Meijers Committee
standing committee of experts on international
immigration, refugee and criminal law

CM1614

Comments on the proposals for a Qualification Regulation (COM(2016) 466 final), Procedures Regulation (COM(2016) 467 final), and a revised Reception Conditions Directive (COM(2016) 465 final)

1. General remarks

The proposals aim to remove differences in asylum standards between Member States in order to prevent asylum shopping and secondary movements. To this purpose, the Qualification and Procedures directive are to be replaced with regulations. Further, the more favourable standards clause is deleted in both proposals, transforming the regulations into instruments of full harmonisation instead of minimum standards. The Meijers Committee supports the aim of more alignment of asylum systems, but is not convinced that the proposals will meet that purpose. The Meijers Committee also questions the necessity to fully harmonise the content of protection.

First, legislative harmonization of standards does not guarantee their uniform application in practice. Different administrative contexts and different national understandings of common standards may still contribute to divergences in procedures and recognition rates. Arguably, complete alignment of asylum standards will require the transferring of responsibility for the processing of asylum claims from the national to the EU level, and establishing an EU-level appeal structure, as was suggested earlier by the European Commission.[1]

Second, divergent asylum procedures and recognition rates are not the most prominent causes of secondary migration. Studies indicate that economic prospects and the presence of migrant communities are more important pull-factors for secondary migration.[2] It is therefore questionable to what extent these proposals will remove incentives for secondary migration.

Third, although the proposals suggest to create a uniform asylum status, the content of protection is legally constructed as treatment to be received on par with nationals in such fields as education, healthcare and social assistance. As long as these socio-economic areas remain within the (exclusive) competence of Member States, the content of protection cannot become uniform. For this reason too, the EU is not able to create a level playing field for protection seekers in the EU.

Fourth, the Meijers Committee is puzzled that the Commission proposes to fully harmonise the content of protection in the new Qualification Regulation, but has chosen not to fully align the reception conditions. The Reception Conditions Directive will remain a directive that includes a more favourable standards clause.

[1] COM(2016) 197 final, p. 9.

[2] E. Neumayer 'Asylum Destination Choice: What Makes some European Countries more Attractive than Others?' (2004) European Union Politics, 5 (2), p. 155-180. K. Kuschminder, J. de Bresser & M. Siegel, 'Irreguliere Migratieroutes naar Europa en de Factoren die van Invloed zijn op de Bestemmingskeuze van Migranten', WODC, Universiteit van Maastricht, 2015.

Finally, the Meijers Committee points out the obvious fact that the current Qualification Directive, Procedures Directive and Reception Conditions Directive are a bit less than 5 and 3,5 years old respectively. It took Member States a number of years to take legislative measures to transpose and implement these 'new' Directives[3]. Requiring from Member States a turnaround less than 5 years after the current legislation was drafted calls into question the reliability and thoroughness of the legislative process at the European level and puts unnecessary burdens on national legislators, including national parliaments.

The Meijers Committee notes that the proposals lack an adequate explanation as to why the current legislation falls short on being able to deliver the aim of more alignment of asylum systems. On page 7 of the proposal for a Procedures Regulation, the European Commission merely states that the current directive "has not proven to be sufficient" to attaining its stated goals but does not explain why the directive was not sufficient or why a regulation would be more sufficient instead. Moreover, from an evaluation perspective it begs the question how the European Commission can come to this conclusion without a proper evaluation of the effects of current legislation given the very short amount of time that this legislation has been applied at the national level.

The Meijers Committee agrees with the European Commission that it is important for the integrity and sustainability of the common European asylum policy to harmonise asylum procedures and eligibility criteria as far as possible. The proposals are an important step in that direction. However, the Meijers Committee doubts whether it is necessary – and whether it is in conformity with the subsidiarity principle – to fully harmonise the treatment to be accorded to beneficiaries of international protection. Most notably, the Qualification Regulation proposal will force Member States into differentiating between refugee status and subsidiary protection status and into reviewing periodically refugee and subsidiary protection status. However, as the content of protection depends on national law, as explained above, and the legal consequences of a revocation of status are within the discretion of Member States, there does not seem to be a clear necessity to fully harmonise these issues at the EU level.

