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accompanying the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on minimum standards on procedures in Member States for granting and withdrawing international protection

Impact Assessment

{COM(2009) 554}
{SEC(2009) 1377}

LEAD DG: JUSTICE, FREEDOM AND SECURITY

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERTED PARTIES

1.1. Background

1.1.1. Policy context

In October 1999, in Tampere, the European Council decided that a ***common asylum policy*** should be implemented and a ***Common European Asylum System*** (CEAS) be established. In the longer term, Community rules should lead to ***a common asylum procedure*** and a uniform status for those granted asylum valid throughout the Union. *Council Directive 2005/85/EC of 1 December 2005 (the Asylum Procedures Directive or APD)* was the last of five asylum instruments which laid down the foundations for a Common European Asylum System (CEAS), based on the Tampere principles.

The Hague Programme further expanded on the Tampere objectives and called for the Commission to submit the second-stage measures to the Council and the European Parliament with a view to their adoption before the end of 2010. The Commission **Policy Plan** for the CEAS ('the Policy Plan'), adopted on 17 June 2008[1], defined a road-map for the coming years and listed the measures that the Commission intends to propose in order to complete the second stage of the CEAS, including a proposal to amend the Asylum Procedures Directive. The European Pact on Immigration and Asylum, adopted on 17 October 2008, provided further political endorsement and impetus to this objective, by calling for initiatives to complete the establishment of the CEAS with a view to offering a higher degree of protection.

The Directive aims at establishing minimum standards on procedures in Member States (MS) for granting or withdrawing refugee status. It was adopted by the Council by unanimous vote after consulting the European Parliament. These procedural requirements brought implications for the content of the Directive which has been described by many commentators as achieving only modest level of harmonisation of asylum procedures in MS.

As observed by many European stakeholders, the objective of a common asylum procedure requires a fundamentally higher level of alignment between MS' legislation and practices. In this respect, the Policy Plan makes its clear that the second stage of the CEAS should aim at ***better*** and ***more harmonised standards*** of protection through further alignment of MS' asylum laws and effective and well-supported practical cooperation. This strategy equally applies to the Asylum Procedures Directive. On 3 December 2008, the Commission adopted proposals for the amendment of three first-phase instruments, e.g. the Dublin Regulation, the Eurodac Regulation and the Reception Conditions Directive[2], and, on 18 February 2009, a proposal for the establishment of a European

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1 COM(2008) 360, SEC(2008) 2030.

2 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (COM (2008) 815 final/2); Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM (2008) 820 final/2); Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No […/…] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] (COM (2008) 825 final) and Proposal for a

Asylum Support Office ("EASO")[3]. Further measures to be taken in the short-term in accordance with the Policy Plan include a proposal for the amendment of the Qualification Directive[4], to be adopted together with the proposal for the amendment of the Asylum Procedures Directive, as well as measures to reinforce the external asylum dimension, including by establishing a joint EU resettlement scheme and further developing Regional Protection Programmes.

1.1.2. The current political feasibility of revising the Directive

There are several reasons why, in the present settings, a revision of the Directive can be realistically expected to achieve higher and more harmonised protection standards than those established in the first phase:

a) As indicated above, the insufficient and vague standards which characterize the directive are, to a large extent, attributable to the unanimity requirement for its adoption. A fundamental difference in the political and legal framework for the adoption of the second-phase directive is the **applicability of Article 251 TEC ('the co-decision procedure'),** which means qualified majority voting in the Council and a stronger role for the European Parliament as co-legislator.

b) Negotiations in the 2nd phase will start taking into account the results of the consultations with MS, some elements of the preferred option, notably the provisions on subsequent applications, address **the concerns expressed by the MS themselves in the consultation.** The MS have acknowledged the need to introduce more precise standards on access to procedures, safe countries of origin, and accelerated procedures. Support has also been expressed to measures aimed at streamlining, facilitating and enhancing the quality and efficiency of the first-instance examinations. Similarly, in the Pact, the European Council pointed to the persistence of wide disparities amongst MS in the granting of protection as the main problem to be addressed and called for a higher degree of protection.

c) A further factor expected to facilitate the adoption of the higher standards proposed is that they correspond to a large extent to **recent developments in the case-law of the ECtHR and the ECJ**. The standards set in the relevant rulings do not suffice as such to address the problems and inconsistencies identified, but can provide the basis for the establishment of *acquis* rules benefitting from the accessibility and coherent application across the EU guaranteed by the Community legal and institutional framework

d) The revision of the Asylum Procedures Directive is crucial for ensuring a proper operation of the asylum acquis as a whole since it (i) backs up the correct and consistent implementation of the substantive criteria of the Qualification Directive, (ii) shares a number of common devices with the Dublin Regulation (admissibility grounds, initial interviews, provision of information) and (iii) is operates side by side with the Reception Conditions Directive (the Reception Conditions Directive applies from the moment the applications has been lodged until the final decision)

(e) By enabling authorities to process claims more rapidly while reaching solid decisions and thus to better deal with abuse, the Asylum Procedures Directive alongside the Qualification Directive fits in

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Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers (COM 2008(815 final/2)

[3] Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office (COM (2009) 66 final)

[4] Council Directive 2004/83/EC of 29 April 2004 (OJ L 326, page 13)

the broader context of measures taken to improve the credibility of the asylum process notably by increasing the effectiveness of return policies, in particular through the entry into force of the "Return Directive" and the creation of the European Return Fund.

(g) Ensuring that asylum seekers have equal access to protection throughout the EU through further harmonization of procedural and substantive standards is a prerequisite for the effective functioning and the credibility of the Dublin System. As demonstrated in the Commission's proposal for its revision, the underlying principles of this System have been considered worth to uphold in the second phase. However, it has become clear that further efforts towards the achievement of a level-playing field are urgently needed with a view to ensuring that the Dublin System can operate in a fair and efficient manner.

(h) The proposals for the revision of the Dublin Regulation and the Reception Conditions Directive contain elements which should be reflected in the revision of the Asylum procedures Directive in order to ensure coherence in the instruments of the second-phase acquis. This in particular includes standards on access to procedures, types of accelerated procedures and border procedures, the notion of applicants with special need, guardianship arrangements for unaccompanied minors, admissibility arrangements and access to effective remedy.

1.1.3. Organisation and timing, consultation and expertise

Procedural notions and devices, enshrined in the Asylum Procedures Directive, were discussed extensively in the course of the consultation, based on ***the Green Paper***, presented by the Commission on 6 June 2007. The response to the public consultation encompassed 89 contributions from a wide range of stakeholders[5], including 20 MS, regional and local authorities, the Committee of the Regions and the European Economic and Social Committee, UNHCR, academic institutions, political parties and a large number of NGOs. These contributions provided the Commission with both valuable information on the implementation of the directive and ideas for shaping policy options in view of developing further common standards on asylum procedures.

Furthermore, the implementation of the directive and possible ways to address the current gaps in the Community framework on asylum procedures were discussed in ***6 experts' meetings*** organised by the Commission between February 2008 and January 2009. These consultations involved Government experts, NGOs and legal practitioners providing legal advice to asylum applicants in national asylum procedures, and focused on the key elements of the Directive, as transposed into national legislation.

In response to ***a questionnaire*** on the implementation of the directive, MS provided the Commission with information on the implementing legislation, administrative arrangements, practices, and, in some cases, costs allocated for putting the directive's provisions into practice.

Also, the Commission ordered an external study to support the preparation of the present report. Thus, further information was collected and analysed by the contractor. The methods used included additional questionnaires addressed to both Governments and non-Governmental organisations providing services to asylum seekers and refugees in MS[6], desk research and bilateral consultations with the stakeholders. A selection of policy options was tested at an experts' meeting with NGOs,

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[5] The 89 contributions received are available at: http://ec.europa.eu/justice_home/news/consulting_public/gp_asylum_system/news_contributions_asym_ystem_e.htm.

[6] A detailed overview of consultations undertaken to inform this impact assessment is provided in annex 2.

held on 8 January 2009, and an experts' meeting with MS' representatives, held on 12 January 2009. Important data were collected from literature reviews in the form of reports by international and non-governmental organisations (i.e. UNHCR, ECRE, and "Save the Children") and academic commentaries. Important information on practical aspects of the implementation of the directive was also found in reports on the implementation of projects co-funded by European Refugee Fund and in the report on asylum procedures in the IGC participating states (the Blue Book)[7].

The report also incorporates comments submitted during two meetings of the **Inter-service Steering Group** which took place on 18 December 2008 and 18 February 2009 and were attended by representatives of the EMPL, AIDCO and MARKT Directorates-General.

1.2. The Impact Assessment Board

The Impact Assessment (IA) was revised to take into account the recommendations by the Impact Assessment Board of 6 April 2009[8]. In particular, the IA provides a quantified analysis of the identified problems, discusses the expected impacts of legislative action on the quality and coherence of minimum standards on procedures and distribution of asylum applications between MS, and systematically assesses the proportionality of the policy options. To the extent possible, the report provides estimates as to the MS and numbers of asylum applicants potentially affected by the envisaged measures and indicates the magnitude costs needed to implement them in the MS concerned.

2. PROBLEM DEFINITION

2.1. Scope of the problem

The EU Member States are important destination countries for displaced persons seeking international protection in the industrialised world. In 2004-2008, the EU-27 received 1 185 250 (67 %) out of 1 764 950 applications lodged in 51 industrialised countries[9]. This reflects a long term tendency: over 20 years, the pre-enlarged EU received about two thirds of asylum applications lodged in industrialised countries, while the overall trend had been upward with a sharp peak in 1992, when over 800 000 applicants requested protection in the EU-15.

In the period 2003-2006 the overall number of asylum seekers in the EU-27 decreased sharply, from a total of 344,800 asylum applications lodged in 2003 to 197,410 in 2006 (-42.7%)[10]. This decreasing trend stopped in 2007, as the number of applications rose to 222,170 (+12%), mainly due to the inflow of Iraqi asylum seekers. Provisional data for the year 2008 indicate that there was a further increase (+8%) compared to 2007, as the number of asylum applications in 2008 is estimated between **240,000 - 260,000**[11]. Despite rises and falls of asylum claims, protection motivated arrivals have had a modest weight in overall migratory flows to the EU, estimated at **1.5 – 2 m.** immigrants per year.

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7 See Asylum Procedures. Report on policies and practices in IGC participating states. May 2009.

8 The option of the Impact Assessment Board will be available at http://ec.europa.eu/governance/impact/cia_2009_en.htm.

9 Asylum level and trends in industrialised countries. Statistical overview of asylum applications lodged in Europe and selected Non-European Countries, 24 March 2009, UNHCR, page 13

10 Table new asylum applications 1987-2007, see Annex 2.

11 Data extracted from EUROSTAT available at: http://nui.epp.eurostat.ec.europa.eu/nui/show.do

2.2. What is the issue or the problem that may require action?

The flows of asylum seekers across the EU and the ways that individual MS choose to address these flows and handle asylum applications are interrelated in complex ways.

The diversity of national asylum legislations and practices was recognised from the beginning as one of the main factors affecting asylum flows[12]. It was precisely with a view to limiting the impact of this factor on asylum flows the Tampere programme called for the adoption of legislative instruments harmonizing national asylum rules on the basis of minimum standards.

However, as will be demonstrated below, the adoption of such standards was not sufficient in itself: divergences in asylum legislations and practices persist, despite the measures introduced in the first phase of harmonization. There are several **interlinked** causes for these persistent divergences. These factors include:

- **the incomplete and/or incorrect transposition and application** of the acquis' rules, **including the implementation of lower standards** than those established by the acquis;

- **the implementation of higher standards** than those established by the *acquis* by individual MS;

- **the vagueness and ambiguity** of the acquis' standards[13].

The Commission is constantly and systematically monitoring the implementation of the asylum acquis by MS and any problems identified as flowing from the incomplete transposition or the incorrect implementation of these rules can only be addressed by infringement procedures.

As regards the possibility for MS to go beyond the minimum standards prescribed by the *acquis*, this possibility reflects the sovereign right of States to go beyond the minimum core of obligations established by human rights instruments and it is fundamental and inherent in Human Rights Law. Accordingly, all asylum Directives allow MS to introduce or retain more favourable standards, in so far as those standards are compatible with their rules[14]. This possibility cannot be precluded and the ensuing divergences cannot be addressed by legislative measures. It is the European Court of Justice that, by applying this compatibility test, could eventually impose certain limits and define more clearly which more favourable national standards undermines the objectives of a relevant asylum instrument.

However, the last factor, i.e. the vagueness and ambiguity of the acquis' standards themselves can (and indeed can **only**) be remedied by the amendment of the first-phase legislation as called for by the Hague Programme.

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12 Further factors include linguistic and cultural links, family ties, the presence of immigrant communities as well as geography. As will be discussed below under section 2.2.4, some MS receive higher numbers of asylum seekers due to their geographical position. The different measures aimed at helping those MS adequately deal with these flows relate to financial solidarity, to burden sharing through relocation of beneficiaries of international protection and to tasks to be assigned to the future EASO.

13 The vagueness and the ambiguity of the Directive also make it difficult to substantiate infringement cases, thus limiting the effectiveness of the Commission's monitoring activities.

14 Pursuant to Art. 5 APD, MS may introduce or maintain more favourable standards on asylum procedures, insofar as those standards are compatible with the Directive.

2.2.1. Harmonization on the basis of minimum standards: meaning, main elements and objectives

The Asylum Procedures Directive lays down minimum procedural standards aimed at safeguarding the right to asylum and preventing secondary movements of asylum seekers. These standards should (i) be common and capable of ensuring fair and efficient examinations[15], (ii) be in compliance with the Refugee Convention and other relevant treaties[16], and (iii) respect the fundamental rights flowing from general principles of Community law, which, themselves, are the result of common constitutional traditions of MS and of the European Convention of Human Rights (the "ECHR"), as enshrined in the EU Charter of Fundamental Rights (the "Charter")[17]. To comply with international law, the minimum standards should, primarily, pass the non-*refoulement* test, which requires procedures **giving an applicant a realistic opportunity to show that s/he is in need of international protection** and **enabling the competent authority to carry out a meaningful assessment of the application[18]**. To this effect, the basic requirements include the principle of a single responsible authority, the opportunity of a personal interview by a competent official, the availability of a competent interpreter, the right to remain in the territory, and access to effective remedy in the case of a negative decision[19]. The directive's standards may not be lower than these requirements but **may go beyond this threshold, in line with the objectives set in the EU context and subject to the respect of proportionality and subsidiarity**. **Indeed, the whole human rights edifice is based on international treaties establishing a common core of obligations, whilst allowing states parties to go beyond this minimum[20].** The general principles of Community Law further imply that procedures should be easily accessible and make it possible to deal with the claims objectively and within a reasonable time[21], and the right to be heard, the principle of "equality of arms", and the right to effective judicial protection should be fully respected. Finally, since the standards are common and aim at harmonising national laws, the procedural notions, even if not directly flowing from international or Community obligations, should be based on **common denominators** and facilitate efficient procedures**,** while respecting the principles of proportionality and of procedural autonomy.

