleted text]* level that there are substantial grounds for believing that a civilian, returned to the country of origin or to the relevant part of country of origin, would, solely on account of his *or her* presence on the territory of that country or region, face a real risk of being subject to the serious threat.

Additionally, **Recital 35** codifies the guidance provided by the Court in *Diakité*,³⁹ relating to the distinction between an “internal armed conflict” under the Qualification Directive and the notion in international humanitarian law.

Exclusion, cessation, revocation and review grounds

1.6. Exclusion: Articles 12 and 18, Recitals 30-31

With every round of reform, the EU asylum *acquis* in the area of exclusion from international protection has become increasingly convoluted and distanced from the original and intended approach of the Refugee Convention. The proposal regrettably continues to exacerbate the incoherence of previous legislation, with selected provisions discussed below.

In relation to the application of Article 1D of the Refugee Convention, **Article 12(1)** maintains an incorrect understanding of Article 1D, by stating that a person falling under its scope “shall be excluded from being a refugee”. However, persons falling under Article 1D are not entitled to the “rights and benefits” of the Convention, but are nonetheless refugees under international law.⁴⁰ Therefore **Article 12(1)** should be amended to reflect the Convention.

ECRE recommends the following amendment to the first sentence of Article 12(1):

Article 12(1): A third-country national or a stateless person shall be excluded from *[deleted text]* **this Regulation** if:

Article 12(4) of the proposal introduces further guidance on the application of the exclusion clause relating to Palestinian refugees, under Article 1D of the Refugee Convention, stemming from the CJEU’s ruling in *El Kott*.⁴¹ ECRE welcomes the codification of the ruling in the Regulation.

³⁹ CJEU, Case C-285/12 *Diakité*, Judgment of 30 January 2014.

⁴⁰ See UN General Assembly Resolutions 194 (III) of 11 December 1948 and 2252 (ES-V) of 4 July 1967.

⁴¹ CJEU, Case C-364/11 *El Kott*, Judgment of 19 December 2012.

On the other hand, **Article 12(5)** of the proposal expands the exclusion clause based on Article 1F of the 1951 Refugee Convention and exacerbates complexity. Following on from the CJEU's ruling in *B and D*,⁴² and although **Article 12(2)(b)** provides that "particularly cruel actions" *may* be classified as serious non-political crimes, even if committed with an allegedly political objective, **Article 12(5)** provides that the following acts *must* be classified as serious non-political crimes:

- ❖ "Particularly cruel actions when the act in question is disproportionate to the alleged political objective;
- ❖ Terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective."

The mandatory classification of "particularly cruel actions when the act in question is disproportionate to the alleged political objective" as serious non-political crimes in **Article 12(5)(a)** is misleading. Since there is no international agreed definition of "particularly cruel actions", the level of severity of a crime needs to be assessed by the decision-maker on an individual basis, taking into account questions of proportionality. Therefore ECRE cautions against mandatory classification of acts as serious non-political crimes in a context where all circumstances of the individual case have to be assessed.

ECRE is also concerned with the proposed **Article 12(5)(b)**, which exacerbates the legal uncertainty surrounding the respective scopes of the "serious non-political crime" ground under **Article 12(2)(b)** and the "acts contrary to the purposes and principles of the United Nations" under **Article 12(2)(c)**. Though an *effet utile* logic militates in favour of different scopes of application,⁴³ the current Directive has already blurred the boundaries between the two grounds by holding that particularly cruel actions, "even if committed with an allegedly political objective, may be classified as serious non-political crimes".⁴⁴ This flows from the CJEU's rulings in *B and D* and *H.T.*⁴⁵

The European Asylum Support Office (EASO) judicial analysis on exclusion explains this as a normative bar, aimed at excluding "particularly heinous crimes... from the rights of the Refugee Convention traditionally granted to politically motivated offenders."⁴⁶ However, **the very existence of Articles 12(2)(b) and 12(2)(c) demonstrates that not all political offenders are protected by the Convention**. As explained in the aforementioned judicial analysis, acts of terrorism may fall under these provisions.⁴⁷

The proposal further conflates the scope of the two grounds in relation to terrorism. Terrorist acts are considered to be contrary to the purposes and principles of the United Nations under **Recital 30**, but *must* be considered a serious non-political crime under **Article 12(5)(b)** and **Recital 31**. Against that backdrop, ECRE fears that the Qualification Regulation risks further undermining the legal clarity of the exclusion clauses laid down in the Refugee Convention. At the same time, the notion of acts "disproportionate to the alleged political objective" in **Article 12(5)(a)** does not seem to take a principled approach to the exclusion of non-political offenders. The proposal's premise that a disproportionate act is classified as non-political by outweighing its political motive seems to be an artificial construct of the exclusion clauses, whereas sufficient scope for sanctioning heinous political crimes is already provided by **Article 12(2)**.

⁴² CJEU, Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, Judgment of 9 November 2010.

⁴³ See UK Supreme Court, *Al-Sirri v Secretary of State for the Home Department*, [2012] UKSC 54, Judgment of 21 November 2012, para 36.

⁴⁴ Article 12(2)(b) recast Qualification Directive.

⁴⁵ CJEU, Case C-373/13 *H.T.*, Judgment of 24 June 2015.

⁴⁶ EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)*, January 2016, 25.

⁴⁷ *Ibid*, 27-28.

ECRE recommends the deletion of Article 12(5) to avoid further conflation of political and non-political crimes covered by the exclusion clauses of the Regulation.

At the same time, **Article 12(6)** entails far-reaching consequences for the assessment of exclusion, as it requires the determining authority to consider the exclusion criteria before assessing the applicant's well-founded fear of persecution. Accordingly, ostensibly following on from the CJEU's ruling in *B and D*,⁴⁸ and domestic case law from countries such as the **UK**,⁴⁹ the exclusion grounds "shall not be subject to any additional proportionality assessment in relation to the particular case."