2. The proposal for a Qualification Regulation (COM(2016) 466 final)

2.1 Mandatory review of status (Articles 15 and 21)

The proposal to oblige Member States to review refugee status and subsidiary protection status when renewing the residence permit or on the basis of a significant change in the country of origin (Articles 15 and 21) is problematic. It is not aligned with the practice in most Member States. The Meijers Committee doubts whether the possible consequences of this proposal have been fully thought through. The Commission suggests that such reviews will not cause additional administrative burdens. Any revocation of status may lead to appeals procedures, procedures for obtaining residence on other grounds or return procedures. Although it seems fair to reserve international protection to those who need it, experiences in Germany and the Netherlands in respect of Iraqi and Somali refugees show that large scale revocations of statuses are difficult to follow-up with returns. Technical or other barriers to

[3] In the Netherlands the current Procedures and Reception Conditions Directives were transposed into national legislation which took effect on 20 July 2015, i.e. less than a year and a half ago.

return, or personal reasons, may make returns impossible. Furthermore, refugees and especially minors may have started to bond with the Member State, creating possible legal obstacles to return.

In addition, it should be questioned what aim is being served by obliging all Member States into conducting periodic reviews of statuses. The practical effect of reviews and revocation very much depends on national law. The new Articles 14(5) and 20(3) provide that the legal effect of a revocation decision is to be suspended for three months, in order to provide the third-country national or stateless person with the opportunity to apply for residence in the Member State on other grounds. Whether such grounds are available is a matter of national law. Furthermore, a possible effect of the proposal is that Member States will try to regularize stay on the basis of statuses providing limited protection, such as the German quasi-status of Duldung or other forms of tolerated stay. Member States may also, in order to prevent situations of large scale and permanent illegal residence, ultimately opt for regularisation programmes. Because such legal consequences remain outside the scope of Union law, there is no sound subsidiarity argument for obliging Member States to conduct reviews of statuses in the first place. Obliging Member States to engage in periodic reviews of statuses does not guarantee alignment of standards, creates significant administrative burdens, and puts the residence status of large numbers of third country nationals at risk.

For these reason, the Meijers Committee recommends to delete Articles 15 and 21 on the mandatory review of statuses.

2.2. Duration of residence permit (Article 26)

The proposal precludes the grant of a residence permit for a duration longer than three years for refugees and longer than one year for subsidiary protection beneficiaries. In effect it transforms the minimum threshold into the norm. This will create significant administrative burdens for Member States that currently provide for validities of residence permits to be of longer duration, as well as for Member States that do not differentiate between refugee status and subsidiary protection status.

The Meijers Committee also observes that the Explanatory Memorandum fails to specify the effects of a short and more vulnerable residence status for the integration prospects of international protection beneficiaries. Uncertainty about the durability of legal residence is an obstacle to integration. Protection beneficiaries may feel less incentivised to participate in society and to integrate. Furthermore, employers are less inclined to hire persons with a short or insecure residence status.

The Meijers Committee is not convinced of the necessity to fully harmonise the duration of the residence permit at the EU level, as long as the legal consequences of a possible revocation of status (return or continued residence on a national ground), remain within the discretion of Member States.

For these reasons, the Meijers Committee recommends to maintain the current freedom of Member States to offer the same rights and benefits to all international protection beneficiaries as well as the freedom to decide on the duration of the residence permit, i.e. to maintain the wording of Article 24 of Directive 2011/95/EU.

2.3. Freedom of movement (Article 28)

The new Article 28(2), which seeks to codify the judgment in Alo and Osso (Joined Cases C-443/14 and C-444/14), allows for the imposition of a residence condition on international protection beneficiaries who receive social assistance, where such a condition is necessary to facilitate integration. As most international protection beneficiaries initially rely on social assistance, this is a serious exception to the freedom of movement of refugees as guaranteed in Article 26 of the Refugee Convention. This is even more the case, because the views of the Member States on what measures are conductive for the integration of third country nationals vary greatly. In Alo and Osso, the residence condition imposed by Germany aimed to prevent the concentration in certain areas of third country nationals as this could lead to the emergence of social tension, but also to ensure availability of integration services. These are quite general considerations that risk turning the exception to free movement into the rule. It must also be observed that the residence conditions at issue in Alo and Osso, were imposed by Germany only on subsidiary protection beneficiaries, whereas the proposal would allow them in respect of all international protection beneficiaries.

Crucially, the CJEU in Alo and Osso did not say that a residence condition with the objective of facilitating the integration of third-country nationals in the Member State is always allowed, but that it was for the national judge to verify whether such a condition did not amount to discrimination of subsidiary protection beneficiaries compared to other categories of third country nationals.

In these various ways, the new Article 28(2) oversimplifies and widens the scope of the judgment in Alo and Osso. Because Article 28(2) is anyhow a mere specification of the general rule of Article 28(1) on freedom of movement, it is legally superfluous to include it in the new regulation.

In view of these considerations, the Meijers Committee recommends to delete Article 28(2) and to leave it to national authorities to decide, whether restrictions to the freedom of movement are allowed on the basis of Article 28(1) and international obligations, including Article 26 of the Refugee Convention.