2.2.2. Problems with the standards set down by the current Directive

On the basis of the Green Paper contributions and consultations with Government and Civil Society experts, academic commentaries, MS' replies to the questionnaires and the analysis of the transposition measures carried out by DG JLS, two main problems have been identified. Namely, the minimum standards are **(a) insufficient** to secure compliance with International Law and Primary Community Law and **(b) vague,** thus opening ways to derogate from and/or implement disparately the agreed standards. While a certain convergence has been achieved, it has been brought about to a 'lowest common denominator'. Notions designed to respond to specific challenges faced by

15 The Tampere European Council conclusions, as reiterated in Recital 3 of the Asylum Procedures Directive.

16 Point 1 of first paragraph of Article 63 TEC

17 See the ECJ judgements in Soprope, C-349/07, para. 33; Dynamic Medien, C-244/06, para. 39-41; Promusicae, C-275/06, para. 62-64, and C-540/03, para. 35-39.

18 See the ECtHR judgements in Bahaddar, 19 February 1998, para. 45 and Jabari, 11 July 2000, paras 39 -40.

19 See Conclusions on the International Protection of Refugees, The Executive Committee of the UNHCR Programme No 8, 30

20 See, for example, Article 53 of the European Convention of Human Rights

21 *Panayotova*, 16 November 2004, Case C-327/02, para 27

particular MS, once reflected in the directive, have been institutionalised in asylum procedures of other MS, in particular of the EU 12[22].

These deficiencies mainly result from the unanimity requirement and compromises reached at the level of the more restrictive interpretation of what is required under International Law. While the directive's provisions, taken separately, do not *per se* contradict to MS' international and Community obligations, ***cumulative effect*** **of insufficient and vague standards make procedures susceptible to administrative error and, consequently, capable of leading to *refoulement*.** **They have also led to the proliferation of disparate procedural arrangements between MS.** Some MS consider themselves bound by their international and Constitutional obligations to provide higher standards, while others put an emphasis on fast processing of unfounded claims. In a number of MS, the deficiencies of the minimum standards are further aggravated by the **incomplete and/or incorrect transposition** of the directive as revealed by the DG JLS analysis of national transposition measures. This primarily concerns the safe country of origin notion, the safe third country notion and the right to effective remedy. The ways MS implement corresponding national legislation also vary and in some cases may be inadequate to ensure compliance with the agreed standards, in particular those on access to procedures, the conditions of personal interviews and the reasoning of first instance decisions. On the other hand, certain MS apply procedural standards which are **higher than those established by the Directive**. These include *inter alia* quality control and assurance mechanisms, provision of free legal assistance in first instance procedures, video and audio recording of personal interviews, the use of medico-legal reports and the possibility for applicants to comment on draft decisions of the determining authority. More favourable procedural standards normally lead to higher percentages of positive 1st instance decisions and therefore have an impact on the distribution of asylum applications between MS. The above implies that asylum seekers experience different treatment and benefit from a different level of procedural fairness depending on where in the EU her/his protection claim is examined.

The insufficient fairness and quality of standards have evidently hampered the efficiency of procedures, since a large share of first instance decisions are annulled on appeal and a number of MS have reported a rise of subsequent applications. In 2008, subsequent applications amounted to 36.4% in the Czech Republic, 28.5% in Belgium, 20.7% in Germany, 15.4% in Poland and 12.3% in the Netherlands. In the same year, out of 197,284 applications recorded in EURODAC, in **31,910** cases the same person had already made at least one asylum application before. The **high rate of successful appeals** (in 2008, **28%** of appeals in the EU resulted in overturning negative decisions[23]), point to **the low defendability of initial determinations and to the need to improve the robustness of negative decisions and reduce the risk of their annulment.**

2.2.3. Statistical evidence of insufficient harmonization

Data points to a causal link between the fairness and quality of procedures and the numbers of persons qualified for international protection under the Qualification Directive (QD). This has brought two implications on the effectiveness of the asylum *acquis*, namely: (i) similar cases are treated differently between MS, leading to **the wide divergences in the application of the QD**, (ii) applications are not distributed equally, thus creating an incentive for overburdened MS to lower

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22 This, in particular, concerns the safe country of origin notion, grounds for an accelerated examination and border procedures. Yet, the ways these notions have been implemented in national systems vary significantly between MS.

23 In 2008 appeals thus resulted in 18,500 final decisions to grant protection in addition to 47,745 positive first-instance decisions; for data on appeals in 2007 and 2008 see Annex 25.

their standards or maintain restrictive policies[24]. Consequently, the objectives pursued by the Union policy on asylum have not yet been achieved, as illustrated by extensive statistical evidence. In particular,

- Percentages of total positive decisions in the different MS in **2005 - 2008** varied from 65,9 % in Lithuania and 57 % in Italy, to 44,1% in Austria and 41,5% in Sweden, to 23,8 % in Germany, to 5,3 % in Spain, to 2,4 in Slovenia, to 1,3 % in Greece.

- Recognition rates in different MS for applicants from the same nationality for the period **2005-2007** varied significantly: for instance, for asylum seekers from Russia (mostly of Chechen background), from 63% in Austria to 0% in Slovakia; 98 % of Somali asylum seekers received protection in Malta, 55% - in the UK and 0% in Greece.

2.2.4. The effect of insufficient harmonization on secondary movements and distribution of asylum seekers amongst MS

The Dublin system has significantly limited the possibility for asylum seekers to choose a destination MS. However, the asylum "lottery" resulting from deficiencies in procedural and substantive standards has been a driver behind continuous secondary movements. Multiple applications remained high – at 17% in 2006 and 16% in 2007. Asylum seekers evidently find certain MS more "attractive" destinations than others. Thus, between January and December 2006[25], Belgium, Germany, France, Sweden and the United Kingdom received more than 3000 multiple applications while countries such as Cyprus and Portugal had received less than 100 such applications and Estonia one.

The harmonization achieved by the Directive has not led to more equal distribution of applications. Based on the numbers of asylum seekers per 1,000 inhabitants in 2004-2008, **two groups of MS appear to be most affected** by arrivals: (1) MS situated at the borders receiving major irregular flows to the EU (Cyprus, Greece, Malta and Slovakia) and (2) MS in which the probability of receiving protection, measured against the EU average (24,7 % in 2005-2008), is high: Luxembourg (48 %), Sweden (46 %), Austria (32, 4 %), Belgium (25,3 %) and the UK (22,3 %). There may be a series of reasons behind personal choices of asylum seekers as to where to seek protection, including linguistic and cultural ties, community networks and economic factors. Yet, several examples are supportive to a stronger role of the outcomes of procedures. Sweden (46 % recognition rate in 2007) has received 5 times more applications than Spain (4,5% recognition rate). Also, despite geographical proximity of all three Baltic states to Russia, only Lithuania (65, 9 % recognition rate) has continuously experienced arrivals of asylum seekers from Caucasus (Chechnya). Continuous unequal distribution of applications result in MS' unilateral acts aimed at preventing further arrivals. **Sweden**, which restricted its procedural and substantive policies on Iraqi asylum seekers in 2007, witnessed a **decrease by 2/3** in the number of arrivals of Iraqis in 2008, while the number of applications from Iraqi nationals **in Germany and the Netherlands more than doubled** in 2008 compared to 2007**, Finland received 4 times** as many and **Norway three times** as many[26]. Trends in applications and positive decisions are illustrated in annex 8.

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24 This is, in particular, illustrated by flows of Iraqi asylum seekers' to Sweden

25 Annual report to the Council and the European Parliament on the activities of the EURODAC Central Unit 2006, SEC(2007)1184, Brussels, September 2007, pp.48-49

26 Asylum applications by Iraqis in Sweden decreased from 18,560 in 2007 to 6,330 in 2008, whereas in. Germany they increased from 4,325 in 2007 to 7,135 for Jan-Oct 2008, in the Netherlands from 2,005 in 2007 to 4,805 for Jan-Oct 2008 and in Finland from 290 in 2007 to 765 for Jan-Oct 2008); Source: Eurostat.

2.2.5. Difficulties in quantifying assessments

There are serious limitations for estimating impacts of EU wide policy measures on asylum procedures. Asylum flows, being a form of ***forced displacement***, essentially differ from ***economically motivated migration***, such as labour migration. It is apparent from statistical data that peaks in numbers of applications in the EU normally occur around large scale conflicts characterised by **intensive and indiscriminate violence, and wide spread Human Rights violations[27].** While any major conflict in Eurasia or Africa will inevitably produce flows of asylum seekers to the EU, the occurrence and intensity of such conflicts **can not be predicted**. The closer the conflict is, the higher numbers should be expected, as proved by wars in former Yugoslavia and the Caucasus. Research further shows that ***asylum applications often rise in advance of outright war and persist well after the end of the conflict[28].*** Furthermore, protection is granted on ***a case by case basis,*** based on a complex analysis which is context specific, and depends on a number of legal and factual circumstances. The ***profile of future arrivals*** will also influence the outcomes of procedures, and the interpretation of ***substantive criteria*** set out in the QD will have further impacts on the results of determinations. While general trends are identifiable, it is not possible to establish to what extent a particular standard, or its amendment, may be attributable to changes in asylum flows or recognition rates. Generally, MS have not been able to provide segregated data on costs employed in first instance and appeal procedures. It is thus impossible to estimate how many applicants might actually be affected by envisaged measures or to assess accurately their financial impacts. This is an objective constraint which future proposals must work within. Same applies to flows to the EU. While the research suggests that restrictive policies of the last two decades of XX century might reduce asylum applications in the EU by about **12 %** of their mean level[29], the decrease is attributable to a serious of factors, such as visa requirements, ex-territorial border controls, reduced reception standards, restrictive procedures and limited interpretation of the refugee definition. Given the complexity and magnitude of different pull factors, the impact of procedural standards on **flows of asylum seekers to the EU** appears to be appreciable but still limited. The current overall rise of application in the EU **(+ 12 %** in 2007, and **+ 8 %** in 2008) and consistent presence of countries affected by armed conflict, violence and/or political terror in the top 5 of EU asylum statistics point to a stronger potential of push factors in combination with other factors, such as common language and geographical proximity, to determine flows.

2.2.6. Specific problems

Given the central role of procedural standards in the CEAS, the limited effectiveness of the asylum *acquis* is, to a large extent, attributable to the current directive. More specifically, the following deficiencies have been identified.

2.2.6.1 Insufficient procedural safeguards open room for administrative error and may lead to denial of protection

Insufficient arrangements for personal interviews

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27 Data refers to wars in former Yugoslavia in 1992-3 and 1998-9, Gulf War I in 1990-1, and Afghanistan in 1999-2005

28 T. Hatton, Discussion paper "The rise and fall of asylum: what happened and why?", March 2008, the Australian National University, Centre for Economic Policy Research, page 4.

29 See T.Hatton, European Asylum Policy, National Institute Economic Review, 1994

The directive allows MS to omit a personal interview on a number of 6 grounds, and 10 MS have explicitly provided for this possibility in their national legislation[30]. Based on the number of applications submitted in those MS in 2008, up to **111 650** applicants (40 % of the total asylum seekers' population) might be potentially targeted by this derogation. This derogation has been used in practice with PL reporting the highest rate (up to 5 % of all cases). Since the right to a personal interview **is a basic procedural safeguard,** the very possibility of taking a decision without interviewing an applicant makes procedures vulnerable to error and consequent *refoulement.* Where an interview is granted, the awareness of the applicant about the purpose of the interview, the preparedness of the personnel, and the content of and conditions in which the interview takes place may be decisive for the outcomes of the examination. While the Directive, to a large extent, **is silent on these issues**, research demonstrates that in some cases information collected in a personal interview is clearly insufficient to correctly apply the provisions of the QD[31]. Indicatively, the length of interviews varies significantly between MS: from 0,5 hour in EL to 3 hours in the UK. In the UK, a quality control audit found that in about 13 % of 1,085 cases sampled applicants were refused asylum based on decisions and/or interviews that were rated as poor or not fully effective[32]. The applicant is not entitled to comment on or provide clarifications with regard to the contents of the report, although MS are allowed to request the applicant's approval of its contents. As indicated by legal advisors,[33] factual mistakes or misunderstandings are common in the reports having direct impacts on the outcomes of the examination.

Limited access to legal advice

Based on Article 6 ECHR and respective case law of the ECtHR, the EU Charter provides for the right of access to legal advice and requires, subject to certain conditions, to make free legal assistance available to individuals[34]. The ECJ case law further indicates that the grant of free legal assistance may be necessary to a person in the less advantageous position in a pre-judicial procedure to safeguard rights guaranteed by Community Law[35]. The directive does not require MS to grant free legal assistance at first instance, whilst the right to free legal assistance in appeal procedures is qualified by several exceptions and derogations[36]. A number of MS have remedied this gap in Community legislation by making free legal assistance available to applicants already in the initial stage of the asylum process[37]. Others, however, literally follow the Directive's arrangement allowing applicants to consult, ***at their own cost***, a legal advisor or counsellor[38].

Indicatively, MS which make free legal assistance available to applicants in procedures at first instance are above or close to an EU average as regards first instance positive decisions on asylum applications, whilst MS which do not follow this approach, with a few exceptions, have lower rates.