On the one hand, the Qualification Regulation must be **read in the light of general principles of EU law, which include the principle of proportionality**.⁵⁰ On the other hand, ECRE stresses that the assessment of the relevance of proportionality is much more cautiously done in *B and D* than what seems to be incorporated in the proposal. The CJEU emphasises that "the seriousness of the acts committed" will determine whether the person must be excluded from refugee status,⁵¹ and to determine such seriousness the determining authority will have "taken into account all the circumstances surrounding the acts in question and the situation of that person..."⁵² Accordingly, ***B and D* does not hold that the consequences of a person's exclusion are irrelevant to the application of the exclusion clauses.**

The inaccurate meaning given to in *B and D* also breaks away from a contextual interpretation of the Refugee Convention, as done among others by the Supreme Court of **Canada** or the International Criminal Tribunal for ex-Yugoslavia.⁵³ At the same time, ECRE notes that such a provision is not reflected in the exclusion clauses applicable to subsidiary protection under **Article 18**. The consequence of exclusion is the denial of international protection to persons who otherwise qualify as refugees and potentially of protection from removal to a country where they may face persecution. In this regard, the proportionality test required under international refugee law implies an assessment of the likelihood of persecution feared against the seriousness of the act committed.⁵⁴ By ruling out any "additional" proportionality assessment in relation to the particular case, **Article 12(6)** translates the CJEU's interpretation according to which proportionality is already implied in assessing the seriousness of the acts committed and the individual's responsibility. However, in ECRE's view this constitutes an incomplete reading of States' obligations under the Refugee Convention, which require them to equally assess proportionality of exclusion with regard to the risk a person faces in case of removal. Therefore, this provision should be deleted.⁵⁵

It should be noted that the CJEU engages in a proportionality assessment when assessing whether an individual poses a threat to public order or national security.⁵⁶ In *H.T.*, the Court stressed the relevance of proportionality for assessing whether to revoke a residence permit on such grounds.⁵⁷

ECRE recommends the deletion of Article 12(6).

⁴⁸ Explanatory Memorandum, 13.

⁴⁹ UK Court of Appeal, *AH (Algeria) v Secretary of State for the Home Department*, Judgment of 14 October 2015, denying the applicability of expiation for an applicant's past crimes in the assessment of exclusion.

⁵⁰ ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, 17.

⁵¹ CJEU, *B and D*, para 108.

⁵² *Ibid*, para 109.

⁵³ Canadian Supreme Court, *Pushpanathan*, Judgment of 4 June 1998; International Criminal Tribunal for ex-Yugoslavia, *Kupreskic*, IT-95-16, Judgment of 14 January 2000.

⁵⁴ See UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, 10-11.

⁵⁵ ECRE, *Position on exclusion from refugee status*, March 2004, available at: <http://goo.gl/hSS7mg>, 20; G Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (OUP 2007), 184.

⁵⁶ See e.g. CJEU, Case C-601/15 PPU *J. N.*, Judgment of 15 February 2016.

⁵⁷ See e.g. CJEU, Case C-373/13 *H.T. v Land Baden-Württemberg*, Judgment of 24 June 2015, para 92.

1.7. Cessation: Articles 11 and 17, Recitals 40-41

The proposal maintains the existing provisions of the Directive on cessation, while **Articles 11(2)(b) and 17(2)(b)** add a requirement on the determining authority to “base itself on precise and up-to-date information obtained from all relevant sources”, including the common country of origin information and analysis of the EU Agency for Asylum or UNHCR guidance.

The proposal has also introduced an additional guarantee for beneficiaries whose status has ceased due to a change of circumstances in the country of origin. **Articles 14(5) and 20(3)** require the person to be given a “grace period” of 3 months before status is revoked on cessation grounds, to allow him or her to apply for a residence permit on other grounds. This is explained as a deference of revocation for a “reasonable period” under **Recital 41**.

1.8. Revocation, non-renewal and review: Articles 14, 15, 20, 21 and 23, Recital 39

One of the core reforms brought about by the Commission proposal concerns Member States’ power to revoke, refuse to renew, and review international protection status. Similar to the current Directive,⁵⁸ **Articles 14(1) and 20(1)** impose revocation or non-renewal of status where:

- (a) Cessation of status applies;
- (b) Exclusion from status should have been applied;
- (c) Status was granted on the basis of misrepresentation or omission of facts.

However, the optional grounds for revoking or refusing to renew refugee status under the Directive, relating to persons deemed to be a threat to public order or, having been convicted of a particularly serious crime, constitute a danger to the community, are now rendered mandatory under **Article 14(1)(d)-(e)**. As previously argued by ECRE,⁵⁹ **these grounds contravene the 1951 Refugee Convention and Article 78(1) TFEU**, as they fall outside the scope of the exclusion clauses foreseen in the Convention. Through these grounds, the Qualification Regulation would introduce more grounds for exclusion than those permitted by international refugee law. One example can be drawn from participation in associations which support terrorist activities. Though participation *per se* has not been deemed sufficient by the CJEU to trigger exclusion in *B and D*, it would suffice to trigger revocation on public order grounds under **Recital 45**, thereby leading the person to be excluded from refugee status.

It should also be noted that the compatibility of the current provisions of the Directive with the Refugee Convention will be assessed by the CJEU, following a preliminary reference by the **Netherlands**.⁶⁰

ECRE recalls that the two aforementioned grounds mirror the wording of the derogation to the protection of *refoulement* of refugees under Article 33(2) of the Refugee Convention. This means that in cases relating to a threat to public order or a danger to the community following a serious conviction, the **Convention allows refugees to be refouled, without excluding them from refugee status**. Yet, not only does the proposal fail to address the incompatibility of the Directive with international refugee law, it exacerbates incoherence in EU law by obliging Member States to revoke or refuse to renew international protection status when **Article 23(2)** applies; that is, when a beneficiary is denied protection from *refoulement* on the exact grounds mentioned above. **Article**

⁵⁸ Articles 14(1) and (3), and 19(1) and (3) recast Qualification Directive.