2.4. The amendment to the Long-Term Residence Directive 2003/109 (Article 44)

Article 29 provides that a beneficiary of international protection is obliged to reside in the Member States which granted protection. The proposed Article 44 introduces a new sanction in Directive 2003/109 in case the beneficiary is found in another Member State without the right to stay or reside there. The proposal provides that the five year period after which beneficiaries of international protection are eligible for the Long Term Resident status should restart each time the person is found in a Member State, other than the one that granted international protection, without a right to stay or to reside there in accordance with relevant Union or national law.

The proposed Article 44 suggests that the sanction comes into effect quasi-automatically. The text does not specify whether the authorities of the Member State of usual residence or the authorities of the other Member State should establish that the stay is not in accordance with Union law and national law. Moreover, according to the proposed text any irregular stay, however short and irrespective of the presence of a serious justification, automatically results in a prolongation of the waiting period for the

acquisition of the Long-Term Resident status and the related right to intra-EU mobility. Depending on the length of the lawful residence in the Member State of habitual residence, the waiting period could be extended with a few weeks up to almost five years. The longer the lawful residence of the protected person, the longer will be the extension of the waiting period, irrespective of the seriousness of the infraction.

Beneficiaries of international protection have the right to move freely and stay in other Member States for up to three months in accordance with the conditions of Article 21 of the Convention Implementing the Schengen Agreement (SIA). If a beneficiary of international protection would overstay this period with a few day because of medical treatment in hospital of because of another urgent and serious (family or business) reason, he would automatically be sanctioned with a prolongation of the waiting period for the acquisition of the Long-Term Resident status, possibly for several years. Such sanction would not be compatible with the Union law principle of proportionality.

Secondly, the question whether the beneficiary did or did not overstay in another Member State may arise many years later at the time when the beneficiary applies for the Long-Term Resident status. It may be difficult to establish at that time irregular stay or residence in another Member State in the past.

Thirdly, the question whether the beneficiary actually did comply with Article 21 SIA or was in another Member State without the right under Union or national law to stay or reside there, should be decided by that Member State. The other Member State is better qualified to establish whether the stay or residence was irregular than the Member State of habitual residence, where the beneficiary will make his application for the long-term resident status. Finally, the proposed automatic sanction runs counter to the aim of Directive 2003/109 on the status of long-term residents to be “a genuine instrument for the integration of long-term residents into society in which they live” (see recitals 4 and 12 in the preamble of Directive 2003/109).

On these grounds the Meijers Committee proposes to amend the proposed Article 44 as follows (the words added are in bold):

Article 44 - Amendment to Directive 2003/109/EU

1. In Article 4 of Directive 2003/109/EU, the following paragraph 3a is inserted:

"3a. Where a beneficiary of international protection is found in a Member State, other than the one that granted international protection, **and the authorities of that Member State have established that the beneficiary did stay or reside there** without a right to stay or to reside there in accordance with relevant Union or national law **for more than two weeks without a serious and urgent justification,** the period of legal stay preceding such a situation shall not be taken into account in the calculation of the period referred to in paragraph 1."

3. The proposal for a Procedures Regulation (COM (2016) 467 final)

3.1. Country of origin assessments in the preamble

The Meijers Committee recommends not to include country of origin assessments in the preamble (recitals 53-62). On a general note, the Meijers Committee questions the trend in EU lawmaking of ever expanding and more detailed preambles (the 2005 Procedures directive contained 34 recitals, the 2013 Procedures directive 62, and the current proposal 77). Moreover, recitals do often not merely set out the reasons for the contents of the enacting terms, but spell out in detail what the content of a norm is. This increases the potential for contradiction and legal uncertainty.

Recitals 53-62 explain why a number of third countries are included in the list of safe countries of origin (which will be annexed to the Regulation). In an earlier note, the Meijers Committee has questioned the methods used by the European Commission to designate certain countries as safe. Such assessments should be open to contestation in individual procedures, which is one reason why it is unfortunate if such assessments are laid down in legislative acts. Further, assessments of the safety of a country have limited temporary value, as the current volatile situation in Turkey – one of the countries designated as safe – illustrates. It is therefore desirable that the preamble of a new Procedures Regulation only refers in general terms to the criteria and the procedure for designating safe countries of origin, similar to recital 5 of the Visa List Regulation (Reg. 539/2001).

On these grounds the Meijers Committee proposes to delete recitals 53 and 55-62. The references to objective country of origin information in recital 54 should be considered sufficient.