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30 These include Cyprus, Estonia, France, Greece, Malta, Poland, Portugal, Slovenia, Spain, and UK

31 A study of the implementation of the Qualification Directive, UNHCR, November 2007, page 33.

32 Out of 1,085 cases examined

33 On 17 March 2008, the Commission convened an experts' meeting attended by practicing immigration lawyers representing asylum applicants in national asylum procedures of 19 MS (Sweden, Lithuania, Slovakia, Italy, Ireland, Hungary, Greece, Romania, the UK, Finland, Germany, Estonia, Austria, Czech Republic, Cyprus, Poland, Slovenia, Malta, Latvia).

34 Pursuant to Article 47 of the Charter, legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

35 *Evans*, Case C-63/01, 4 December 2003, paras 77, 78. In particular, the ECJ emphasised that the less advantageous position and conditions under which the person is able to submit his/her comments may be decisive for granting legal aid in a procedure aimed at safeguarding rights which individuals derive from Community law.

36 Article 15 APD

37 Austria, Belgium, Lithuania, Luxemburg, Sweden, the Netherlands, Finland, United Kingdom, Hungary

38 These include Greece, France, Italy, and Cyprus.

It is also worth noting that the latter group includes those MS which derogate from the obligation to interview applicants.

With the ***Community average of 24, 7%*** in 2005 – 2008, **the percentage** of positive decisions at first instance amounted to 59 % in Lithuania, 40 % in Sweden, 38 % in the Netherlands, 29 % in Finland, 28 % in Austria, 22 % in Belgium**,** and **was only** 1 % in Slovakia, Greece and Slovenia and 3 % in Cyprus. In 2008, at least **132 185** asylum applicants had to substantiate their protection requests in procedures lacking arrangements which guarantee access to professional legal advice. Divergences in interview arrangements and access to legal advice negatively affect the operation of the Dublin system which is based on the assumption that asylum applicants have the possibility of accessing protection under equivalent conditions in all MS. In the period 2006 through June 2007, out of 23 183 requests pursuant to the Dublin regulation, 14 380 requests – or 62 % of all requests were received by MS which do not grant legal assistance in first instance procedures.

Procedures are not responsive to special needs

The principle of non-discrimination is a corner stone of Community Law enshrined in both the TEC and the Charter of Fundamental Rights[39]. In *Thlimmenos,* the ECtHR also emphasized that the right not to be discriminated is violated when states without an objective and reasonable justification fail to ***treat differently*** persons whose ***situations*** are ***significantly different***[40]. International treaties dealing with the rights of women and vulnerable persons[41] promote a similar approach by prohibiting both direct and indirect discrimination and providing for special measures to achieve *de facto* or substantive equality[42]. The UN Child Rights Convention (the CRC) explicitly obliges participating states to take ***appropriate measures*** to ensure that a child who is seeking refugee status ***receives appropriate protection***[43]**.**

Based on studies examining gender, age and trauma implications for asylum procedures, two sets of problems are identifiable. Firstly, the Directive does not take account of extensive research demonstrating that consequences of torture can seriously obstruct asylum seekers from remembering and speaking about their traumatic experiences as well as seriously affect the quality of their statements.[44] Secondly, it has been argued that certain provisions of the Directive may indirectly discriminate applicants due to their gender or age.

As regards survivors of torture, the directive's silence on the special needs of this category of applicants in combination with provisions allowing MS to treat cases as manifestly unfounded and omit a personal interview, if the applicant has made *'inconsistent, contradictory, improbable or insufficient representations',* have been widely criticized as having the potential to produces errors.

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39 See Article 21 (1) CFR

40 Thlimmenos v. Greece, Application No. 34369/97, 6 April 2000, para 44

41 The relevant treaties include: the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDW) and the 1989 Convention on the Rights of the Child (CRC)

42 See inter alia General recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures by the UN Committee on the Elimination of Discrimination against Women, available at *http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf*

43 Article 22 CRC

44 See e.g. Psychological and psychiatric aspects of recounting traumatic events by asylum seekers, in Care Full, Medico-legal reports and the Istanbul Protocol in asylum procedures, edited by René Bruin, Marcelle Reneman, Evert Bloemen,pp.42-85, 2006.

Research commonly estimates that between **4-35%** of any given refugee group have experienced torture, and a study[45] on the rehabilitation needs of asylum seekers in 14 MS point to **20%.** This implies that at least **50 000** asylum seekers might be potentially affected by the current deficiencies annually. A detailed quantified analysis of the problem is provided in annex 20.

While ***gender based persecution*** is explicitly addressed in the QD, no corresponding procedural standards appear in the APD. The Directive's gender neutrality reflects national arrangements: in at least 10 MS[46], there are no gender guidelines and at least 7 MS do not have legislation allowing the applicant to choose a same sex legal representative and/or interpreter[47]; only 5 MS confirmed that their asylum procedures are evaluated to ensure that they are gender-sensitive.[48]

The Directive does not explicitly provide for the right of children to make an application for asylum, since its relevant provisions are formulated as "may" clauses[49]. It has also been argued that the directive's standards on access to procedures are not responsive to the needs of unaccompanied minors who, due to their age or level of maturity, may be not able lodge an application on equal footing with adults. In this respect, NGO reports on immigration detention of unaccompanied children point to the lack of procedural arrangements, such as the appointment of a guardian, capable to facilitate access to protection for unaccompanied minors who may have the protection needs[50]. The requirements for the representatives of unaccompanied minors in asylum procedures are vague[51] and that key issues, such as qualifications and impartiality of guardians, are not addressed in the asylum *acquis.* Also, the directive contains a 'stand still clause' allowing MS to refrain from appointing a guardian for unaccompanied minors who are of or above 16 year old. The clause is reflected in national legislation of 2 MS (EL and DE). The above deficiencies affected **54, 115** minors who were seeking asylum in the EU in 2008. **11 019** (some 21 %) of them were unaccompanied[52].

Applicants do not have adequate access to effective remedy

The right to effective judicial protection requires access to a court or tribunal which (i) is ***independent*** and ***impartial,*** (ii) carries out a full and ***ex nunc*** examination of facts and points of law, (iii) has access to materials upon which the administrative authority based its decision, and (iv) ensures ***equality of arms*** of parties to proceedings. Appellants should enjoy protection from removal pending the outcomes of appeal proceedings. A detailed analysis of international and Community

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45 Data refer to the IRCT study carried out in 14 MS in 2007.

46 Austria, Belgium, Bulgaria, Cyprus, Hungary, Lithuania, Latvia, Malta, Poland and Slovakia

47 Finland, Cyprus, Latvia, Malta, Sweden, Slovakia and Poland

48 In Finland, gender-related aspects are taken into account as one element in an overall evaluation of asylum procedures. In Czech Republic and Malta, this is done through the analysis of the interview (Czech Republic) and through the Country of Origin Information (Czech Republic and Malta). In Hungary, the UNHCR monitors the refugee determination procedure on its gender-sensitiveness on an annual basis, and there is a "Standard operating procedures for prevention of and response to sexual and gender-base violence" under construction in cooperation with the UNHCR.

49 The right to make an application for asylum on his/her own behalf is explicitly recognised for ***each adult having legal capacity*** only pursuant to Article 6 (2) APD.

50 The current framework is based on the assumption that all third country nationals, including unaccompanied minors, should first make an application for asylum in order to benefit from the guarantees set out in the acquis. This leads to the situation of a "vicious cycle".

51 Pursuant to Art. 2 (i) APD , [...]'representative' means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.

52 EUROSTAT provisional data for 2008.

law requirements applicable to the right to effective remedy is provided in Annex 19. In this respect, the following key deficiencies of the current standards have been identified by commentators: (a) the accessibility of remedies may be limited, since the directive offers no binding arrangements on suspensive effect of appeals, and time limits for lodging appeals are left to MS to establish, (b) the scope and nature of review by a court or tribunal is not defined, and (c) both the court (tribunal) and parties to procedures may be denied access to materials on which the determining authority based its decision.

Data extrapolated from statistical reports of several MS for 2007[53], indicate that some **77 %** of rejection decisions may have been appealed with the success rate of some **18,5 %.** This points to some ***20 500*** erroneous 1st instance decisions presumably corrected by appeal bodies in 2007. This estimation also indicates that some **20 %** of applicants do not appeal against negative decisions and therefore appears to be a subject of concern, expressed by UNHCR, Civil Society and academics, with regard to **the limited accessibility of remedies** provided for in the directive. In practice, a number of MS indeed give **short time limits** for lodging appeals, in particular against decisions taken in border and/or accelerated procedures. The limits are as short as 24 hours (Spain), 2 days (the UK) and 3 days (Hungary, Germany and Slovenia). In addition, DE and UK deny by law suspensive effect to certain categories of applicants, whilst national legislation of the Netherlands, the Czech Republic and Slovakia do not guarantee the right to remain pending the outcomes of a request for interim measures.

2.2.6.2 Vague procedural notions and devices negatively affect the accessibility, fairness and efficiency of asylum process.

Obstacles to requesting international protection

The directive's standards on access to procedures are limited to 3 mandatory requirements, namely (i) borders and transit zones are included in its territorial scope, (ii) it guarantees the right to make an application to every adult having legal capacity, and (iii) it requires authorities likely to be addressed by a potential applicant to advise him/her on access to the procedure. This arrangement leaves unanswered a number of key questions, such as the time limits for completing formalities related to the receiving of applications, the obligations of border guard and immigration authorities and the availability of procedural guarantees in the entry points or areas close to the border. In particular, the directive appears to be inadequately equipped to enable MS to distinguish between illegal migrants and *de facto* asylum seekers in increasingly mixed arrivals and to accommodate the evolving border management strategies. Studies on access to procedures indicate that a lack of valid travel / entry documents appears to be a decisive factor in border checks under the Schengen Borders Code[54], while the persons concerned are not necessarily provided with adequate arrangements to explain the reasons for their arrival before a formal decision to deny entry is taken[55]. While reliable data on numbers of asylum seekers denied access to procedures are not available, NGOs involved in border monitoring[56] or advocacy work[57] on behalf of refugees have reported cases of *de facto* asylum

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53 Data concerns BE, DK, UK, SP, GE and FR.

54 Regulation (EC) No 562/2006 of 15 March 2006

55 See *Access to protection at airports in Europe*, Hungarian Helsinki Committee, op.cit, also *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007

56 See, for example, the report *Access to protection at airports in Europe*, Hungarian Helsinki Committee, August 2008

57 In particular, in 2007 and 2008 Pro Asyl and Human Rights Watch published reports, based on individual interviews with asylum seekers, describing difficulties to access territory and asylum procedures in the context

seekers who were allegedly turned back at the border or diverted at sea. Data also show that significant numbers of *de facto* asylum seekers irregularly arrive at the borders alongside other migrants whose reasons for travel are not protection related. Indicatively, ***every second migrant*** irregularly arrived at the maritime borders and eventually admitted into the asylum procedure in Italy and Malta receives international protection: in 2005 -2008, the percentage of positive decisions on asylum applications at first instance amounted to 57 % in Italy and 52, 4 % in Malta. Poland and Lithuania demonstrate similarly high recognition rates with regard to applicants arrived at the external land borders of the Union: in 2005 – 2008, 65,9 % of all applicants were granted international protection at first instance in Lithuania and 52,5 % in Poland.

Furthermore, the directive is very ambiguous on the initial stage of procedures. While MS have in their disposal 8 inadmissibility grounds capable to prevent substantive examinations, the directive leaves aside key issues such as a (screening) personal interview or level of connection with a safe third country, and the procedural arrangements vary greatly between MS[58]. Similarly, 12 MS have border procedures in place for handling asylum applications at entry ports[59]. All these procedures are very different in terms of cases being processed, level of procedural guarantees, time frames and access to effective remedy. They all, however, may result in rejecting the application within a very short time period either on the inadmissibility grounds or because it is considered as manifestly unfounded. In France's border procedure, the share of applicants allowed entry into territory was 44, 6 % in 2007, 20 % in 2006 and 22, 2 % in 2005[60]. It also appears that the opportunity to present her/his views is not given to the applicant in some border procedures (e.g. in Estonia) and that appeals against decisions to deny entry do not have suspensive effect in a number of MS (e.g. Estonia, Spain).

Disparate use of accelerated procedures

The directive provides 16 grounds of accelerated or prioritised procedures, a number of which are linked with the possibility of omitting a personal interview[61], and MS may consider cases falling under any of the 16 grounds as manifestly unfounded[62]. In addition, MS may accelerate or prioritise any examination at first instance[63]. In effect, therefore, the procedures may be expedited on ***any ground*** *and* ***within any time limits[64].*** This has resulted in the proliferation of diverse procedural arrangements in the Union. Almost all MS have made use of the Directive's grounds for accelerated examination[65], and some have introduced additional grounds which do not appear in the directive[66]. Each of the 16 grounds has attracted from 5 up to 13 national transpositions with different combinations of MS engaged (an overview of the transposition of each of the 16 grounds is provided

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of border surveillance in the Mediterranean Sea, see *Stuck in a Revolving Door* by Human Right Watch and *The truth may be bitter, but it must be told* by Pro Asyl.

58 Czech legislation explicitly stipulates that an interview shall not be conducted in cases where the application is deemed as inadmissible, Article 23 (1) of the Asylum Act. In Lithuania, the inadmissibility decisions are taken by the determining authority on the basis of screening interviews conducted by border guards or police officers.

59 These include Austria Estonia, Germany, Greece, Czech Republic, France, Hungary, Portugal, Romania, Slovakia, Slovenia, and Spain.

60 Data refer to the ANAFE report of September 2008 on access to procedures in transit zones.

61 See Article 23 (4) in conjunction with Article 12 (2) (b) APD.

62 See Article 28 (2) APD. Based on the consultation, it appears that in most cases, accelerated procedures lead to a negative decision.

63 Article 23 (3) APD

64 The Directive is silent on the issue of time frames for accelerated or prioritised procedures.

65 In the consultations, Hungary was the only Member State who explicitly confirmed that it had not transposed this Article

66 For example, Slovenian legislation refers to an applicant arrived in Slovenia for economic reasons exclusively.

in annex 22). The time frame for accelerated procedures varies greatly between the MS, ranging from 3 days (BG, RO) to 3 months (AT). Legislation of 9 MS[67] allows for omitting a personal interview in accelerated procedures, and in a number of MS accelerated procedures are merged with border procedures[68]. Also, the share of applications treated through accelerated and prioritised procedures varies greatly between the MS. In 2007, the proportion of applications examined in an accelerated procedure was 17.6 % in Latvia, 8 % in Poland, 17,3 % in Slovakia and 1 % in Sweden.