⁵⁹ ECRE, *Comments on the European Commission proposal to recast the Qualification Directive*, March 2010, 17; *Position on exclusion from refugee status*, March 2004, 9.

⁶⁰ CJEU, Case C-391-16 *M*, Reference of 29 August 2016, available in Dutch at: <http://goo.gl/MmVcWd>.

23(2) equally reflects an erroneous conflation of expulsion of beneficiaries with exclusion from international protection status.

In order to align the Qualification Regulation with the Refugee Convention and the Treaty, ECRE proposes the following amendments:

Articles 14(1)(d)-(f), 14(2)-(3) and 20(1)(d) should be deleted.

Article 23(2): Where not prohibited by the international obligations referred to in paragraph 1, refugee or a beneficiary of subsidiary protection may be refouled, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that Member State.

[deleted text]

Furthermore, through **Articles 15 and 21**, the proposal intends to introduce a systematic review of international protection status. The reasoning of the Commission seems to be based on the assumption that longer-term protection renders the EU a more attractive destination to other parts of the world:

“The absence of checks on the continued need for protection gives the protection a de facto permanent nature, thereby creating an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places, including in countries closer to their countries-of-origin.”⁶¹

Yet, the proposal incorrectly implies that there is a determinable, temporary period during which states must provide international protection and integration. As previously argued by ECRE,⁶² the assumption that the purpose of protecting refugees so long as risks prevail in their country of origin is in contradiction with traditions of permanent resettlement in countries of asylum and seems to ignore the reality of displacement phenomena leading to forced migration. **Most contemporary crises of displacement have been described as protracted**, given that those affected have been displaced for long periods of time.⁶³ Displacement periods tend to last on average 10 years for internally displaced persons (IDPs) and as many as 25 years for refugees,⁶⁴ as reiterated by the European Commission’s humanitarian services.⁶⁵ Permanent residence is also offered by other regions such as the **US** or **Canada**.⁶⁶

Articles 15 and 21 propose mandatory review of status when guidance from the EU Agency for Asylum suggests a significant change in the country of origin that could impact protection needs of the person, or upon the renewal of his or her residence permit; that is the first renewal of a refugee permit and the first and second renewal of a subsidiary protection permit. However, there are strong factors

⁶¹ Explanatory Memorandum, 4.

⁶² ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, available at: <http://goo.gl/KIK2vB>, 2.

⁶³ European Commission, *Lives in Dignity: From Aid-dependence to Self-reliance: Forced Displacement and Development*, COM(2016) 234, 26 April 2016, 3. See further Gil Loescher & James Milner, *Protracted Refugee Situations: Domestic and international security implications* (Adelphi Books 2005), mentioning that 70% of the world’s refugees are in protracted situation.

⁶⁴ UNHCR, *World at War: Global Trends 2014*, June 2015.

⁶⁵ European Commission, *Lives in Dignity: From Aid-dependence to Self-reliance: Forced Displacement and Development*, COM(2016) 234, 26 April 2016, 3.

⁶⁶ ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, 2.

militating against the introduction of mandatory review, drawn from the very objectives of the reform of the CEAS:⁶⁷

- ❖ **Administrative efficiency:** a systematic review of protection needs would prove highly resource-intensive for asylum authorities in Member States. In light of these difficulties, the privileged process of obtaining a permanent residence permit (*Niederlassungserlaubnis*) for refugees in **Germany**, by far the largest host of refugees in the EU, has been simplified as of August 2015, as the local Aliens Offices no longer need a formal notification from the Federal Office for Migration and Refugees (BAMF) of the outcome of a status review before granting the permit; permanent residence is granted unless the BAMF has issued a notification to the contrary.⁶⁸ Member States have more generally raised the problem of new administrative burdens stemming from systematic review of status during the Commission consultations.⁶⁹
- ❖ **Integration:** a systematic reconsideration of protection status would severely reduce protected persons' security and undermine their prospects of integration in host communities. Stable residence is an essential precondition for effective integration,⁷⁰ but is not necessarily taken into consideration in the EU's integration strategy. **Both Member States and civil society organisations have warned against undermining beneficiaries' integration prospects** by giving them a perception of temporary residence during the Commission consultations.⁷¹

In light of these concerns, ECRE firmly opposes the introduction of an obligation to review refugee or subsidiary protection status. It is also worth noting that the majority of Member States currently refrain from any systematic use of such review.

ECRE recommends the deletion of Articles 15 and 21, and Recital 39.

2. Content of international protection

2.1. Residence permits: Articles 2(12), 22(3) and 26, Recital 37

The proposal standardises the format of residence permits issued to beneficiaries of international protection in **Articles 2(12) and 26(1)**. It also clarifies in **Article 26(1)** that a residence permit must be issued to the beneficiary of protection within 30 days of the decision granting international protection, contrary to the obligation to issue a permit "as soon as possible" under Article 24 of the current Directive. In the absence of a clear-cut time limit for Member States' obligation to issue a permit, practice across the EU has revealed significant delays in several countries. While beneficiaries in **Bulgaria, Sweden, Hungary** or **Italy** have faced delays of at least a month before issuing a residence permit, delays of several months have been reported in **Cyprus** and **Malta**, or of up to one year in **France** in some cases.⁷² Accordingly, ECRE welcomes the introduction of a 30-day time limit within which Member States would be required to grant a residence permit. At the same time, however, **Article 22(3)** makes the granting of benefits with regard to access to employment and social security conditional on the prior issuing of a residence permit, within the limits set by international obligations. Where States make use of the 30-day time limit to issue a residence permit, this may result in beneficiaries of international protection being deprived of social security benefits, potentially

⁶⁷ *Ibid*, 7-8.

⁶⁸ *Ibid*.

⁶⁹ Explanatory Memorandum, 10-11.