3.2. Medical examination (Article 23)

The proposed Article 23 on medical examinations is broadly similar to the current Article 18 of Directive 2013/32. The proposal, thus, continues the major shortcoming in the current Article 18 of not effectively guaranteeing the right of asylum applicants to put forward medical evidence at their own initiative. Article 23(3), like Article 18(2) of the current Directive, provides that in cases where the immigration authorities decide that a medical examination is irrelevant, applicants may at their own initiative and at their own costs arrange for a medical examination. Since most asylum seekers do not have the funds to pay the costs of the examination, the current Article 18(2) is a dead letter in most Member States. This situation is not compatible with the Union law principle of effectiveness and the principle of equality of arms. The latter principle applies according to a recent judgment of the CJEU also when Union law is applied in an administrative procedure, see Vasile Toma, case C-205/15, ECLI:EU:C:2016:499. If the immigration authorities decide not to order a medical examination, almost all asylum seekers will be unable to afford a medical examination, unless supported by a charity.

It is fair that the immigration authorities pay the costs in cases where the outcome of the examination at the initiative of the applicant assists their decision making. If the medical report does not contribute to the assessment of the asylum application the Member State is not obliged to pay the cost of the report.

The practice in the Netherlands illustrates the need for this amendment.[4] Between spring 2012 and September 2016 an independent private organization, called iMMO, at the initiative of asylum seekers who claimed to be victims of torture or inhuman treatment, conducted medical examinations in 422 cases. After the reports of those examinations were presented to the immigration authorities, residence permits were granted in 234 cases, i.e. 55% of all cases; 28% of the cases are still pending with the IND (Dutch Immigration and Naturalisation Service) or before a court; in the remaining 17% of the cases the asylum request was refused, the asylum seeker disappeared or the outcome is unknown. Until the implementation of Directive 2013, the immigration authorities hardly ever arranged for a medical examination, since they considered the outcome irrelevant for their decision making. In 23 of the 234 cases where a residence permit was granted after a medical examination at the initiative of the asylum seeker, the immigration authorities paid the costs of that examination, either at the request of the asylum seeker or after they had been ordered by a court to pay these costs. In the first year after the implementation of the Directive 2013/32 in July 2015, the immigration authorities took the initiative for a medical examination in approximately ten cases, mostly asking for a second opinion after a report by iMMO. The iMMO, at the request of asylum seekers, produces an average of ten medical reports per month. The immigration authorities did not pay the costs of a single medical report arranged for by the asylum seekers where the decision was made in accordance with Article 18 of Directive 2013/32. In this respect the implementation of the Directive had a counter-productive effect.

On the basis of these considerations, the Meijers Committee recommends to insert an additional paragraph into Art. 23 which ensures the right to equality of arms. Moreover, it is suggested to add five words in paragraph 4 of the proposed Article 23 (see below in bold) in other to clarify that paragraph 4 applies irrespective of who arranged for the medical examination:

Article 23 - Medical examinations

4. The results of the medical examination referred to in **paragraphs 1 and 3** shall be submitted to the determining authority as soon as possible and shall be assessed by the determining authority along with the other elements of the application.

We propose to add between the paragraphs 4 and 5 a new paragraph, reading:
5. If the result of the medical examination referred to in paragraph 3 contributes to the assessment of an application, the reasonable costs of the examination shall be reimbursed to the applicant from public funds.

3.3 Safe country of origin and safe third country (Articles 45-50)

The Meijers Committee has strong concerns about the proposed mandatory nature of the application of safe country of origin and third country exceptions in Articles 45-50.

Firstly, the Meijers Committee wonders from a perspective of subsidiarity whether the European Commission is best placed to decide for all member states that and how they should apply the concepts

[4]See M. Reneman e.a., 'Medische waarheidsvinding en geloofwaardigheidsbeoordeling in asielzaken', Asiel- & Migrantenrecht 2016, p. 462; Annual Report iMMO 2015, p. 9: http://www.stichtingimmo.nl/wp-content/uploads/2016/07/Inhoudelijk-jaarverslag-iMMO-2015.pdf.

of safe country of origin and third country. The Netherlands is among a number of Member States that is using a national list of safe countries of origin. The decision to place a country on this list can give rise to extensive and complex litigation in national courts. In the Netherlands, for example, the highest administrative court asked the advocate-general for a legal opinion prior to its examination of Albania as a safe country of origin for a homosexual applicant.[5] In its lengthy verdict the administrative court eventually found that the decision to render Albania a safe country of origin should be based on the legal and factual situation in that country, and that Member State authorities need to provide evidence that the country is safe not just in general but also for a specific applicant, given his/her individual circumstances. [6]