This situation also raises fairness concerns, since "*time limits should not be **so short** or applied **so inflexibly**, as to deny an applicant […] **a realistic opportunity** to prove his or her claim*[69]*".*

Inconsistent application of the safe country of origin notion

The directive sets out a complex framework for processing applications of persons from safe countries of origin. It provides for Community and national lists of safe countries, spells out 5 different sets of requirements for designation and allows MS to omit a personal interview in such cases. The implementation of these arrangements has proved to be difficult in practice.

MS have demonstrated divergent approaches to the use of the notion at national level. Firstly, a group of MS ***have not made use of the national designation*** of third countries as safe[70]. In the consultations, several MS also submitted that the notion of safe country of origin was applied in their procedures ***on a case by case basis*** in line with the criteria laid down in national legislation[71]. Other MS have provided ***for national lists*** in line with the material requirements set out in Annex II and Article 31 (1) APD[72], whilst a few MS have benefited from ***stand still clauses***[73] thus applying less rigorous requirements for the national designation[74]. The contents of national lists and the share of applications to which the safe country of origin concept is applied also vary. Generally, the notion is only rarely applied in MS which stick to the material requirements of Annex II, whilst MS derogating from the agreed standards apply the notion more frequently: there were only 25 cases falling under the notion out of a total of 8,888 applications in Austria in 2008, while 1,898 first instance claims (i.e 8.8% of all claims) have been introduced from persons coming from safe countries of origin in France since 1 December 2007[75]. It is also worth mentioning that despite legislative provisions on the national designation, several MS have not in fact adopted a national list of safe countries[76]. In the consultations, only 4 MS confirmed that the applicant is allowed to present her/his views and describe individual circumstances through a personal interview[77]. At the same

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67 *Cyprus, Greece, Estonia, France, Malta, Portugal, Slovenia, Poland and UK*

68 According to the Greek legislation, all applications lodged at the border or in transit zones at ports and airports of Greece must be subject to accelerated procedures.

69 *Bahaddar v. The Netherlands* (application 25894/94).

70 Belgium, Latvia, Italy, Slovenia, Poland, Sweden

71 Estonia, Finland, the Netherlands, Portugal

72 Cyprus, Czech Republic, Greece, Ireland, Hungary, Luxemburg, Lithuania, Romania, Slovakia. Some of these MS have also provided for the designation of part of a country as safe.

73 Article 31 (2) (3) APD

74 Germany, France, the UK

75 Similarly, Romania reported 4 cases, Slovakia - 1 case, and Luxemburg – 1 case. While in the consultations the UK was not able to indicate the number of cases in which the notion had been applied, the UK Border Agency statistical report for 2007 maintains that ***6 500 applicants*** did not appeal against negative decisions. This number includes ***non-suspensive appeal cases*** of applicants from 24 countries which are on ***the UK national list of safe countries of origin.***

76 E.g. Bulgaria, Greece, Hungary, Lithuania

77 These are: Hungary, Lithuania, Luxembourg, and Romania.

time, a number of MS consider such applications as manifestly unfounded[78] and /or provide for non-suspensive appeals[79].

The directive's provisions on procedures for the adoption and amendment of a common list of safe countries of origin have been annulled by the ECJ.[80] Although forming a constituent part of the current framework and transposed in national legislation, the relevant standards of the directive are not used in practice.

Insufficient quality and efficiency of decision making

Deciding on asylum applications has been described as the single most complex adjudication function in contemporary societies requiring a decision maker to be prepared to deal with cultural, social, and psychological aspects surrounding the application as well as with complex legal issues[81]. The implementation of the current APD points to a link between the quality and the efficiency of procedures. Asylum systems "frontloading" expertise, quality control and services have proved to be better prepared to deliver quick and reliable final determinations[82]. These initiatives, however, are undertaken unilaterally, while the current directive offers only basic and vague standards. In essence, it requires the personnel examining applications and taking decisions to have the knowledge of asylum and refugee law[83]. In practice, the training programmes for the case workers and decision makers vary significantly in terms of the contents, level and intensity. While mandatory introductory programmes, initial and on-going (follow up) training courses as well as training units have been introduced in some national asylum systems[84], other MS rely on *ad hoc* training. This implies that the level of expertise available in national asylum systems varies between MS[85]. Furthermore, the directive allows for institutional arrangements at national level which include authorities whose competences are not directly related to asylum matters[86]. While these optional provisions have not been widely implemented across the EU, in several MS authorities primarily responsible for immigration or border control are involved in asylum decision making. These include the authorities examining cases raising national security considerations and the authorities responsible for a preliminary examination of subsequent applications[87], border guards in border procedures pursuant to Article 35 (1) APD[88], and the immigration authorities in special border procedures pursuant to Article 35 (2) APD[89].

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78 E.g. Greece, Estonia, Romania, the UK

79 Non-suspensive appeals are appeals which do not stop the enforcement of a negative decision. The system is in place in Estonia and the UK

80 Case 113/06, Judgement of 6 May 2008.

81 See C. Rousseau, F. Crepeau, P. Foxen, F. Houle, The complexity of determining refugeehood: a multidisciplinary analysis of the decision making process of the Canadian Immigration and Refugee Board. Journal of Refugee Studies Vol.15, No 1, 2002

82 Quality control units operate within asylum authorities of AU, GE and UK.

83 Articles 4 (3) and 8 (2) (c) APD

84 SE, GE, NL, AU, the UK.

85 An analysis of national training programmes was carried out in the framework of the European Asylum Curriculum project. See also the Commission Staff working document accompanying a proposal for a regulation of the European Parliament and of the Council establishing an European Asylum Support Office, COM(2009) 66 final, SEC(2009) 154, page 9

86 Article 4 (2) APD provides for 6 exceptions to the principle of a single determining authority. These *inter alia* include cases involving ***national security considerations*** and cases being examined in ***border procedures.***

87 Belgium

88 Estonia

89 France

Rights guaranteed by Community law require procedures capable of ensuring that the persons concerned will have their applications dealt with objectively and within *reasonable time.*[90] The relevant directive's standards are too vague to meet this requirement. Two problems are identifiable. First, no reliable indications as to when a first instance decision may be taken are set out in the directive. In practice, some procedures result in negative decisions taken within time limits described by commentators as fatal (3 days in BG, 5 days in LV), while others take mounts and even years. Second, low fairness and insufficient quality of initial determinations increase the overall duration of asylum process producing additional costs.

Lack of targets for taking first instance decisions negatively affects the accessibility of the QD for genuine refugees, requires additional reception costs (estimates made by DG JLS point that one reception day may cost, in average, 30 *per capita* EUR), and limit the ability of MS to remove failed asylum seekers. In 5 MS (CY, FI, FR, LU and SL) **no temporal limits** for mainstream procedures are set out, while in other MS formal limits range from 1 month (IT, RO, LV), to 3 months BG, CZ, SK, to 6 months (AU, EE, NL, SE). The initial periods may be extended in the majority of MS. National practices vary greatly between and in MS. While certain procedures are concluded within hours (SP) or days (LV, LT), others require much longer periods: in SE only 31 % of applications were concluded within 6 months in 2008; in FI the average processing time in the first quarter of 2009 was 297 days (9,9 months). See annex 23 for an overview of MS practices. The administrative and financial capacities of MS' asylum authorities are also not equal. The number of applicants per staff member varies from **242 applicants / staff** employed in CY to **3 applicants / staff** employed in EE, and average costs of applications range from **95 Euro** per capita in MT, to **14,908** Euro in NL, to **20 000 EUR** in SE. See annex 13 for an overview of MS' resources employed in asylum procedures. The UK New Asylum Model demonstrates that targets in taking decisions, quality control and organisation of first instance procedures are instrumental in complying with the efficiency requirements. Out of **27 905** applications lodged in the UK in 2007, **40 %** of cases resulted in the **grant of protection or removal** within 6 months by December 2007, while a backlog of applications unresolved before the introduction of the model amounted to some **400, 000 – 450, 000** cases. The UK Border Agency estimates that this backlog cost nearly **£ 600 million in** 2**007-08,** of which £ 430 million (72 per cent) was accounted for by accommodation and welfare support[91].

Data point to a link between *the quality and robustness of first instance examinations* *and* ***the overall efficiency of procedures***. MS have been increasingly confronted with repeated claims. In 2008, subsequent applications amounted to **36.4%** in CZ, **28.5%** in BE, **20.7%** in GE, **15.4%** in PL and **12.3%** in NL. Abusive claims are definitely part of this phenomenon and MS have reported difficulties in implementing relevant procedures[92]. Causes of subsequent applications are also rooted in omitted and poorly conducted personal interviews, insufficient awareness of rights and obligations and lack of *ex nunc* examinations at first instance. The EURODAC data further point to significant levels of multiple applications: 17% and 16% in 2006 and 2007. In 2008, out of the total **197,284** recorded applications, in **31,910** cases the same person had already made at least one asylum application before[93]. In 2008, the **success rate** of appeals was 28 % against 24,7 % recognition rate

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90 *Panayotova and others*, Case C-327/02.

91 Management of asylum applications by the UK Border agency. Report by the Controller and Auditor General. Op.cit., page 4

92 Procedures for dealing with subsequent applications are set out in Art. 32 – 35 APD. Concerns were expressed by AU, CZ and FR.

93 Sources: Annex to the Communication on the Evaluation of the Dublin System, SEC(2007)742, Brussels, June 2007, p.42 ; Annual report to the Council and the European Parliament on the activities of the EURODAC Central Unit 2006, SEC(2007)1184, Brussels, September 2007, pp.48-49

at first instance resulting in 18 500 final decisions to grant protection[94] in addition to 47 745 positive first instance determinations. The defendability of first instance is therefore low, leading to delays in delivering final decisions and producing additional reception and processing costs.

2.3. The baseline scenario

With regard to the development of the problems and future situation if no EU level action was undertaken (i.e. status quo), there are a number of key trends that can provide an indication of whether the identified problems would be addressed or become aggravated.

The problems concerned by the present proposal essentially relate to (1) insufficient procedural guarantees and low quality of decision making capable of leading to administrative errors; (2) vague standards on access to procedures; and (3) vague procedural notions and devices affecting the efficiency and fairness of asylum process.

With regard to problem (1), improvements can be expected, in particular in relation to the right to effective remedy and arrangements for personal interviews, as a result of the future ECJ and, to a lesser extent, ECtHR rulings. The ECJ case law impact may however be limited, since only national courts "against whose decisions there is no judicial remedy under national law", may seek ECJ position on the Directive's standards[95]. Given insufficient standards on legal assistance and lack of suspensive effect of appeals[96], national Supreme Courts might not always be accessible for asylum seekers. The infringement proceedings may give the ECJ the opportunity to interpret the APD standards in line with the general principles of Community Law but the Court's contribution will be of *ad hoc* and not of systemic nature, since the ECJ has powers to ***interpret*** or ***annul*** the rules in force rather than to create the new ones. In particular, given the directive's modest attention to quality issues, no relevant case law is expected.

The establishment of the EASO will have the potential to lead, in a longer term, to a certain degree of convergence of the procedural guarantees through promoting exchanges of good practice on interviews and legal advice, providing support to translation and interpreting and to training. The Office's analysis of the asylum situation in the Union and recommendations on the implementation of asylum instruments will reinforce the impact of the current Directive. While this should help address the problems of incorrect or incomplete implementation, the Office's input in setting standards which are higher than the lowest denominator authorised by the directive will depend on their voluntary acceptance by MS. While improvements compared to the present situation are foreseeable, they will vary between MS and lack systemic impacts. Same applies to the quality of decision making, since the lack of a level playing field in this area will lead to different degrees of acceptance of the EASO services in MS: MS which have put in place regular training and quality assurance programmes are likely to benefit from the Office's support to a higher degree in comparison to MS which have not developed similar mechanisms. The UNHCR quality initiatives, based on the UK 2003 pilot, are likely to bring improvements in the concerned MS[97]. Yet, as these initiatives are essentially *ad hoc* projects, their outcomes will not have systemic impacts on the 26 MS, while the sustainability and the institutional ownership of these initiatives are yet to be proven.

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94 This estimate is based on the provisional EUROSTAT data for 2008.

95 Article 68 (1) TEC

96 Since the APD entry into force (1 December 2007), the ECJ has not received any request for a preliminary ruling with regard to the APD.

97 With ERF support, UNHCR is currently implementing the quality initiative covering eight MS: Bulgaria, Hungary, Poland, Romania, Slovakia and Slovenia, Austria and Germany.

Because the directive's provisions relevant to the quality of decision making are limited to a few basic standards, they will lack the potential to offer benchmarks to Union wide initiatives, including those proposed in the draft regulation for establishing the EASO. Insufficient quality of decision making would lead to litigations and subsequent applications, thus delaying the final outcomes of proceedings. This would reproduce cost-inefficiency, require additional reception costs and create difficulties for effective return of failed asylum seekers.

With regard to problem (2), the Commission monitoring of the implementation of the current APD might result in clarifying the scope of the minimum standards, in particular if the ECJ gives a broad interpretation to the directive's rules on access to procedures. However, actual flaws in administrative practices may be left in a shadow due to the specifics of border checks and controls. Border monitoring initiatives involving NGOs and public authorities, if implemented consistently across the EU, might improve transparency of border controls and make access related services more accessible. Nevertheless, the sustainability and the territorial scope of such projects are likely to be limited, as no mandatory standards require MS to have such arrangements. Forms of practical cooperation, for example, developed following the establishment of the EASO (e.g. through peer learning, good practices, specific projects such as the interpreters pool and remote interpretation, and joint training activities with FRONTEX) and the development of EU level guidelines could contribute to some improved access to asylum procedures. These activities, however, do not cover the full extent of the current problems.

Problem (3) is likely to be aggravated given the wide margin of discretion MS enjoy with regard to the types and lengths of procedures, and the notions and devices employed. Differently from problems (1) and (2), no significant case law impact is expected, since neither international law nor the general principles of Community Law explicitly address the organisation of procedures. Neither does the EASO mandate cover the organisational aspects of asylum process. **The proliferation of disparate procedural arrangements,** which is a clearly identifiable trend now, is a foreseeable baseline scenario. This will further cause secondary movements towards more efficient and fair procedures and unequal distributions of applications between MS. This will force MS concerned to procedurally respond to these challenges on a unilateral basis, bringing more divergences and promoting "race to the bottom".