⁷⁰ ECRE, *The Way Forward: Towards the Integration of Refugees in Europe*, July 2005, 3; UNHCR, *Note on the Integration of Refugees in the European Union*, May 2007, 6.

⁷¹ Explanatory Memorandum, 10.

⁷² ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, 5-6.

placing them in a situation of destitution contrary to the Charter. ECRE therefore strongly recommends deleting the link between access to social security and the issuance of a residence permit.

On the other hand, the proposal regrettably fails to address a critical flaw of the Directive, relating to the divergence in the duration of residence permits awarded to refugees and subsidiary protection beneficiaries. **Article 26(1)(a)** refers to a period of validity of 3 years for refugee residence permits, renewable by 3-year periods. On the other hand, **Article 26(1)(b)** provides for a 1-year validity period for subsidiary protection residence permits, which would be renewable by 2-year periods. This architecture retains an unjustifiable distinction between the two statuses, based on an unjustified assumption that subsidiary protection is of more temporary nature than refugee status.⁷³ The Commission itself has acknowledged that:

“When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.”⁷⁴

The elimination of unjustified distinctions in the treatment of refugees and subsidiary protection beneficiaries vis-à-vis residence permits also finds support from Member State practice. As many as six countries (**Finland, Greece, Italy, Luxembourg, Malta, the UK and the Netherlands**) have opted for more favourable standards and provided a uniform duration of residence for both statuses.⁷⁵ On the other hand, in countries where the distinction between statuses matters in terms of residence rights, the prospect of lower rights for subsidiary protection beneficiaries has prompted asylum authorities to shift their approach with regard to the type of protection granted to key nationalities. An illustrative example of this can be found in **Germany**, which remains by far the largest host state for Syrian nationals. The German Federal Office for Migration and Refugees (BAMF) had an overwhelming rate of 95.7% refugee status and a mere 0.06% rate of subsidiary protection for Syrians in 2015.⁷⁶ In the first nine months of 2016, this has shifted to 65.4% refugee status and 34.3% subsidiary protection,⁷⁷ raising sharp criticism from civil society organisations as regards the **quality of asylum decision-making**.⁷⁸ This also leads to **increasing appeals against erroneous refusals of refugee status**, in which German Administrative Courts have accepted that Syrians are entitled to refugee status.⁷⁹ As many as 17,000 appeals have been filed before the courts to correct the first instance grant of subsidiary protection.⁸⁰

Against this backdrop, ECRE stresses the need to **align the duration of residence permits issued to both international protection statuses, as there is no objective reason for assuming**

⁷³ On this point, see ECRE, *Comments on the European Commission proposal to recast the Qualification Directive*, March 2010, available at: <http://goo.gl/SuxckF>, 12.

⁷⁴ European Commission, *Proposal for a [recast Qualification Directive] – Explanatory Memorandum*, COM(2009) 551, 21 October 2009, 8.

⁷⁵ ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, 4.

⁷⁶ BAMF, *Asylum statistics – December 2015*, available in German at: <http://goo.gl/d5BE7X>.

⁷⁷ BAMF, *Asylum statistics – September 2016*, available in German at: <https://goo.gl/OPV74B>.

⁷⁸ See e.g. ProAsyl, ‘Neue Anerkennungspraxis verwehrt Flüchtlingsschutz und wird Gerichte überlasten’, 31 August 2016, available in German at: <http://goo.gl/BFAPSa>.

⁷⁹ See e.g. Administrative Court of Regensburg, Decision RN 11 K 16.30889, 6 July 2016; Administrative Court of Schleswig, Decision 12 A 149/16, 15 August 2016. For an overview, see Informationsverbund Asyl und Migration, ‘Neue Gerichtsentscheidungen zum Schutzstatus Asylsuchender aus Syrien’, 25 August 2016, available in German at: <http://goo.gl/GHslcF>.

⁸⁰ See Sueddeutsche Zeitung, ‘17 000 Flüchtlinge klagen auf höheren Schutzstatus in Deutschland’, 18 October 2016, available in German at: <https://goo.gl/U2pJqq>.

subsidiary protection to be of a more temporary nature than refugee status. Uniform rules on permits for the two statuses will also have a highly beneficial impact on Member States' administrative resources, as they reduce incentives for litigation by persons whose status is deemed incorrectly determined. This was the main driver of the one-status system applied in the **Netherlands**.

Furthermore, ECRE recommends that Member States be continued to be allowed to grant a residence permit for longer than three years, to foster effective integration by providing beneficiaries with greater security of residence. Currently, as many as 17 Member States provide refugees with residence permits longer than three years.⁸¹

At the same time, the proposal broadens the grounds for revoking or refusing to renew a residence permit issued to a beneficiary. This is foreseen in cases where status is revoked or not renewed in accordance with **Articles 14 and 20**, or where *refoulement* is permitted in accordance with **Article 23(2)**, as was previously the case. However, in addition to those grounds, whereas the recast Qualification Directive permitted the revocation or non-renewal of a permit where "compelling reasons of national security or public order" were applicable, **Article 26(2)(c)** only refers to "reasons of national security or public order" and has deleted the term "compelling". This deletion seems unjustifiable, in the absence of any related explanation in the Explanatory Memorandum or the Preamble of the proposal. It appears even more so given that the corresponding provision relating to travel documents in **Article 27(3)** retains the term "compelling".

ECRE recommends the following amendments to Article 26:

Article 22(3); Within the limits set by international obligations, granting of benefits with regard to access to employment **[deleted text] may** require the prior issuing of a residence permit.

Article 26: 1. No later than 30 days after international protection has been granted, a residence permit shall be issued using the uniform format as laid down in Regulation (EC) No 1030/2002, **which must be valid for at least 3 years and renewable [deleted text]**.