This verdict illustrates that whether a country can be considered safe can vary from applicant to applicant, depending on specific circumstances. This is also reflected by the proposed Article 45(3). The flexibility to include or exclude a country from the safe country of origin list can be easily attained at a national level, where it is at the executive's discretion to do so. Such flexibility would be more problematic at the European level. In light of this, the Meijers Committee points out that the turnaround time between the decision of the immigration authorities in the Netherlands to declare Albania a safe country and the judicial review by the highest administrative court (i.e. not the first instance decision but the appeal) was less than 10 months. It is hard to imagine that such procedural speed can be achieved at the European level. The crucial issue here is that whilst in national systems ample possibilities exist to challenge national safe country designations, there are no direct legal challenges possible against the inclusion of a country on the common EU lists (see further our earlier note). The proposal merely relies on the EU legislator as a political body to make the correct assessment and the European Commission to take prompt action. Art. 46(2) and 48(2) say that the Commission "shall regularly review the situation in third countries that are designated as safe". What is regular and how can the Commission be forced to undertake a review? The addition in Article 49(1) that the Commission shall initiate a review "in case of sudden changes" in the situation of a third country does not guarantee flexibility, as changes relevant for safe country designations may well be incremental instead of sudden. As it stands, the proposal guarantees neither flexibility nor judicial oversight in respect of the common lists of safe third countries and safe countries of origin.

The existence of two safe (third) country lists for a transitional period of 5 years at both the Union and the national level (proposed Articles 49 and 50), which could differ from each other, may give rise to confusion and contradiction. The Meijers Committee suggests that such duality should be avoided. For applicants, lawyers, Member State authorities, parliamentarians and the judiciary such duality can cause the undesirable situation that a country that is considered safe at the Union level is considered not to be so at the national level. This leads to complex questions such as to which list prevails. Article 50(2) and (4) do not resolve this situation.

Furthermore, the Meijers Committee is concerned about the wording of Article 45(1)(e), insofar as this provision makes it possible for a country to be considered a safe third country even if it does not

[5]Conclusion Advocate-General Widdershoven of 20 July 2016, in case number 201603036/3/V2, ECLI:NL:RVS:2016:2040.

[6]Afdeling Bestuursrechtspraak Raad van State, 14 september 2016, case number 201603036/3/V2, ECLI:NL:RVS:2016:2474

guarantee protection in accordance with the Geneva Convention. The provision is vague and leaves the possibility to declare a country that is not party to the Geneva Convention as a safe country for an applicant.

The Meijers Committee has the strong impression that this legislative provision has been included with a view to the much-criticized statement between the EU and Turkey which took effect on 20 March 2016. [7] This is also reflected by the long paragraph (see above comments on designation of countries as safe in the preamble) on Turkey in the preamble. To the best knowledge of the Meijers Committee Turkey has not provided refugees with protection, in the sense of a residence status, with the exception of nationals from Syria, as a result of the territorial limitation Turkey still relies on when applying the Geneva convention. This is one of the reasons why organizations such as Human Rights Watch have strongly criticized the deal as being in breach of legal standards as per the 1951 Convention. [8]

The Meijers Committee feels it apt to recall that the European Parliament, in a resolution of 24 November 2016, has expressed strong concerns about the situation in Turkey and has condemned the disproportionate repressive measures taken by Turkey as a response to the July 2016 coup attempt.[9] This resolution is a strong antithesis to the European Commission's declaration of 16 March 2016 that Turkey could be considered a safe country of origin (and that Greece should adopt legislation to this effect) in the context of the EU-Turkey deal. The Meijers Committee takes this opportunity to point at Eurostat figures cited by ECRE in its comments on the proposed Procedures Regulation that the recognition rate for refugees from Turkey in the EU currently stands at 23%, with Italy granting protection in 83% of cases.[10] This is in stark contrast to the finding that Turkey is a safe third country because it affords "sufficient protection". A country cannot on the one hand be considered safe for refugees because it affords "sufficient protection", and on the other hand be considered unsafe for its own citizens in an average of almost a quarter of asylum cases within the EU. The Meijers Committee considers it crucial that the question of whether Turkey or other third countries meet the criteria for being safe is not being decided exclusively by the Union legislator, but that such designations are open to prompt and effective legal challenges.

The Meijers Committee would also like to draw attention to the fact that whilst an individual applicant is given the right to challenge the assumption that a (third) country can be considered safe or not in his or her individual circumstances (see proposed Article 45(4)), the proposed Procedures Regulation is vague as to whether or not the applicant has access to legal aid/representation in doing so. The proposed Article 15(1) provides the right to free legal aid/representation in the administrative

[7] See, inter alia, professor Steve Peers on his blog EU law analysis (http://eulawanalysis.blogspot.nl)"the draft EU/Turkey on migration and refugees: is it legal?" of 16 March 2016.