As a general issue, applicable to all problems discussed above, is the following: by not establishing key principles and issues in Community law, changes in the MS can always occur due to national developments. National initiatives will have much stronger impact on asylum procedures than non-binding Community level measures. Statistics for 2007 and 2008 point to a steady increase of asylum applications in the EU, and any significant upwards trends in arrivals, in combination with other factors, such as implications of economic crisis, can lead to a negative public perception of asylum seekers and, consequently, restrictive procedures. Acceding MS will also be left with a high level of discretion.

2.4. Does the EU have the power to act?

2.4.1. The EU's right to act

The current legal base for Community action in the area of asylum procedures is set out in points (1) and (2) of the first paragraph of Article 63 TEC.

2.4.2. Added value of EU action and respect for the principle of subsidiarity

Action at the EU level is more effective in comparison to MS' unilateral actions in several respects.

i) The objectives set by the Hague Programme - and confirmed in the Pact - regarding a common asylum procedure requires harmonisation of procedural asylum laws and practices of all 26 MS.

At the Tampere European Council of 15-16 October 1999, MS agreed to work towards the establishment of a Common European Asylum System (CEAS) incorporating *inter alia* common rules on asylum procedures. The Hague Programme re-confirmed this objective. According to the Asylum Procedures Directive, the CEAS should include, in the short term, ***common standards for fair and efficient asylum procedures*** in the MS and, in the longer term, ***Community rules leading to a common asylum procedure in the European Community***[98]**.**

ii) Secondary movements and the uneven distribution of asylum seekers are cross-border issues that can only be addressed at EU level. Only enhanced **harmonisation at the EU level** can tackle those factors leading to secondary movements linked to the divergences of national legislations and practices and to different levels of procedural fairness provided in different MS. Thus, **asylum seekers' incentive for movements and the costs of transfers under the Dublin Regulation should be drastically reduced.** The unequal distribution of asylum applications between MS has been a key driver for establishing an efficient and effective CEAS. The first phase of asylum legislation has led to laying down minimum standards for asylum procedures at EU level[99]. While these standards are an important starting point for proceeding towards a common asylum procedure, ***considerable disparities remain between MS concerning the grant of protection,*** as maintained by the European Council in the European Pact on Immigration and Asylum. This situation, to a large extent, is caused by a limited potential of the directive's standards to ensure ***fair and efficient procedures across the EU.*** This lead to some MS having higher procedural standards, in terms of fairness and efficiency, and some MS having low ones. Consequently, asylum flows to and between MS continue to be distributed unequally. Data shows that certain MS receive **much higher numbers of applicants** than others, both in terms of absolute numbers and proportion of the population. One of the reasons for the unequal burden between the MS[100] is that the applications for international protection are treated differently across the EU. Asylum seekers evidently try to seek protection in MS having more generous procedural and substantive standards, whilst the introducing of restrictive policies, based on the directive's lowest denominator, in a MS, normally leads to redistribution of asylum applications between MS. Acting alone a MS may reduce a number of arrivals in its territory but this inevitably affects other MS, as demonstrated by changes in asylum policy in Denmark (2001) and in Sweden (2008). While structural pull factors, such as community networks or employment opportunities, will always have impacts on asylum flows, protection related motives for choosing a country of asylum are the only factors which may be addressed by EU legislation and relevant flanking measures. In a longer term, a level playing field, based on sufficient procedural and substantive standards, will lead to lesser impact of some of structural pull factors such as community networks, since more equal access to protection will lead to more equal distribution of refugee communities between MS[101].

iii) It is unlikely that the level of procedural standards will be comprehensively raised to meet the higher international standards. 'A race to the bottom' may continue, since those MS currently

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98 Recital 3 APD

99 Pursuant to Article 1 APD, the purpose of the Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

100 Other reasons are e.g. geographical location, presence of different migrant communities, historical links with countries of origin, economic situation etc.

101 There will still be differences in the asylum flows due to geography or socio- economic conditions, buts the distortions are expected to be of a lesser scale.

providing more generous protection standards may be inclined to lower their standards in order to avoid "attracting" larger numbers of asylum seekers. Setting essential elements of asylum procedures at the EU level would secure their interpretation, application and enforcement **in line with the Fundamental Rights forming part of the general principles of Community Law.**

iv) The Directive is instrumental in ensuring the coherent application of the asylum *acquis.* The Asylum Procedures Directive lies at the heart of the asylum acquis, since it connects and backs up all the asylum instruments. Consequently, any deficiencies in this directive negatively affect the application of Community rules, set out in the Qualification Directive, the Reception Conditions Directive and the Dublin Regulation. A number of arrangements put in place in the first stage CEAS can have impact on the outcomes of an asylum seeker's attempt to seek protection in the EU. The Dublin system has significantly limited the possibility for asylum seekers to choose a destination MS. This has contributed to asylum "lottery," since the QD works clearly differently in different MS. While this phenomenon is attributable to a number of factors, a lesson learnt during the first stage CEAS is that ***different levels of procedural guarantees*** and ***different procedural arrangements*** resulting from current insufficient and vague standards lead to ***different decisions on the substance*** of asylum applications. In order to ensure a proper operation of the Dublin system and a correct identification of persons in need of protection pursuant to the QD, the minimum Community standards on procedures need to be re-visited.

Consequently, **EU action is necessary** in order to ensure that the existing minimum standards on asylum procedures are **sufficient, coherent** and **consistent** with the rest of the asylum *acquis.* The need for this action is recognised in the European Council's Immigration and Asylum Pact. The respect for the principle of subsidiarity in this respect is confirmed by the ECJ case law, which maintains that once the Council 'has found it necessary to improve the *existing* level of protection (minimum standards in the area of health and safety) and to *further harmonise* the law in this area while maintaining improvements already made, the achievement of this objective necessarily presupposes Community action'[102].

3. OBJECTIVES

3.1. Global objective

In line with the Commission's Asylum Policy Plan, the global objective for this initiative is **to achieve higher standards of protection across the EU for persons in need of international protection**.

3.2. Specific objectives

The proposal pursues the following specific objectives:

(1) To ensure that procedures are accessible to persons seeking international protection;

(2) To improve the fairness of asylum procedures;

(3) To ensure consistent application of common procedural devices;

[102] Case C-377/98, Netherlands v Council, para 52, concerning the "Working time Directive"

(4) To improve the quality and efficiency of procedures;

(5) To improve access to effective remedy across the EU;

(6) To ensure consistency between different EU asylum instruments. [103]

3.3. Operational objectives

The following operational objectives will contribute to achieving **specific objectives 1 and 2:**

- to remove obstacles to requesting international protection
- to ensure correct application of admissibility grounds and border procedures

The following operational objective will contribute to achieving **specific objectives 2 and 5:**

- to limit possibilities for MS to derogate from the basic procedural guarantees
- to provide adequate procedural guarantees, notably for persons with special needs

The following operational objective will contribute to achieving **specific objectives 1, 2, 3 and 6:**

- to prevent the proliferation of disparate accelerated and/or manifestly unfounded procedures
- to ensure consistent application of the safe country of origin concept
- to provide adequate guarantees for applicants to challenge the presumption of safety when applying safe country concepts

The following operational objective will contribute to achieving **specific objective 4**:

- to reinforce MS' administrative capacity to handle caseloads and deliver reliable decisions
- to reduce unreasonably lengthy procedures

The following operational objective will contribute to achieving **specific objectives 4 and 5**:

- to improve accessibility of remedies
- to ensure full review of cases by a court or tribunal

The following operational objective will contribute to achieving **specific objective 6**:

- to ensure consistency between substantive and procedural rules on international protection
- to ensure coherence between asylum procedures and Dublin procedures.

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[103] The assessment of problems and policy options related to this objective are provided in annex 14. The section is not included in the main text, since all 26 MS have introduced arrangements (a single procedure) corresponding to the key element of the preferred option and largely support the concept, as confirmed by the Green Paper and follow up consultations.

4. ASSESSMENT OF POLICY OPTIONS

4.1. Status Quo

Under the status quo, the existing legal framework would remain unchanged and ongoing activities would continue. The Commission would continue monitoring the implementation of the Asylum Procedures Directive. For an assessment of the status quo see annex 16.

4.2. Presentation of sub-policy options

4.2.1. To ensure access to asylum procedures

Presentation of sub-policy options

Three sub-options, proposed bellow, correspond to three different dimensions of the problem: (i) getting access to the competent authorities, (ii) requesting protection in the context of mixed arrivals, and (iii) avoiding errors in the admissibility stage of procedures.

Option 1 (legislative): *amend the Directive to enable persons who wish to request protection to approach the authorities competent to register the application. In particular,*

- *underline that the territorial scope of the Directive covers territorial waters;*
- *provide that MS shall (i) designate competent authorities responsible for registration of applications for international protection and (ii) organise access procedures in a way that enables a person to lodge the application as early as possible;*
- *fix a reasonable time limit (i.e. 72 hours) for registering applications for international protection;*
- *underline that border guards, police and immigration authorities, and personnel of detention facilities should receive relevant instructions, including the obligation to register or forward the application to the competent authority, whilst other authorities likely to be addressed by someone who wishes to make an application for international protection should be able to advise a person as to how and where he/she may lodge an application.*

Option 2 (legislative): *in addition to option 1, amend the Directive to facilitate access to procedures for persons who are subjected to border controls. In particular,*

- *underline that information about the procedures for lodging an application for international protection as well as counselling and interpretation arrangements must be made available for persons who are present at border crossing points or detention facilities and wish to request international protection;*
- *specify that organisations providing legal advice and counselling to asylum seekers must be allowed access to persons present at the border, in the transit zones or in detention facilities in agreement with the competent authorities of MS.*

Option 3 (legislative): *in addition to options 1 and 2, amend the Directive to enhance procedural guarantees in the admissibility stage of the procedure. In particular,*

- *revise the admissibility grounds, in particular the safe third country notion, with a view to bringing them in line with the Qualification Directive;*

- *provide for arrangements enabling the person concerned to effectively make known her/his views as regards the grounds and information on which the authorities intend to base their decision to consider her/his application inadmissible, and delete the European safe third country concept.*

Option 4 (practical cooperation): *map jointly (national) guarantees for persons who are physically present in the territory, including at the border, and wish to request international protection; develop EU-wide guidelines building on, for example, the UNHCR 10-point plan and test them at EU external borders; develop further and apply training programmes for border guards to raise awareness and improve skills for detecting requests for international protection, as well as addressing asylum seekers, including those with special needs.*

Assessment

Option 1 would remove physical and formal obstacles for *de facto* asylum seekers to approach competent authorities. Reference to the territorial waters would explicitly outlawed push back practices, thus strengthening protection at the sea border. The time limit to register applications would reduce the period of legal uncertainty and enable *de facto* asylum seekers to enjoy quicker access to other benefits, in particular those provided for in the Reception Conditions Directive. While option 1 would ensure access to procedures for determined asylum seekers who are able to clearly express, in a common language, their wish to apply for asylum, it would be less effective with respect to persons who are not capable for objective reasons to clearly communicate their request to the competent authorities. Option 2 remedies this limitation by (i) improving awareness of the right to apply for international protection at EU entry points, (ii) facilitating access to independent advice, and (iii) making at least basic communication possible. These standards are of direct relevance to persons who lack necessary documents and, therefore, are subject to return procedures pursuant to the border *acquis*. The option has the potential to improve transparency of access procedures. It also accommodates MS concerns regarding a possible increase of unfounded claims from irregular migrants by making it clear that the services should be made available for those who wish to apply for international protection; ***no new rights*** for all third country nationals present at the border would be created. NGOs providing services at the border would have to comply with relevant national rules and regulations. Option 3 also improves the quality of admissibility procedures essentially enabling applicants to put forward his/her arguments as to why legal barriers for accessing substantive examinations should not be used in his/her case. This would prevent situations where inadmissibility grounds are applied automatically without taking into account the individual circumstances of the applicant. The option is in line with the evolving ECJ case law on the right of defence, and is essential for safeguarding the right to asylum, as enshrined in the EU Charter. It also enables MS to collect more information on the case, thus increasing their ability to identify unfounded and/or abusive cases. Option 4 would be instrumental in enhancing the preparedness of the border guards and immigration authorities to identify asylum seekers in mixed flows.

Comparison of financial impacts: Option 1 implies costs of providing police, border guards and detention facilities staff with training and instructions on dealing with asylum requests and registering or forwarding applications to the competent authority. The overall additional costs however would be limited as MS have already developed similar mechanisms in line with their obligation under the Geneva Convention, and training materials prepared by FRONTEX in collaboration with other Union agencies (e.g. the EASO and the Fundamental Rights Agency) would facilitate MS efforts to implement this option. Thus, the costs would be essentially related to adapting existing materials and instructions. The overall implementation costs of the option are expected to be low. Option 2 implies increased costs related to producing information materials as well as making communication and interpretation arrangements available at the border crossing points. As only a limited number of EU entry ports have similar services in place, Option 2 would

require additional investments in the majority of MS. ERF support would be made available for this purpose. As the option may lead to a higher number of requests for protection expressed at the border, it implies additional indirect costs for processing applications. Option 3 would, in addition, imply additional processing costs, namely (i) labour costs of interviewing personnel, (ii) administrative costs related to preparing the transcript (report) of the interview and, where relevant, (iii) interpreter's services. The overall costs, however, would be limited due to the fact that a considerable number of MS conduct screening interviews at the admissibility stage in line with national legislation. The costs, therefore, would mainly concern MS which do not currently conduct interviews in the initial stage of the process (CZ, EE). As option 3 also includes the expenditures related to options 1 and 2, it will have the highest costs.

Social effects and fundamental rights: Each option would enable more persons than is currently the case to express their protection needs and challenge inadmissibility decisions. Persons seeking asylum would have increased chances of obtaining protection and the necessary social and healthcare. Governance would be improved by better information and training for relevant personnel, and by increased transparency of border control and immigration procedures. The options, and in particular option 3, would enhance Article 18 (Right to asylum) and article 19 (Non-refoulement) of the EU Charter. Applicants would have enhanced access to the right to be heard. Practical cooperation would enhance good governance and social protection.