2. A residence permit shall not be renewed or shall be revoked in the following cases:

(a) where competent authorities revoke, end or refuse to renew the refugee status of a third-country national in accordance with Article 14 and the subsidiary protection status in accordance with Article 20;

(b) where Article 23(2) is applied;

(c) where **compelling** reasons of national security or public order so require.

3. When applying Article 14(5) and 20(3), the residence permit shall only be revoked after the expiry of the three month period referred to in those provisions.

2.2. Travel documents: Article 27, Recital 37

Article 27 of the proposal introduces a minimum validity of 1 year for travel documents issued to beneficiaries of international protection, in accordance with the technical standards elaborated in Council Regulation (EC) No 2252/2004 on standards relating to travel documents issued by Member States.⁸² However, similar to ECRE's observations relating to residence permits above, such a short duration for travel documents is liable to create unnecessary administrative costs for both Member States and beneficiaries of protection. At the same time, the majority of Member States have opted for far more favourable standards in terms of duration of travel documents issued to both refugees and

⁸¹ ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, 10.

⁸² Explanatory Memorandum, 16.

subsidiary protection beneficiaries; five years in **Austria, Spain, Greece, Italy** and the **Netherlands**, while the **UK** and **Ireland** have 10-year travel documents for refugees.⁸³

With a view to avoiding undue administrative burden and to allowing beneficiaries of international protection effective opportunities to travel, in line with the precepts of the Refugee Convention, ECRE believes that the minimum duration of the travel document should be 3 years, reflecting the minimum duration of the residence permit.

ECRE recommends the following amendment to Article 27:

Article 27: 1. Competent authorities shall issue travel documents to beneficiaries of refugee status, in the form set out in the Schedule to the Geneva Convention and with the minimum security features and biometrics outlined in Council Regulation (EC) No 2252/2004. Those travel documents shall be valid for at least **[deleted text] three years**.

2. Competent authorities shall issue travel documents with the minimum security features and biometrics outlined in Regulation (EC) No 2252/2004 to beneficiaries of subsidiary protection status who are unable to obtain a national passport. Those documents shall be valid for at least **[deleted text] three years**.

3. The documents referred to in paragraphs 1 and 2 shall not be issued where compelling reasons of national security or public order so require.

2.3. Employment and recognition of qualifications: Articles 30 and 32, Recitals 48-49

ECRE welcomes the reinforcement of Member States' obligations to guarantee equal treatment to nationals, as well as access to vocational training, advice services and other related opportunities for beneficiaries of international protection, under **Article 30**. A similar welcome reform is proposed in relation to the recognition of qualifications in **Article 32**.

2.4. Freedom of movement: Article 28

Article 28(1) brings about a welcome clarification of the scope of the right to free movement within the territory of the Member State which granted protection. In line with the CJEU's ruling in *Alo and Osso*,⁸⁴ interpreting the scope of Article 33 of the recast Qualification Directive, the proposal clarifies that the right to free movement within the territory also encompasses the beneficiary's "right to choose their place of residence in that territory". **Article 28(1)** also proposes a welcome incorporation of Article 26 of the Refugee Convention, as it refers to the applicability of conditions and restrictions such as those provided for other third-country nationals legally resident "who are in a comparable situation". Following on from the Court's reasoning in *Alo and Osso*,⁸⁵ the proposal precludes the imposition on subsidiary protection beneficiaries of residence conditions that are not imposed on refugees. In that regard, ECRE welcomes the proposal's aim to **align free movement rights guaranteed to both refugees and subsidiary protection beneficiaries**.

On the other hand, **Article 28(2)** allows for the imposition of residence conditions attached to social security or social assistance benefits "only where those residence conditions are necessary to facilitate the integration of the beneficiary". In ECRE's view, this paragraph does not appropriately reflect the CJEU's reasoning in *Alo and Osso*. The Court found that restrictions may be permissible on the ground that persons who legally reside in a Member State for non-protection-related reasons can be assumed to be sufficiently integrated given that they are generally required to have sufficient

⁸³ ECRE, *Unravelling Travelling: Travel documents for beneficiaries of international protection in Europe*, AIDA Legal Briefing No 8, October 2016, available at: <https://goo.gl/QwJbhc>.

⁸⁴ CJEU, Joined Cases C-443/14 and C-444/14 *Alo and Osso*, Judgment of 1 March 2016, paras 28-37.

⁸⁵ *Ibid*, paras 54-56.

means of subsistence, and would only be entitled to benefits after a period of residence.⁸⁶ The assessment of whether beneficiaries of protection are in a “comparable situation” with other third-country nationals is entrusted to Member States. Yet the Court’s assumption does not seem to be reflected in the EU’s policy framework relating to integration. For instance, nowhere in the European Commission’s recent Action Plan on Integration are beneficiaries of international protection identified as being in a less favourable position compared to other third-country nationals with longer residence, in terms of integration prospects. Quite to the contrary, the Action Plan seeks to ensure that all persons “who are rightfully and legitimately in the EU, regardless of the length of their stay, can participate and contribute...”⁸⁷

ECRE therefore questions the assumption that beneficiaries of international protection are not in a “comparable situation” with other third-country nationals legally residing in Member States as far as integration needs are concerned. This could be further clarified in **Article 28(2)** through a reference to the general provision in **Article 28(1)**.

ECRE recommends the following amendment to Article 28(2):

Article 28(2): Within the limits set by international obligations, residence conditions *in accordance with paragraph 1* may be imposed on a beneficiary of international protection who receives certain specific social security or social assistance benefits only where those residence conditions are necessary to facilitate the integration of the beneficiary in the Member State that has granted that protection.

2.5. Social assistance: Articles 2(18) and 34, Recital 51

Article 34(1) proposes a welcome rule of equal treatment with Member State nationals with regard to social assistance, which reflects Article 23 of the Refugee Convention.