[8] See Human Rights Watch "Q&A: why the EU-Turkey deal is no blueprint" of 14 November 2016 on its website: https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint.

[9] Resolution 2016/2993 of 24 November 2016, http://www.europarl.europa.eu/news/en/news-room/20161117IPR51549/freeze-eu-accession-talks-with-turkey-until-it-halts-repression-urge-meps

[10] ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, p. 59. http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf

procedure unless (proposed Article 15(3)(b)) there is "no tangible prospect of success". This concept is not further defined. Given that the proposed Procedures Regulation envisions inadmissibility decisions in case of safe (third) country procedures (proposed Article 36) this leaves the possibility open that an applicant is left to his own devices to challenge the legal assumption that a country can be deemed safe for him/her. Given the complex legal nature of safe (third) country concepts this may conflict with the general EU principle of the rights of the defence.

The Meijers Committee therefore suggest the following changes:

- **Replace the word 'shall' by 'can' in Article 45 (as well as in Article 36(1)(a) and (b));**
- **Delete the words "or sufficient protection as referred to in Article 44(2), as appropriate" in Article 45(1)(e);**
- **Ensure that an applicant has access to free legal aid to challenge an inadmissibility decision based on safe (third) country concepts as provided by article 45(4) and (6);**
- **Insert a new provision after Article 53, which allows national courts to suspend, at the national level, EU designations of third countries as safe third country or safe country of origin, whilst ensuring a common approach in the Member States by obliging national courts which make use of that possibility to ask the CJEU for a preliminary ruling:**

Article 53a – Remedy against safe country designations

1. Where an application is rejected on the basis of Article 44 or 45 and the applicant makes use of the remedy referred to in Article 53, the court or tribunal of a Member State may, if it considers this to be necessary to enable it to give judgment, examine whether the relevant third country meets the conditions for designation as safe country of origin or safe third country laid down in Article 45(1) and Article 47(1).

2. If the examination referred to in paragraph 1 results in the finding that the conditions are not met, the court or tribunal shall:

(a) suspend the designation of the third country as a safe third country or safe country of origin at the national level; and

(b) refer the matter to the Court, in accordance with the procedure of Article 267 TFEU.

3.4 Subsequent applications and the right to an effective remedy (Article 53)

The Meijers Committee is concerned with measures in the proposed Procedures Regulation which seek to further create obstacles to submitting subsequent applications.

The proposed Article 53(3) provides "The applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been aware of at an earlier stage or which relate to changes to his or her situation." This provision would make it impossible for an applicant to, for example, submit a subsequent application based on the fact that the applicant has been able to acquire documentation proving his situation in the country of origin which he for some reasons was unable to acquire at an earlier stage. Sometimes it is extremely difficult to obtain original evidence of issues material to an asylum application such as an UNWRA registration, a death certificate, an original ID-card, a copy of a death list. The cited provision in Article 53(3) creates insurmountable obstacles for subsequent applicants, in combination with acceleration of first

procedures (leaving sometimes too little time to gather evidence), no right to remain in the country during the subsequent application (Article 9(3)(a)) and lack of legal aid for subsequent applications (Article 15(3)(c)). This is especially the case for applicants who, due to traumatic experiences or other personal circumstances, were unable to provide the authorities with all relevant information during their first application.

The impression is all too often that subsequent applications are doomed to fail and only serve to unnecessarily prolong an applicant's right to remain in the Member State pending a procedure. The most recent figures from the Netherlands which are publicly available show a much more nuanced situation.[11] The Dutch immigration authority IND researched all subsequent applications submitted between 1 July 2012 and 30 June 2013 and found that 35% of subsequent applications result in a positive decision for the applicant; whilst 58% result in a negative decision. In 97% of the cases those applicants who have received a negative decision make use of their right to appeal this decision. First instance courts overturn 6% of the negative decisions and uphold 75%, whilst a further 1% are overturned on higher/further appeal. This means that there is a chance of success of a little below 40% when submitting a subsequent application. These figures show that it misleading to suggest that subsequent applications resemble fishing expeditions with very little chance of success. In order to provide an applicant with an effective remedy the proposed Procedures Regulation should not further restrict the possibility to submit a subsequent application by explicitly prescribing what elements should be submitted and in what manner. Furthermore the Meijers Committee imagines that the chance of success of a subsequent application vastly increases if the applicant has access to (some) legal representation during this procedure, especially since the proposed article 42 para 3 asks for a written submission prior to the lodging of a subsequent application. Without legal representation an applicant cannot, in good faith, be expected to provide a proper/legal submission written in a language which the State authorities understand.