Preferred option: All three legislative sub-options are proportionate to the objectives. While option 1 addresses the organisation of access procedures, the proposed intervention is strictly limited to the institutional and organisational elements needed to ensure that the competent authorities (i) are approachable and (ii) complete necessary formalities without delay. MS enjoy a wide discretion as to the types and location of such authorities. Option 2, essentially, builds on the current guarantees (Art. 10 APD) and specifies that MS should make certain communicative guarantees available already at the moment of expressing a wish to apply for asylum. Option 3 is strictly in line with the right to defence, as interpreted by the ECJ. While option 3 implies the highest costs comparing to options 1 and 2, the fundamental nature of the values which are at stake, namely life and physical integrity of a human being, requires comprehensive procedural protection in the access procedures. Such protection is adequately guaranteed by option 3. It should be the preferred option in combination with practical cooperation.

4.2.2. To remove derogations and improve procedural safeguards

Presentation of sub-policy options

Three cumulative options, proposed below, respond to different types and nature of the problems and possible level of ambition. Option 1 essentially addresses guarantees which are already set out in the Directive but are qualified by extensive derogations which make them insufficient. Option 2 adds an additional standard on which the directive is silent thus completing the list of safeguards which are indispensible to ensure sufficient level of protection. The problems additionally addressed by option 3 are similar to option 1 but of different nature: while option 1 aims at ensuring the availability of guarantees, option 3 makes them also accessible, and reflects a higher level of ambition.

Option 1 (legislative): *remove derogations from the basic principles and guarantees and provide free legal assistance to persons with special needs in procedures at first instance. In particular,*

- *make it clear that a personal interview must be conducted with all asylum applicants except in well founded cases and in cases where the applicant is unfit or unable to be interviewed;*

- *delete derogation from the basic principles and guarantees in border procedures;*
- *specify that extradition treaties may not be used to return an applicant to her/his country of origin;*
- *provide for free legal assistance to applicants with special needs in procedures at first instance;*
- *extend guarantees applicable to UNHCR partner organisations to other NGOs.*

Option 2 (legislative): *in addition to option 1, extend the right to free legal assistance to all applicants who lack financial resources in procedures at first instance.*

Option 3 (legislative): *in addition to options 1 and 2,*

- *require MS to communicate information to an asylum seeker in a language s/he understands;*
- *allow a legal advisor or counsellor to be present in a personal interview with an applicant;*
- *require MS to make a transcript of the personal interview and give to an applicant an opportunity to comment on its content;*
- *allow applicants to have access to the transcript and, where relevant, to the report of the personal interview before a decision is taken.*

Option (4) (Practical cooperation): *map and promote good practices in relation to personal interviews, legal assistance and interpretation services; provide support to MS through the Interpreters' pool and allocate funding for legal assistance.*

Assessment

Option 1 would make access to the basic guarantees more equal across the EU, and the directive's potential to ensure fair procedures would be increased. Better involvement of NGOs would improve transparency of procedures and facilitate service supply. Professional legal assistance would enable applicants with special needs (e.g. victims of torture) to better present the elements of their application. Possible difficulties to establish timely and correctly the special needs might prevent applicants from accessing legal advice. Option 2 addresses this gap, since legal aid would contribute *inter alia* to timely identification of the special needs. Option 3 would make procedural guarantees ***practical*** and ***accessible*** to applicants through increased awareness, better communication and more reliable documentation of procedural acts. Root causes of administrative error related to flaws in procedures would be essentially eliminated, whilst the determining authority would be better equipped to defend its position before appeal bodies. The duty to always provide and communicate information to an applicant in a language s/he understands would be difficult to implement in practice[104]. This element might also be vulnerable to abuse. While Option 4 is capable to support efforts of MS concerned to improve the fairness of procedures, it would lack systemic impacts.

Comparison of financial impacts: Option 1 implies additional processing costs for 10 MS which have made use of derogations from personal interviews. Provision of legal assistance at first instance

[104] This is relevant e.g. for certain African countries. For example, several (very) different dialects of Swahili exist; in order for the asylum seeker to be able to understand the meaning of procedural actions and decisions, information may need to be provided in the relevant dialect of Swahili.

under options 1 and 2 would produce costs for at least 11 MS. Based on expenditure level in MS which currently provide this service, costs may vary from 100 EUR to 900 EUR *per capita*. Option 3 would be more expensive as it brings, in addition to costs required in options 1 and 2, interpretation and administrative costs (i.e. provision of printed information on asylum procedures). In the case of less common languages, use of interpreters available in other MS may be inevitable, thus implying telecommunication or travel costs. Option 4 does not imply additional costs in comparison to baseline scenario, since the envisaged measures would be eligible for the ERF funding.

Social effects and fundamental rights: Social benefits for asylum seekers are incremental, i.e. the maximum option 3 will achieve more positive effects. The rights established in Article 18 (Right to asylum) and Article 19 (Principle of *non-refoulement*) of the EU Charter are promoted by all three legislative options, however, to a higher degree by option 3 than option 2 and option 1. Options 2 and 3 also facilitate access to effective remedy and promote the principle of non-discrimination. Option 4 would reinforce impacts of legislative options.

Preferred option: Options 1 and 2 are proportionate to the objectives. Option 1 essentially removes derogations from the basic procedural guarantees. All 26 MS would be required to stick to the agreed standards. Provision of free legal assistance to applicants with special needs further aims at ensuring equality in the asylum process. Based on evolving International Law and Primary Community Law, Option 2 takes into account the complexity of the asylum *acquis* and effectively backs up the Qualification Directive, in particular as regards assessment requirements (Art. 4 QD). It is capable to bring multiple positive impacts in terms of effectiveness, efficiency and coherence. It contributes to achieving several specific objectives. While Option 3 appears to be more effective comparing to options 1 and 2, it is also less efficient due to significant interpretation and administrative costs needed to produce information on procedures and communicate the results of the examination in a language a person understands. In this respect, option 2 has the potential to achieve similar results (i.e. provision of information) by making legal advice available. Option 3 also appears to be less proportionate, since MS may increase awareness of procedures by making other services available (e.g. legal advice and access to NGOs). Yet, as proper communication during an interview is indispensible to secure reliable decisions and to prevent *refoulement*, it is considered proportional to conduct an interview in a language a person understands. Same applies to the presence of a legal advisor in a personal interview and access to the transcript of the interview. These elements also meet the efficiency criterion, since no significant additional investments are required. The preferred option should be option 2 in combination with selected elements of option 3 and practical cooperation.

4.2.3. To improve guarantees for applicants with special needs

Presentation of sub-policy options

The political feasibility and the nature of the problems have guided the construction of cumulative options described below. Whilst option 1 provides for basic guarantees, option 2 aims at taking account of gender, age and trauma considerations throughout the procedure. Option 3 deals with specific aspects of accelerated and border procedures.

Option 1 (legislative): *amend the directive to set out age, gender and trauma sensitive procedural guarantees. In particular,*

- *define the qualifications of the guardian and specify that the guardian should have the right to apply for international protection on behalf of an unaccompanied minor;*

- *define the role of and procedure for obtaining medico-legal reports to document symptoms of torture;*

- *introduce gender sensitive requirements for interviews, such as an obligation to provide an interpreter of the same sex;*

- *require MS to include gender, trauma and age related issues in the training programmes for the personnel of the determining authority.*

Option 2 (legislative)*: in addition to option 1, amend the directive to mainstream gender, age and trauma considerations throughout the asylum procedure. In particular,*

- *introduce the notion of applicants with special needs and require MS to take steps to give to such applicants the opportunity to present the elements of their application as completely as possible and with all available evidence;*

- *lay down the right of a minor to lodge an application on his/her behalf;;*

- *delete the current possibility to refrain from appointing a representative (guardian) where the unaccompanied minor is 16 years or older, and provide for free legal assistance to unaccompanied minors throughout the asylum procedures;*

- *require MS to inform each adult in private of her/his right to make a separate application, and specify that dependent adults should be given the opportunity of presenting their personal circumstances to the determining authority;*

- *require MS to provide survivors of torture with necessary time to prepare for a personal interview on the substance of the application;*

- *underline that vulnerability of certain categories of applicants such as unaccompanied minors and victims of torture should be duly taken into account when deciding whether to apply accelerated procedures;*

- *specify that interviews with minors should be conducted in a child friendly manner, and underline that gender considerations and international obligations as regards the rights of the child should be duly taken into account when applying the directive.*

Option 3 (legislative)*: in addition to options 1 and 2, exempt certain categories of applicants with special needs from accelerated and border procedures. To this effect,*

- *require MS to exempt survivors of torture, persons with mental disabilities and unaccompanied minors from accelerated procedures, based on the notion of manifestly unfounded applications;*

- *require MS to exempt unaccompanied minors from the border and safe third country procedures.*

(Option 4) (practical cooperation): *map national policies and practices on procedural arrangements for applicants with special needs; provide Community funding for national and cross border initiatives to develop gender, age and trauma sensitive procedures and evaluation mechanisms; develop EU wide gender, age and trauma related guidelines and provide support for training (through the EASO); promote gender and age sensitive COI .*

Option 1 increases gender, age and trauma sensitivity of procedures. It does not eliminates risks resulting from accelerated and/or border procedures, and women with valid claims (and in some cases, children) may remain silent. Options 2 reduces risks in accelerated/border procedures, and significantly improves gender equality in asylum process. Option 3 would provide complete procedural safeguards for vulnerable applicants, thus securing full attention to their special needs in examination procedures. Option 4 would improve gender, age and trauma awareness among asylum personnel. It would have a limited potential to modify less sensitive arrangements that are set in national legislation.

Comparison of financial impacts: Every different element of the options potentially implies a cost for MS that currently do not provide the guarantees foreseen: (a) appointment of qualified guardians in all options, (b) medico-legal reports in all policy options; (c) additional social welfare / healthcare and reception to enable survivors of torture to prepare for their personal interview in options 2 and 3; (d) gender sensitive requirements, such as same sex interpreters, which is an obligation in all options; (e) age sensitive requirements, such as interviews with minors in a child-friendly manner (options 2 and 3); (d) exclusion of some (option 2) and exclusion of all (option 3) unaccompanied minors, victims of torture and persons with mental disabilities from border and/or accelerated procedures, leading to an increase in costs for procedures and reception; (g) specific and follow up training of personnel in all options. Option 4 would not lead to additional costs in comparison to the base line scenario, since practical cooperation would be eligible for the ERF funding and covered by the envisaged EASO's mandate.

Social effects and fundamental rights: Option 3 would achieve the greatest positive social effects and promotion of fundamental rights compared to options 1 and 2. Option 1 would contribute the least. Non-discrimination, social protection, public health and access to justice would be enhanced by all policy options, but to the highest degree by option 3. The rights established by Articles 18 (Right to asylum), Article 19 (The principle of non-*refoulement*), Article 23 (Equality between men and women), Article 24 (The rights of the child), Article 35 (Health care) and Article 47 (Right to an effective remedy) are promoted by all three options, however, to a higher degree by option 2 than options 1, whilst option 3 includes specific elements further ensuring respect for the right to asylum, the principle of non-*refoulement*, the rights of the child and the right to an effective remedy specifically for unaccompanied minors and trauma victims as well as promotes the principle of non-discrimination. Option 4 brings lesser effects in comparison to legislative options, but has a strong potential to reinforce them.

Preferred option: All three legislative options respect the principle of proportionality, since the envisaged measures reflect international and Community standards on non-discrimination and special guarantees for vulnerable persons. While option 2 makes special procedural guarantees available to asylum seekers with special needs, option 3, in addition, eliminates risks resulting from organisational aspects of procedures, thus being more effective. It is also consistent with the Commission's proposal on the revised Reception Conditions Directive and implies no additional costs in comparison to options 1 and 2. It should be the preferred option in combination with practical cooperation.

4.2.4. To approximate accelerated procedures

Presentation of sub-policy options

The below options have been identified based on 2 models institutionalised in MS.

Option 1 (legislative): *to improve procedural safeguards in accelerated procedures. To this effect,*

- *require MS to conduct personal interviews and provide free legal assistance to applicants in accelerated procedures;*
- *underline that the determining authority should be given the necessary time to conduct a rigorous assessment of the application, while preserving MS' discretion to accelerate any examination at first instance.*

Option 2 (legislative): *to clarify grounds for accelerated and priority procedures and improve assessments. To this effect,*

- *introduce a limited and exhaustive list of grounds for accelerated procedures, based on the notion of manifestly unfounded applications, while preserving MS' discretion to prioritise other claims;*
- *require MS to conduct personal interviews, and specify that the determining authority should be given the necessary time to conduct a rigorous assessment of the application.*

Assessment

Option 1 would improve the fairness of accelerated procedures. Its impacts, in terms of effectiveness and coherence, would be however limited, since the grounds and time limits for expedite examinations would continue to vary between MS. Valid and complex cases could still be processed within short time limits, and applicants, in particular those with special needs, would continue to face difficulties when trying to present the elements of their application. Short deadlines for taking decisions would preserve a margin for administrative error. Option 2 would improve the fairness of procedures, ensure more reliable determinations of cases considered to be manifestly unfounded, and support MS' efforts to resolve quickly less complex cases.

Comparison of financial impacts: Option 1 would lead to increased staff costs for 9 MS that have made use of derogations from personal interviews[105]. It could also potentially lead to further proliferation of accelerated procedures (data provided by MS point to a share of 20% of claims treated through accelerated procedures), hence leading to lower overall costs for reception at first instance. These initial savings might be reduced in a long term, since better access to effective remedy would lead to a higher share of decisions annulled by appeal bodies. Option 2 implies higher labour and reception costs in the majority of MS. Its impacts would depend on the number/share of accelerated procedures under the current standards and the difference in length and costs between the accelerated and the full procedure. BG, CY, SP, LV, EE, PL, SL and UK would be most affected.

Social effects and fundamental rights: Option 1 would enhance equal treatment of applicants, in particular due to the obligation to ensure the right to be heard for all applicants. Same applies to social protection and access to justice. Positive impacts on governance are less obvious, since the option lacks elements to ensure an adequate assessment of claims. Option 2 strikes a balance between the speed and the reliability of administrative procedures, thus bringing stronger positive impacts on good governance. This would also lead to better protection from discrimination and enhanced social protection. Option 1 would lead to better respect of Article 18 (Right to asylum), Article 19 (non-*refoulement*) and Article 47 (Right to effective remedy) of the EU Charter. The right

[105] Cyprus, Estonia, France, Greece, Malta, Poland, Portugal, Slovenia, and UK

to asylum and non-*refoulement* are however better promoted by option 2, since it implies a lesser margin for administrative error.