However, **Article 34(2)** of the proposal maintains the discretion left by the Directive to Member States to limit the scope of social assistance guaranteed to beneficiaries of subsidiary protection to “core benefits”. Under **Article 2(18)**, core benefits entail minimum income support, assistance in case of illness, pregnancy and parental assistance, if similar benefits are granted to nationals. **Recital 51** confirms that “as regards beneficiaries of subsidiary protection, Member States should be given some flexibility”. However, no justification is provided for this difference in treatment between categories of beneficiaries of international protection, although it is likely related to the different length of residence afforded to the two categories, as is done in other instruments of the EU migration *acquis*.⁸⁸

Echoing its observations relating to residence permits, discussed in Section 2.1 above, ECRE opposes discrimination between refugees and subsidiary protection beneficiaries as regards the content of protection granted. **Beneficiaries of subsidiary protection should not be assumed to have more temporary protection needs than refugees and should thus be entitled to equal social assistance.** As stated above, ECRE recalls that harmonising the rules between the two statuses will also have a highly beneficial impact on Member States’ administrative resources, as they reduce incentives for litigation by persons whose status is deemed incorrectly determined. This was the main driver of the one-status system applied in the **Netherlands**.

⁸⁶ *Ibid*, para 63.

⁸⁷ European Commission, *Action Plan on the integration of third-country nationals*, COM(2016) 377, 7 June 2016, 2.

⁸⁸ See e.g. Recital 46 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Seasonal Workers Directive), OJ 2014 L94/375, justifying the exclusion of seasonal workers from certain forms of social assistance “due to the temporary nature of the stay of seasonal workers”.

At the same time, **Article 34(1)** introduces a problematic possibility for Member States to condition the grant of certain social assistance upon the effective participation in integration measures. This is discussed in more detail in Section 2.6 below.

ECRE recommends the following amendment to Article 34:

Article 34: Beneficiaries of international protection shall enjoy equal treatment with nationals of the Member State that has granted protection as regards social assistance. **[deleted text]**

2.6. Integration measures: Article 38, Recital 53

Article 38(2) of the proposal permits Member States to oblige beneficiaries of international protection to participate in integration measures. This is presented as a corresponding measure to Member States' duty to provide access to integration facilities in **Article 38(1)**.⁸⁹ While ECRE does not oppose the compulsory character of integration measures *per se*, the conditionality of certain benefits upon attendance of integration measures should be resisted. The corresponding right for Member States to deprive persons from social assistance under **Article 34(1)** is left at their discretion and could lead to abusive practice, driving Member States to focus on *coercive integration conditions* rather than strongly investing in *integration measures*, in accordance with the precepts of the Action Plan on Integration. At the same time, the notion of "effective participation" in integration measure is not sufficiently clear: the term could be read either as a performance obligation on the beneficiary to participate, or a result obligation to have effectively succeeded in integration measures e.g. by passing civic integration examinations or language tests.

On the other hand, compulsory integration measures should fulfil a number of necessary prerequisites. Firstly, integration measures should be free of charge and accessible throughout the territory for beneficiaries of international protection. Secondly, the beneficiary's individual hardship shall be taken into account,⁹⁰ in line with jurisprudence of the CJEU.⁹¹ However, whereas the Explanatory Memorandum refers to such an obligation, this is not prescribed in the Article or **Recital 53**. The Regulation should clarify the need for Member States' positive obligation to invest in integration measures, to take into consideration the beneficiary's individual circumstances and needs, such as level of education and literacy, and to be gender-sensitive.

ECRE recommends the following amendments to Article 38(1) and Recital 53:

Article 38(1): In order to facilitate the integration of beneficiaries of international protection into society, beneficiaries of international protection shall have access to integration measures provided by the Member States, in particular language courses, civic orientation and integration programs and vocational training, which **are free of charge, easily accessible and** take into account their specific needs.

Recital 53: In order to facilitate the integration of beneficiaries of international protection into society, beneficiaries of international protection shall have access to integration measures, modalities to be set by the Member States. **Integration measures should be free of charge and easily accessible throughout the territory of Member States, and take into account the specific needs of beneficiaries, in particular in view of their gender, age and level of education and literacy.** Member States may make the participation in such integration measures, such as language courses, civic integration courses, vocational training and other employment-related courses compulsory.

⁸⁹ Explanatory Memorandum, 17.

⁹⁰ *Ibid.*

⁹¹ CJEU, Case C-579/13 *P and S*, Judgment of 4 June 2015, para 49.

3. Prevention of secondary movements

3.1. Link to the Dublin system: Article 29, Recitals 42-43

The proposal clarifies that beneficiaries of international protection do not have the right to take up residence in another Member State by virtue of their protection status. The principal consequence of irregular secondary movement is return to the Member State which granted protection. Under **Article 29(2)**, this process takes place under the Dublin Regulation, which will be reformed accordingly to encompass beneficiaries of international protection in its Article 20(1)(e).

ECRE reiterates that beneficiaries of international protection should be granted freedom of movement across the EU, in keeping with the Article 78(2)(a) TFEU objective of a “uniform asylum status, valid throughout the Union”. The proposal regrettably retracts from earlier political commitments towards mutual recognition of positive asylum decisions.⁹²

In the meantime, however, ECRE supports the clarification of linkages between the Qualification Regulation and the Dublin Regulation. Through **Article 29**, the proposal fills a legal gap in the EU asylum *acquis*, which previously led Member States to transfer back beneficiaries of international protection under bilateral readmission agreements outside the scope of the Common European Asylum System. With this reform, transfers of beneficiaries will be subject to the procedural guarantees applicable in the Dublin system, not least with regard to time limits, *non-refoulement* safeguards and constraints on the use of detention.

3.2. Amendment of the Long-Term Residence Directive: Article 44, Recital 44

Article 44 proposes an amendment to the Long-Term Residence Directive, with a view to further restricting the possibility for refugees and subsidiary protection beneficiaries to lawfully move within the EU. Under the proposal, the calculation of the residence period of 5 years after which a beneficiary would be eligible for long-term resident status would restart every time the person is found to be unlawfully present in a Member State other than the one that granted protection.