The Meijers Committee therefore suggest the following changes:

- **Delete the words "The applicant may only bring forward new elements which are relevant for the examination of his or her application and which he or she could not have been aware of at an earlier stage or which relate to changes to his or her situation" from Article 53(3);**
- **Delete Article 9(3)(a) so that an applicant can remain in the country legally whilst the authorities examine the subsequent application;**
- **Delete Article 15(3)(c) so that a subsequent applicant has a degree of access to legal aid.**

3.5 Legal aid

Whilst the Meijers Committee welcomes the fact that legal aid in the proposed Article 15(1) of the Procedures Regulation is to include legal representation during the administrative procedure, it is concerned about the vague exceptions to this general rule as provided by paragraphs 3(b) (administrative procedure) and 5(b) (appeal procedure). In the proposed Article 15(3)(b) b and (5)(b)

[11]See report of 9 December 2014 of IND which was sent as an annex to a letter of the same date to national parliament, available online on https://www.rijksoverheid.nl/documenten/rapporten/2014/12/11/tk-bijlage-tweede-en-volgende-asielaanvragen.

funding for legal representation can be withheld if the application or procedure lacks "any tangible prospect of success".

This raises the question who or which body is to make the determination that a procedure lacks any tangible prospect of success. Often the determination that an application lacks any tangible prospect of success will coincide with the decision to reject an application by the Member State authority or appeal by the court, i.e. this determination will follow the actual procedure when the legal representative has already done all the work.

The Meijers Committee considers it dubious to thus burden legal aid providers/representation with the task to determine whether an application lacks any tangible prospect of success for fear of having to suffer financially if they make the wrong assessment. Such financial incentives can restrict an applicant's right to access to legal representation and thereby to an effective legal remedy. Furthermore, it is not the role of a legal representative to assess the likelihood of success of an application for international protection. The legal representative all too often has nothing to do with the decision to apply for international protection and is only linked to the applicant at a later stage when the application has already been submitted. Although the final sentence of the proposed article 15 allows the applicant to challenge the determination that his application lacks any tangible prospect of success, on the basis of legal aid, the Meijers Committee is concerned that this will only create more procedures (and increase costs) and impedes access to effective legal protection.

The Meijers Committee therefore suggest the following changes:

- **Delete Article 15(3)(b);**
- **Delete article 15(5)(b);**
- **Delete the final sentence of Article 15.**

4. The proposal for a recast Reception Conditions Directive (COM (2016) 465 final)

4.1 General remarks

The Meijers Committee welcomes the improvements suggested in this proposal to ensure greater consistency in reception conditions across the EU. There is now an extended definition of family members (Art. 2(3)) and a clearer definition of what material reception conditions should entail in order to ensure a dignified standard of treatment, both relating to regular as well as exceptional reception measures. Further, the provisions on contingency planning in case of high numbers of applicants (Art. 28), earlier access to the labour market (including the entitlement of a common set of rights based on equal treatment with nationals of the Member States in Art. 15) and better identification of special reception needs (Art. 21) can be considered as positive. The fact that Member States' reception systems will be assessed and monitored by the EU Asylum Agency (Art. 27) will also contribute to convergence of reception systems and compliance with EU standards.

However, the Meijers Committee is concerned about the restrictive and punitive measures sanctioning secondary movements of applicants. The obligation of excluding certain categories of applicants from reception conditions and subjecting them to freedom restricting measures and even detention in order

to deter them from absconding, raises questions of compatibility with the EU Charter of Fundamental Rights and case law of the ECJ and ECtHR. Moreover, we doubt whether this coercive approach will have the desired effect in practice as sanctions will often push applicants into more irregularity. Furthermore, it is both legally and morally questionable whether applicants can be punished for Member States' failures to implement their reception obligations.

4.2 Sanctions for applicants

4.2.1 Freedom restricting measures

According to the new Art. 7(2)(c) and (d), Member States will be obliged, where necessary, to decide that an applicant must reside in a specific place for the swiftness of the Dublin procedure (c) and to effectively prevent the applicant from absconding in cases where the person did not apply for asylum in the first EU Member State of entry or is required to be present in another Member State (d). Apart from the obligation to reside in this specific place, the applicant can also be required to report to the authorities at given times (if there is a risk of absconding).

The Meijers Committee is concerned that these new provisions will allow freedom restricting measures in all cases where the Dublin Regulation is applicable. Restrictions on free movement must, however, comply with Art. 6 of the EU Charter of Fundamental Rights (right to liberty and security) and Art. 2 of Protocol 4 to the ECHR (freedom of movement). These provisions require restrictions to free movement to be based on individual assessments and to meet the principles of necessity and proportionality. It is therefore important to maintain Art. 7(7) and (8), which incorporates these requirements.