Preferred option: Option 2 is more prescriptive than option 1. Both options, however, leave to MS a margin of institutional flexibility, since neither the length of accelerated/priority procedures nor the exhaustive lists of priority procedures are included in the options. Given the fact that Option 2 targets several operational objectives by improving fairness and reducing wide procedural disparity between MS, an approximation of the grounds of accelerated and/or manifestly unfounded procedures is considered proportionate. It has stronger impacts on fundamental rights, while its possible financial impacts are mainly related to increased reception costs. The latter, however, should be off-set by the improved overall efficiency of asylum process. Option 2 is the preferred option.

4.2.5. To consolidate the application of the safe country of origin notion

Presentation of sub-policy options

Three legislative options represent different ways to reduce the ambiguousness of the current standards.

Option 1 (legislative): *make the application of the notion optional and enhance assessment. To this effect,*

- *remove a minimum common list of safe countries of origin, and delete the MS' obligation to consider the application as unfounded where the third country appears on the common list;*
- *require MS to review regularly the national lists of safe countries, and specify that all applicants must be given the opportunity of substantiating their application at an interview;*

Option 2 (legislative): *make the application of the notion optional, enhance assessment and set out common material requirements for the designation of safe countries of origin. To this effect,*

- *remove a minimum common list of safe countries and delete derogations from the material requirements for the designation;*
- *require MS to review regularly the national lists of safe countries, and specify that all applicants should be given the opportunity of substantiating their application at an interview.*

Option 3: (legislative): *introduce a complete common list. To this effect,*

- *remove the possibility of national designation of safe countries of origin;*
- *require MS to consider the application as unfounded where the third country appears on the common list, and give an applicant the opportunity of challenging the presumption at an interview.*
- ***Option 4: (practical cooperation)****: map country of origin information (COI) used for the national designation; enhance an exchange of information on the use of the notion within the framework of the EASO and EURASIL and make services of the common COI portal available to MS.*

Assessment

Under option 1 the responsibility for the assessment of the situation in third countries would rest exclusively with MS. This would improve legal clarity, while enhanced guarantees would lead to better fairness. Regular reviews of the list would lead to up to date assessments of the safety of third countries. The vague material requirements for the national designation would be preserved and divergent national lists would persist. Applicants would continue to substantiate their claims under different safe country arrangements across the EU. Regular reviews of the list would lead to up to date assessments of the safety of third countries. Option 2 would consolidate the application of the notion in all MS that choose to make use of the optional provision. The responsibility for the application of the notion would rest entirely with the MS, based on consolidated and harmonised criteria. Follow up assessments of the situation in the safe countries and the enhanced possibilities to rebut the presumption of safety would improve the fairness and reliability of decisions. Although of a lesser extent, divergent arrangements would persist, since a number of MS[106] would not use the notion. Under option 3 the list of safe countries of origin would have to be adopted and amended by the Union institutions through the co-decision procedure. This would lead to more consistent application of the notion, but limit the MS' ability to respond quickly to developments in a safe country. The material requirements for the designation would improve, since the safety of the entire territory is a pre-condition for including a safe country in a common list. The option gives rise to proportionality concerns, since a MS would be obliged to apply the presumption of safety even if its own assessment, based on the interpretation of international obligations, differs from the opinion of the majority of MS and of the European Parliament. Option 4 is capable to lead to more consistent and reliable safety assessments. To produce maximum impacts it need to be based on harmonised material requirements.

Comparison of financial impacts: Option 1 would lead to additional labour costs for all MS to follow up on the situation in safe countries. Option 2 would be more expensive to implement in FR and UK, since these would need to revise their national lists and process lesser numbers of applicants through safe country procedures. This would result in additional processing and reception costs. Option 3 would imply a partial transfer of costs from the MS to the EU institutions resulting in labour costs savings. Impacts on processing and reception costs would depend on the final content of the list. Option 2 requires more initial investments than options 1 and 3, but reduces litigation costs. Option 4 is not expected to produce costs for MS, since its elements are covered by the envisaged EASO's mandate.

Social effects and fundamental rights: Option 1 has positive impacts on governance since it ensures more reliable safety assessments. It also enhances non–discrimination, since no derogations from personal interviews would be allowed, and promotes access to justice by strengthening applicants' ability to rebut the presumption of safety. Under option 2 positive impacts on governance are stronger, since the assessments would be based on more rigorous criteria. This would also enhance non-discrimination and result in better access to justice. Option 3 is less capable to improve governance, since it limits the involvement and responsibility of MS' asylum authorities in assessing the situation and developments in countries of origin. Impacts on non-discrimination and access to justice are likely to be positive, but would eventually depend on the content of the list. Option 4 may enhance good governance, in particular if combined with legislative options. Option 1 promotes the set out by Article 18 (Right to asylum), Article 19 (non-*refoulement*) and Article 47 (Right to effective remedy) of the EU Charter. The impacts of option 2 on the implementation of these rights are stronger due to due to more rigid criteria for determining the safety of a country of origin and better examination of individual circumstances. Option 3 is likely to have positive impacts on Article

[106] Belgium, Latvia, Italy, Slovenia, Poland and Sweden do not currently use the notion.

18 (Right to asylum) and Article 19 (non-*refoulement*). Option 4 should lead to more solid determinations, thus enhancing protection against *refoulement.*

Preferred option: Options 1 and 2 adequately respect the principle of proportionality since they essentially delete derogations from the agreed minimum standards. Option 3 may lead to proportionality concerns since the assessment of the situation in safe countries, which is part of examination procedures, would be delegated to the Union institutions. Option 2 would have important social effects, better promote fundamental rights and is more effective. It could usefully be combined with practical cooperation activities leading to more consistent application of the notion. It should be the preferred option in combination with practical cooperation.

4.2.6. To reinforce MS' capacity to deliver reliable decisions within a reasonable time

Presentation of sub-policy options

The two legislative options reflect different drivers behind the problem. While option 1 addresses efficiency problems related to the insufficient quality of determinations, option 2 also deals with institutional and organisational elements of procedures.

***Option 1 (legislative)**:*

- *reduce current derogations form the principle of a single determining authority, and specify that a substantive interview should always be conducted by the personnel of the determining authority;*
- *introduce minimum requirements for the content of the interview;*
- *require the determining authority (i) to dispose sufficient numbers of specialised in-house personnel who have the necessary skills and expertise to undertake their tasks and (ii) to make external expertise on specific issues available to case owners;*
- *underline that the personnel of the determining authority should receive initial and follow up training, and specify the minimum requirements for its content.*

***Option 2 (legislative)**: in addition to option 1, fix time limits for taking decisions on the substance at first instance and consolidate provisions on subsequent applications. In particular,*

- *lay down a reasonable time limit (e.g. 6 months) for taking first instance decisions on the substance of the application;*
- *require MS to take into account new elements or representations before a final decision is taken;*
- *specify that the subsequent application procedures should not apply to persons whose applications have been rejected as implicitly withdrawn;*
- *explicitly merge the subsequent application procedures with admissibility procedures and allow MS to remove an applicant from the territory in cases of multiple subsequent applications frustrating the enforcement of a return decision.*

***Option 3 (practical cooperation)**: organise and support training for asylum personnel (through EASO); make the EAC fully operational and accessible; provide funding and institutional support (through EASO) to quality initiatives, based on UNHCR pilots; map and promote good practices in*

making procedures more efficient, such as the UK Case Owner Model; provide expert support and emergency funding to MS under pressures.

Assessment

Option 1 separates asylum decision making from border and immigration controls and lays down basic tools to ensure that asylum personnel have necessary knowledge and skills. Better quality of interviews will enable MS to base determinations on complete and accurately established circumstances. The option complements the envisaged procedural guarantees leading to more reliable determinations and improved defendability of negative decisions. It reinforces the integrity of procedures, since the asylum personnel would be better prepared to identify unfounded or abusive claims. It lacks the potential to address efficiency constraints rooted in the ambiguousness of the procedural devices. Option 2 is capable to address this gap by streamlining first instance procedures, eliminating root causes of subsequent applications and providing MS with additional tools to respond to abusive claims. Option 3 is largely covered by the envisaged EASO's mandate. It is instrumental in ensuring coherent application of quality assurance standards across the EU. It increases accountability of individual procedural acts and makes it possible for MS to timely identify flaws in practices. This should reduce a margin for administrative error, including in cases of unfounded or abusive claims.

Comparison of financial impacts: Option 1 implies costs to redistribute examination functions in national procedures of BE, EE and FR. It would also require investments in capacity building of staff and development of training in the EU 12 as well as in EL, PT and IT. The requirement of *sufficient numbers of specialised personnel* would produce additional costs for EL, CY, HU and FR. Small asylum services (LT, LV and EE) could also be affected, if the level and distribution of applications changes. Option 2 does not require additional investments and is capable of limiting processing times leading to savings in asylum personnel labour costs and reception costs in CZ, AU, FR and EL. Elements of Option 3 would be largely covered by the EASO's budget. The setting up of quality assurance mechanisms would require additional allocations for EL, IT, MT, SP, PT, BE, LT, LV and EE. The initial costs might amount to ***125 000 EUR*** per MS[107].

Social effects and fundamental rights: Option 1 brings positive impacts on good governance, equal treatment/non-discrimination, social protection and access to justice. Under option 2 positive impacts on governance are stronger, since the time limits for taking decisions should improve administration and transparency of procedures. It also enhances social protection, since persons in need of protection would enjoy quicker access to social and economic rights set out in the QD. Option 3 would enhance good governance, equal treatment/non-discrimination, social protection and access to justice. Its impact would however vary between MS depending on the level of institutional commitments to and ownership of cooperation projects. Quality decision making promoted by option 1 is instrumental in securing Article 18 (Right to asylum) and Article 19 (non-refoulement) of the EU Charter. Since option 2 allows MS to derogate from the right to remain in the territory in the case of multiple abusive applications, it has lesser potential to prevent *refoulement.* This weakness is however balanced by the elements enhancing a comprehensive and quality examination of the initial application. By ensuring a quicker determination of the protection needs, option 2 improves accessibility of the QD for persons genuinely in need of protection, thus promoting the right to

[107] The eligible costs of the ERF funded ***The Asylum System Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region*** being implemented in HU, PL, RO, SI and SK are 624, 824.36 EUR.

asylum. Option 3 contributes to facilitating access to asylum (Article 18) and enhances protection against *refoulement* (Article 19).

Preferred option: Both options address the institutional set up and organisation of procedures. Under option 1, the reducing of derogations from the principle of a single authority reflects practices in the majority of MS. While Option 2 lays down the time limits for first instance examinations, the element is in line with the principle of effectiveness of Community Law and reflects arrangements provided for in other EU directives.[108] Option 1 strengthens the ability of the asylum authorities to deliver quality determinations at first instance. This element is capable, alongside other measures, to reduce the overall length of asylum process. Option 2, in addition, strengthens good administration and has a stronger potential to approximate the length of asylum procedures in 26 MS. It should bring positive impacts on the efficiency of procedures. Option 3 stand alone would not lead to common quality standards, but it is instrumental in ensuring the coherent implementation of the envisaged legislative measures. The preferred option is option 2 in combination with practical cooperation.

4.2.7. To enhance accessibility and quality of remedies

Presentation of sub-policy options

The two options reflect two models of harmonisation of asylum appeal procedures. While option 1 lays down common principles, option 2 also aims at setting a common institutional framework for appeals.

Option 1 (legislative): lay down all elements of the right to effective remedy in the directive. In particular,

- *specify that the scope of review must cover both facts and issues of law at least in procedures before a first level court or tribunal, and require appeal bodies to conduct an ex nunc examination of the protection needs in line with the Qualification Directive;*
- *underline that appeals against decisions taken in border procedures should always have automatic suspensive effect. Same applies to appeals against other first instance decisions with the exception of manifestly unfounded applications, identical subsequent applications and decisions taken pursuant to the Dublin regulation. In the later cases, interim measures could be granted by courts (tribunals) on a case by case basis;*
- *provide for an unrestricted right of a court or tribunal to receive the materials used as a basis for the first instance decisions;*
- *require MS to lay down reasonable time limits for lodging appeals against first instance decisions with a view to ensuring the accessibility of remedy.*

Option 2 (legislative): In addition to option 1, describe appeal procedures in detail, defining types and functional roles of courts and tribunals in asylum appeal. In particular,

- *describe the stages of appeal process;*

[108] E.g. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

- *set out the requirements for the appeal bodies and define their powers in respect of decisions taken at lower instances, and list minimum procedural rights and obligations of appellants;*

- *lay down the time limits for lodging appeals and taking decisions by courts (tribunals) of different levels.*

Option 1 brings the directive's standards on appeals in line with the latest developments in the respective case law of the ECJ and of the ECtHR. Appeal proceedings would share a number of common principles, whereas MS would preserve a margin of discretion to organise the appeal systems in line with their administrative traditions. The accessibility of remedy would be enhanced and the court (tribunals) would base their decisions on complete factual circumstances. In combination with the *ex nunc* examination, full review of law and fact should bring positive impacts on reducing subsequent applications, and lead to more consistent application of the QD. The option is supportive to MS' efforts to prevent abuse, since it allows for derogating from the principle of suspensive effect with regard to manifestly unfounded claims. It respects the principle of proportionality, since it does not go beyond the standards spelt out by the ECJ and the ECtHR. Option 2 would harmonise asylum appeal procedures across the EU leading to more consistent application of the QD. The option may give rise to proportionality concerns, since it would bring far reaching institutional implications for MS legal systems. It might also cause tension with the principle of procedural autonomy of MS.

Comparison of financial impacts: The increased accessibility of remedy under option 1 entails higher reception and processing costs. Policy option 2 requires a substantial reorganisation of national appeal systems. Given divergent institutional frameworks in MS, option 2 would produce significant additional costs.