Article 44 confirms an inappropriate approach to addressing secondary movements of beneficiaries of international protection. Rather than seeking to confront the reasons why people move onwards after being granted status in a country, the proposal seeks to restrict irregular movements by “providing for additional disincentives”.⁹³

Under the 1951 Refugee Convention, refugees should receive at least the level of protection afforded to other foreigners in a comparable situation in the host country. The proposal therefore introduces a highly concerning sanction against beneficiaries of international protection for secondary movements, whereas other categories of third-country nationals are not subject to sanctions for irregular movement within the Union.

As previously argued by ECRE, even the current design of the Long-Term Residence Directive “cannot be seriously considered as an instrument that would allow for the free movement of

⁹² European Commission, *Policy Plan on Asylum*, COM(2008) 360, 17 June 2008, 6; European Council, *Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ 2010 C 115/1, para 6.2.1; Council of the European Union, *18-month programme of the Council (1 January 2013 – 30 June 2014)*, 17426/12 POLGEN 213, 7 December 2012, 111. For a detailed analysis see ECRE, *Mutual Recognition of positive asylum decisions and the transfer of international protection status within the EU*, Discussion Paper, November 2014

⁹³ Explanatory Memorandum, 5.

beneficiaries of international protection.”⁹⁴ Instead of coercing beneficiaries to reside in countries where their rights are not guaranteed or integration prospects are not offered, the proposal should provide positive incentives for persons to comply with the rules of the Dublin system. An incentive-based approach would reflect the Commission’s announcement in its Communication on the Reform of the CEAS:

“In addition, further initiatives could be taken in the longer term to develop the mutual recognition of the protection granted in the different Member States which could be the basis for a framework for transfers of protection.”⁹⁵

In accordance with the 1951 Refugee Convention, refugees should in fact receive the most favourable treatment afforded to non-nationals for a number of rights, such as association and employment.⁹⁶ In keeping with this approach, ECRE recommends **lowering the requisite residence period for beneficiaries of international protection to be eligible for long-term resident status**. This recommendation has also been made by the European Parliament during consultations with the Commission.⁹⁷

Risks of disproportionate distribution inequalities across Member States as a result of swifter access to long-term resident status should be nuanced, against the backdrop of the proposal’s stronger emphasis on integration measures. An effective implementation of integration policies across all countries would encourage, through incentives rather than sanctions, beneficiaries to stay and rebuild livelihoods in the country granting them protection, rather than moving onwards.

ECRE recommends the following amendments to Article 44(1):

Article 44(1): In Article 4 of Directive 2003/109/EU, **[deleted text] paragraph 1a is amended as follows:**

1. Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within **their** territory for five years immediately prior to the submission of the relevant application.

1a. By way of derogation from paragraph 1, Member States shall grant long-term resident status to beneficiaries of international protection who have resided legally and continuously within their territory for two years immediately prior to the submission of the relevant application.

Member States shall not grant long-term resident status on the basis of international protection in the event of the revocation of, ending of or refusal to renew international protection as laid down in [the Qualification Regulation].

[deleted text]

4. The transfer of international protection status between Member States

As highlighted in **Recital 42** of the Regulation, beneficiaries of international protection can apply to reside in a Member State other than the Member State which granted protection, in accordance with relevant EU rules, notably on the conditions of entry and residence of third-country nationals for the

⁹⁴ ECRE, *Mutual recognition of positive asylum decisions and the transfer of international protection status in the EU*, November 2014, available at: <http://goo.gl/KJf7JT>, 17-18.

⁹⁵ European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM(2016) 197, 6 April 2016, 11.

⁹⁶ Articles 15 and 17(1) Refugee Convention.

⁹⁷ Explanatory Memorandum, 10. See also Member States’ contributions to an earlier study on this issue: Nina Lassen *et al*, *The transfer of protection status in the EU, against the background of a CEAS and the goal of a uniform status, valid throughout the Union, for those granted asylum*, DG JAI/A2/2003/001, 25 June 2004.

purposes of highly skilled employment, and national rules. However, it is emphasised that this does not imply any transfer of the international protection and related rights. Under the amended Long Term Residence and the proposed Blue Card Directive,⁹⁸ both refugees and subsidiary protection beneficiaries can apply for the relevant permit. However, should a beneficiary apply and obtain a residence permit under any of the various schemes available, an immediate concern will be who is responsible for his or her status, and at what stage does another Member State become responsible.

There is a Council of Europe instrument that governs the transfer of protection status, but it is only ratified by 13 European countries and 11 Member States.⁹⁹ Furthermore, some Member States dispute the content of what protection aspects they are responsible for, which is disconcerting for the beneficiary of protection who obtains a resident permit and moves to a second Member State. The national laws that govern the transfer of international protection are equally limited.¹⁰⁰ Even if the European Agreement is ratified by all Member States and even if there is a consensus in relation to which protection aspects Member States are responsible for, it does not deal with the transfer of persons with subsidiary protection. Moreover, under the European Agreement on the Transfer of Responsibility for Refugees, there is no obligation on the second Member State to automatically accept this application.

A fundamental question arises when a beneficiary moves to another Member State and intends to settle there for a significant period of time but where there is no international or national scheme which governs the transfer of protection to the second Member State. Does the first Member State still have an obligation to continue to provide protection to a person who is not living within their jurisdiction and does not intend to be for the foreseeable future due to the fact that they have the relevant residence permit in another Member State?

Under **Articles 15 and 21** of the current proposal, Member States are obliged to review the status of the beneficiary “when reviewing, for the first time, the residence permit issued to a refugee”¹⁰¹ and “when reviewing, for the first and second time, the residence permit issued to a beneficiary of subsidiary protection.” Furthermore, as discussed above, the Regulation envisages a short duration for residence permits which need to be renewed on a frequent basis by the Member State that granted the protection. Should the review as currently proposed remain, contrary to the reservations of ECRE, it is very impractical for the beneficiary to have his or her protection status reviewed in the first Member State which he or she may no longer be living in by virtue of having another type of residence permit in another Member State.