The Meijers Committee suggests to:

- **introduce a 'may clause' instead of a 'shall clause' in Art. 7(2).**

4.2.2 Detention measures

In Art. 8(3)(c) a new detention ground is included: an applicant may be detained in order to ensure compliance with the obligation to remain within a specific place (according to Art. 7(2)), where the applicant has not complied with this residence restriction and there is a risk of absconding. The Meijers Committee notes that it is questionable whether this ground is in conformity with Art. 6 of the EU Charter and Art. 5(1)(b) of the ECHR. In O.M. v. Hungary the ECtHR ruled that detention imposed to fulfil a legal obligation in accordance with Art. 5(1)(b) ECHR must meet several guarantees. One of these guarantees is that the legal obligation must be specific and concrete.[12] Since detention under Art. 8(3)(c) is imposed to serve the same purpose as the residence restriction under Art. 7(2), namely to prevent the applicant from absconding, the question can be asked whether Art. 8(3)(c) concerns the fulfilment of a specific and concrete obligation incumbent on the applicant.

Therefore the Meijers Committee suggests:

- **to delete Art. 8(3)(c).**

4.2.3 Reception excluding and reducing measures

[12] Appl. No. 9912/15, 5 July 2016, paras 42-43.

Art. 17a(1) stipulates that applicants will be excluded from reception conditions if they are (according to the Dublin Regulation) present in a Member State other than the one in which they are required to be present. It is unclear to the Meijers Committee when (after the (first) interview?) and how (by an appealable decision?) this will take effect. One of the crucial elements of the Dublin procedure is to find out whether the applicant is required to be present in another Member State. As the CJEU ruled in CIMADE and GISTI (Case C-179/11, 27 September 2012) neither the decision of a Member State to call upon another Member State which it considers responsible for the examination of the application for asylum for the purposes of taking charge of the asylum seeker nor the acceptance of that request by the Member State requested is a final decision within the meaning of the Reception Conditions Directive. It follows that only the actual transfer of the asylum seeker by the requesting Member State brings to an end the examination of the application for asylum by that State and its responsibility for granting the reception conditions. We would therefore recommend to provide more clarity in the text of the Directive as to when this provision will take effect.

The Meijers Committee agrees with the European Council on Refugees and Exiles (ECRE) that this provision is in contradiction with the reasoning of the CJEU in CIMADE and GISTI (Case C-179/11, 27 September 2012).[13] In this judgment, the CJEU found that due to Art. 1 of the EU Charter of Fundamental Rights, under which human dignity must be respected and protected, an asylum seeker may not be deprived of reception conditions during a Dublin procedure.[14]

According to Art. 17a(3) minors will – pending the transfer to the responsible Member State - only have access to educational activities (instead of education). The Meijers Committee notes that it is unclear what is meant by the period 'pending the transfer' in this regard. If this period already starts at the moment the requested Member State accepts to take charge or take back the applicant, this period may last for 6 to 18 months (Art. 29 Dublin III). We think that withholding children from their right to education for such a long period is disproportionate and unjustified. Moreover, we do not see a legitimate justification for making a distinction between children in detention (who do have a right to education, see Art. 11(2)) and children pending a Dublin transfer.

According to Art. 19(2)(g) and (h) Member States may, in case applicants have not complied with the Dublin Regulation and have travelled to another Member State or have been sent back after having absconded to another Member State, replace material reception conditions provided in money or in vouchers with material reception conditions provided in kind. They can also reduce or withdraw (in certain circumstances) the daily allowance. The Meijers Committee is worried that applicants who are subject to a Dublin procedure thus may find their reception conditions limited twice: both in the Member State where they are required to be and in the Member State they travelled to 'without adequate justification'.

[13]ECRE Comments on the Commission proposal to recast the Reception Conditions Directive COM(2016) 465, October 2016, p. 6-7.

[14]Although Art. 17a(2) states that Member States shall ensure a dignified standard of living for all applicants, it remains unclear how this works out for applicants subjected to the Dublin procedure.

New is also the fact that reception conditions can be reduced in case the applicant fails to attend compulsory integration measures (Art. 19(2)f)). The Meijers Committee agrees with ECRE that an integration strategy based on positive incentives rather than on penalties will be much more effective and desirable for both the applicants and the Member States.[15]

The Meijers Committee therefore suggests to:

- **delete Art. 17a;**
- **replace 'suitable educational activities' by 'education';**
- **delete Art. 19(2)(f), (g) and (h).**

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.
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[15] See also ECRE Comments on the Commission proposal to recast the Reception Conditions Directive COM(2016) 465, October 2016, p. 8.