Under the current amended Long Term Residence Directive¹⁰² and under the proposed Blue Card Directive,¹⁰³ the second Member State in which the beneficiary is now residing, has the ability to revoke the relevant residence permit. Both instruments provide that where a Member State withdraws or does not renew an EU Blue Card or a Long Term Residence Permit issued to a beneficiary of international protection, it shall request the first Member State to confirm whether the person

⁹⁸ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (hereafter 'proposal for a Blue Card Directive')*, COM(2016) 378, 7 June 2016.

⁹⁹ 1980 Council of Europe Agreement on Transfer of Responsibility for Refugees, available at: <https://goo.gl/5rFq3Q>. These countries include: Denmark, Finland, Germany, Italy, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom, Switzerland and Norway. The UK withdrew from the agreement in 2013, see UK Home Office, *Transfer of refugee status – interim notice*, available at: <https://goo.gl/0uikXI>.

¹⁰⁰ France, Austria, Switzerland, Belgium and the Netherlands have all concluded additional agreements on the transfer of refugee status. For more information see ECRE, *Unravelling Travelling, Travel documents for beneficiaries of international protection*, AIDA Legal Briefing No 8, October 2016, available at: <http://bit.ly/2eMK2WH>.

¹⁰¹ Article 15(b) proposal for a Blue Card Directive.

¹⁰² Article 12 Long Term Residence Directive.

¹⁰³ Article 22 proposal for a Blue Card Directive.

concerned is still a beneficiary of international protection in the first Member State. If this is the case, the person concerned will be “expelled to that Member State”.¹⁰⁴ However, the (second) Member State that adopted the non-renewal / revocation decision, shall retain the right to remove, in accordance with its international obligations, “the third country national to a country other than the Member State which granted international protection” where the person fulfils the conditions specified in Article 21(2) of the recast Qualification Directive.¹⁰⁵ The second Member State is still bound by the principle of *non-refoulement* as well as their obligations under EU law and the ECHR. **The application of these provisions implies the mutual recognition of the first Member State’s positive status determination decision.**

Furthermore, both the amended Long Term Residence Directive and the proposed amended Blue Card Directive intend that the second Member State can remove a beneficiary of international protection when the conditions laid down in Article 21(2) of the Qualification Directive are met. In effect this means that the second Member State can *refoule* a beneficiary (in accordance with their international obligations) despite not being the Member State that granted protection. As a result, **there is already, to some degree, a transfer of international protection** obligations taking place between Member States. ECRE has serious reservations about a Member State’s ability to carry out such an assessment, particularly when the second Member State does not have any obligation to apply any other provisions of the recast Qualification Directive (or proposed Qualification Regulation), and particularly where there is no EU instrument governing the transfer of responsibility for protection between Member States. Both the amended Long Term Residence Directive¹⁰⁶ and the proposed amended Blue Card Directive¹⁰⁷ state that the transfer of responsibility for protection of beneficiaries of international protection is outside the scope of the relevant Directive.

Given the serious complications that could arise in relation to the issues outlined above, and to give credence to Article 78(2)(a) TFEU, which provides for a “uniform status of asylum” that shall be “valid throughout the Union”, a comprehensive system is needed which stipulates when and under what circumstances a transfer of international protection status can take place. It should also clarify what aspects of the protection claim is covered, and address the data protection concerns that may arise in respect of such a transfer. It should also cover both refugees and subsidiary protection beneficiaries.

ECRE recommends adding an Annex to the Regulation which would set out the conditions under which the transfer of international protection status between Member States would take place

Conclusion

ECRE acknowledges a number of improvements in a number of areas including the reasons for persecution, rights to employment, recognition of qualifications and free movement of beneficiaries of international protection, as well as additional guarantees where protection status ceases. However, the overall objectives and main reforms of the proposal raise critical concerns from both legal and policy perspectives.

As currently framed, the harmonisation of the qualification criteria under the Qualification Regulation would severely restrict the protection space in the EU and would further distance the CEAS from its requirement of compatibility with the 1951 Refugee Convention. Stricter, mandatory rules are envisaged in relation to *sur place* claims and the internal protection alternative, while possibilities for

¹⁰⁴ Article 22(6) proposal for a Blue Card Directive.

¹⁰⁵ These include where there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

¹⁰⁶ Recital 9 Long Term Residence Directive.

¹⁰⁷ Recital 9 proposal for a Blue Card Directive.

excluding persons from international protection – be it directly under the exclusion grounds or through the oblique “revocation and non-renewal” clauses – run the risk of denying status to those in need of it. At the same time, given the evident limitations of legislative harmonisation in securing convergent outcomes, there is little guarantee that an over-prescriptive and restrictive approach can in fact lead Member States to uniform decision-making on asylum claims. Rather paradoxically, the opportunity for closer harmonisation is missing in the area where it is most needed. Rules on the rights of beneficiaries of protection remain divergent, namely in relation to social assistance, the duration of residence permits and the corollary provisions on review of status.

Furthermore, the incoherence surrounding the objective of promoting integration while undermining the security of international protection status seems ill-fitting in light of the EU’s broader objectives of better integrating third-country nationals into host societies. The systematic review of protection needs risks creating difficulties for both beneficiaries and asylum administrations, while the punitive approach envisaged under the reform of the Long-Term Residence Directive places beneficiaries within even stricter boundaries than the ones currently in place.

ECRE urges the Council and the European Parliament to resist reforms which would further dissociate EU asylum law from the 1951 Refugee Convention and the lessons of experience, and to adopt pragmatic solutions to promote the integration of refugees and subsidiary protection beneficiaries. Punitive measures against secondary movements should be replaced by incentives to ensure greater compliance by those affected.