Social effects and fundamental rights: Option 1 brings positive impacts on good governance, social protection and access to justice. It has a very strong potential to promote Article 18 (Right to asylum), Article 19 (*Non-refoulement*) and Article 47 (Right to an effective remedy) of the EU Charter. While options 2 generally shares social effects of option 1, impacts on good governance may be less obvious, since a common institutional framework would not necessarily work effectively in all MS, given different administrative and institutional. Option 2 should share option 1 impacts on fundamental rights.

Preferred option: While both options should improve access to and quality of remedies, the principle of proportionality is better respected by option 1. Its efficiency and political feasibility are also higher. Option 1 should be the preferred option.

4.2.8. Summary of an additional policy option identified

With a view to enhancing coherence between different EU asylum instruments (specific objective 6 set out in section 3.2.), the proposal aims to ensure consistency between substantive and procedural rules on international protection, and between asylum procedures and Dublin procedures[109].

Legislative option: introduce common rules on a single asylum procedure and integrate Dublin cases in the asylum procedure. To this effect,

[109] See operation objectives set out in section 3.3.The problem definition as well as the comparison and assessment of policy options related to these objectives are provided in annex 14.

- *change the title of the directive and adjust definitions with a view to reflecting both forms of international protection provided for in the Qualification Directive;*
- *provide for a mandatory sequence of an examination of protection needs in line with the Qualification Directive;*
- *introduce requirements for decision making at first instance and access to effective remedy in relation to both sets of substantive criteria provided for in the Qualification Directive;*
- *extend the Directive's provisions on the withdrawal of refugee status to cases of withdrawal of subsidiary protection;*
- *provide for the right of applicants whose protection needs under the Refugee Convention are rejected whilst subsidiary protection is granted to appeal against the decision in relation to refugee status while entitling them to benefit from subsidiary protection status pending the outcomes of the appeal procedure;*
- *underline that the Directive covers persons who are the subject to the Dublin procedures and that the notion of implicit withdrawal of the application does not apply to persons transferred to the responsible Member State pursuant to the Dublin Regulation.*

5. PRESENTATION OF PREFERRED POLICY OPTION

The elements that constitute the preferred option are outlined in annex 17.

6. ASSESSMENT OF PREFERRED POLICY OPTION

6.1. EU added value

In essence, the preferred option provides for setting essential procedural principles, safeguards and notions in Community Law. By harmonising the procedural arrangements, the preferred option has the potential of ensuring equal access to protection under equivalent conditions across the EU and a better distribution of the 'burden' carried by MS. It is also an important step towards achieving the EU aim of creating an area of justice, freedom and security by ensuring better respect for the right to asylum and more generally for Fundamental Rights.

By ensuring (better) access to asylum procedures, removing possibilities for administrative error and establishing standards to improve and ensure better decision making (in terms of efficiency and fairness), the preferred option would promote a more balanced approach to procedures in MS.

Moreover, it would introduce essential elements helping MS to operate a policy of 'frontloading', which, in addition to increasing the effectiveness of the asylum procedure, also ensures a fair treatment of applications and allows for their full scrutiny. As outlined above, frontloading is economically advantageous. Whilst requiring substantial initial investments for MS who have not put in place the elements outlined above, the frontloading should lead to lower numbers of applications that have to be treated in appeal procedures and reduce recourse to repeated applications. Robust determinations are also instrumental to discourage abuse and to defend decisions before appeal bodies.

6.2. Respect for the principle of proportionality

As underlined above, the EU action in the area of asylum procedures is required. This action, however, should be **proportionate** to its objectives. In this respect, only those measures which are inevitably necessary for achieving the objectives have been selected when developing the preferred policy option, whilst more far-reaching options, such as *addressing appeal procedures in detail* or *provision of information in a language the person understands throughout the procedure*, have been rejected. Also, the principle of procedural autonomy of MS has been carefully considered when addressing organisational (length of procedures) or institutional frameworks (responsible authorities, types of appeal bodies). To a large extent, the envisaged measures are designed as ***principles, entitlements*** *or* ***result – oriented obligations****,* whereas modalities for achieving those targets are generally left to MS to maintain or establish in line with their administrative and institutional systems. The proposed safeguards largely aim at ensuring ***equality of arms*** which is a key pre-condition for avoiding administrative error and making entitlements provided for by the QD **accessible** to those in need of protection. The asylum *acquis* and corresponding national measures appear to be **an increasingly complex system of law** in which both the accessibility of substantive rights and the procedural consequences largely depend on the applicant's individual acts. In this respect, information and advice at the early stages of asylum process appear to be the basic guarantees inevitably needed to remedy the procedural vulnerability of applicants. In the preferred option, the right to legal assistance is expected to play a key role in this respect. Apart from strengthening applicant's ability to substantiate her/his claim, free legal assistance has a strong potential to contribute to improving the operation of the asylum system as a whole by (a) preventing cases of applicants' non-compliance with procedural requirements occurring due to negligence, misleading advice or lack of trust towards asylum authorities, (b) improving the fairness and comprehensiveness of initial assessments and therefore justifying MS' recourse to restrictive notions, such as accelerated or subsequent application procedures, and (c) increasing the accessibility of other asylum instruments linked with asylum procedures, notably of the Dublin Regulation and the Reception Conditions Directive. In view of the magnitude of impacts and their relevance to different objectives, this key element of the preferred option is considered to be proportionate.

Where the proposal addresses organisational aspects of procedures, its intervention is strictly limited to elements **which are indispensible to achieve the objectives** and **based on a common denominator** accommodating, to the maximum possible extent, existing national arrangements. Two relevant examples concern time limits for taking 1st instance decisions and the reducing of exceptions to the principle of a single determining authority. In both cases, the preferred option (i) is selected on the basis of prevailing national practices and (ii) gives MS a necessary margin of flexibility.

All the amendments proposed to the Directive can be considered proportionate in relation to the size and nature of the problems they aim to address. The preferred policy option largely reflects standards steaming from international law as well as administrative law principles of MS and, therefore, **is not unknown to domestic legal systems**. Yet, differently from MS' international obligations, the preferred option spells out procedural asylum standards **much more explicitly** and in **greater detail**. Its added value also relates to the fact that the accessibility and coherent application of these standards across the EU will be guaranteed by the Community legal and institutional framework.

In some instances it is necessary to reinforce certain action through practical cooperation (not least to ensure consistent implementation of the provisions), as foreseen in the preferred option. Also this type of action is considered to be proportionate, in particular taking into account the envisaged mandate of the EASO which will cover, to a large extent, practical cooperation activities referred to

in the preferred option. It should however be emphasised that practical cooperation alone would not sufficiently solve the problems on their own merit, but need to be combined with legislative action.

6.3. Summary of relevance, feasibility and expected impacts

The relevance, feasibility and expected impacts of the preferred policy option are outlined below. Evidently, to the extent that standards currently applicable in MS vary, the impacts will also vary.

Assessment Criteria	Rating	Motivation of the rating and relevant aspects of the preferred policy option
Relevance to specific objectives		
1. To ensure that asylum procedures are accessible to persons seeking international protection	**4**	The preferred policy is capable to bring positive impacts in terms of ensuring smooth access to examinations, preventing *refoulement* and better operation of the Reception Conditions and Dublin instruments. In particular, it would: - reduce the risk of diversion from the external sea borders and remove physical obstacles to accessing procedures for persons who are in the territorial waters but are not yet disembarked; - eliminate delays in getting access to asylum procedures and the reception conditions for *de facto* asylum seekers in pre-removal or immigration detention, at the border or in the territory, and facilitate quicker determination of the responsible MS under the Dublin Regulation; - enable MS to quicker distinguish between asylum seekers and other migrants in mixed arrivals, thus optimising labour and administrative resources needed to establish applicable procedures (return, asylum, humanitarian status, extradition etc.) and corresponding legal status of the person concerned; - reduce the risk of incorrect application of admissibility grounds, thus ensuring that admissible claims are processed without delay while persons who do not meet admissibility criteria are properly identified and, where applicable, alternative solutions are implemented. The latter applies to the safe country of asylum and safe third country cases.
2 To improve fairness of asylum process	**4**	The preferred option would bring about positive impacts in terms of (i) reducing room for administrative error, (ii) improving applicants' compliance with the obligations set out in the APD and the QD, including the obligation to substantiate their claim, and (iii) supporting efforts of asylum authorities to take defendable decisions in line with the Qualification Directive. In particular, it would: - provide applicants with a sufficient opportunity to substantiate the claim and improve their awareness of applicable requirements leading *inter alia* to better compliance with procedural obligations; - allow the asylum authorities to take robust decisions, based on complete and properly established factual circumstances of the claim, improve the defendability of negative decisions and reduce risk of their annulment on procedural grounds by appeal bodies; - improve the transparency of procedures and promote partnership between asylum authorities and other actors of asylum process, such as refugee assisting NGOs and legal service providers; - enhance the ability of (vulnerable) applicants with special needs to comply with the obligation to substantiate their claims, and improve the reliability of decisions of the asylum authorities, in particular in cases involving survivors of torture or other serious violence.
3. To harmonise procedural notions with a view to facilitating reliable determinations across the EU	**4,5**	The preferred option would imply significant progress towards a more consistent application of the key procedural notions to the extent that it would clarify and better circumscribe definitions of the manifestly unfounded applications, accelerated procedures, prioritised procedures and safe countries of origin, and eliminate derogations. The directive's notions and devices will become less susceptible to administrative error, while providing asylum authorities with necessary procedural tools to prevent / respond to abuse and process quickly clearly unfounded or less complex applications. In particular, it would: - give the asylum authorities necessary time to conduct a meaningful examination of the application and raise the overall fairness of accelerated procedures; - limit the use of accelerated procedures to manifestly unfounded or abusive cases while enabling MS to

Assessment Criteria	Rating	Motivation of the rating and relevant aspects of the preferred policy option
		prioritise other cases, such as cases of applicants with special needs or well founded cases; - link the notion of manifestly unfounded applications with the strength of the claim in light of the Qualification Directive; - ensure the consistent application of the safe country of origin notion, based on common material requirements, regular reviews of the situation in countries designated as safe and procedural guarantees equally applied in all MS opted for this device.
4. To improve the efficiency and quality of decision making	**4**	The preferred option improves both the efficiency and the quality of decision making by "frontloading" services and expertise and encouraging MS to examine comprehensively initial applications. The proposed legislative measures will bring maximum impacts if implemented in a systemic way and supported by the EASO 's practical cooperation activities. The improved efficiency should result from 3 sets of interlinked measures, namely (a) fixed time limits for taking decisions by asylum authorities should encourage MS to streamline first instance examinations, (b) enhanced preparedness and sufficient numbers of specialised asylum personnel should increase the institutional capacity of MS to handle effectively caseloads, (c) improved quality of decisions will lead to higher recognition rates and improve defendability of negative first instance decisions thus avoiding prolonged litigations, (d) comprehensive examination of initial applications in conjunction with enhanced fairness of procedures should eliminate root causes of subsequent applications, whilst abusive recourse to subsequent applications will be better addressed by giving MS a margin of flexibility to declare such applications inadmissible and remove applicants from the territory. The improved efficiency and quality will have important positive impacts on the asylum acquis as a whole. In particular, it would: reduce MS' reception costs, since (i) applications will be generally examined within 6 months, and (ii) more cases will result in a final decision already in the first instance; lead to quicker access to benefits set out in the Qualification Directive for genuine refugees and persons in need of subsidiary protection; enable MS to better identify cases of unfounded and abusive applications, including those based on false identity or nationality; improve the credibility of asylum procedures leading to better public perception of asylum; support MS' efforts to remove from the territory failed asylum seekers, since robust decisions will be taken quicker; reduce possibilities for applicants with unfounded claims to benefit, for a long period of time, from reception conditions.
5. To improve access to effective remedy across the EU	**4**	The preferred option will re-enforce MS' asylum appeal systems by improving **the accessibility** and **quality** of an effective remedy against negative first instance decisions before a court or tribunal. This will result in particular from: - the requirement to set up reasonable time limits for lodging appeals and laying down the principle of suspensive effect of appeals; - the availability of legal assistance already in the first instance procedures; - the requirement for a court or tribunal to conduct an *ex nunc* and full review of both facts and points of law; - reinforcing the principle of equality of arms in asylum appeal proceedings.
Transposition and implementation feasibility	**3.5**	Key elements of the preferred option that promote a consistent transposition include: • Removing derogations; and, • Establishing more narrow definitions. In particular, MS will have to stick to common procedural principles, and the improved clarity of procedural notions applicable at different stages of the asylum procedure will limit room for diverse procedural arrangements. Yet certain elements of the preferred option give MS a margin of flexibility and may be interpreted differently. In many of these cases, the preferred option foresees practical cooperation in order to achieve a common understanding. The Commission's support activities, such as Contact Committees' meetings, as well as monitoring and evaluation measures will be instrumental to approximate approaches between MS. Further input is

Assessment Criteria	Rating	Motivation of the rating and relevant aspects of the preferred policy option
		also expected from national courts and the ECJ, in particular if the Lisbon Treaty which extends provisions on request for preliminary rulings to all national courts and tribunals comes into force. In terms of implementation, inconsistencies could arise with regard to the following elements: Access to procedures: (i) **Amount and the quality of training provided to various types of staff** (police, boarder guards, immigration authorities). In this respect, the EASO and FRONTEX training support should steadily lead to the convergence of national training programmes. (ii) **Provision of interpretation arrangements at the border** and access to border crossing points and detention facilities for partner NGOs. The extension of and further financial support to border monitoring initiatives funded by UNHCR and ERF in a number of MS (Hungary, Slovenia, Netherlands, Italy) should allow for mapping and approximating approaches across the EU. Procedural guarantees: • Content of personal interviews. Practical cooperation, including the EAC, and guidelines to be prepared by the EASO would be indispensible to map and harmonise national practices. • Determination of insufficient financial resources as a pre-condition for receiving free legal assistance. The implementation of this requirement is likely to vary between MS, since economic conditions and income support levels differs across the EU. The guiding principles for interpretation of this requirement, in particular based on the principle of non-discrimination, may be expected from national courts and the ECJ. • The requirement to communicate to an asylum seeker during the interview in a language that he/she understands and can express him/herself. Both the assessment criteria and forms of interpretation (e.g. through face to face interpretation or remote interpretation) may vary. The interpreters' pool project and the EASO support measures, including guidelines on personal interviews, would bring more consistency in the implementation of this standard. • Interpretation of the notion of 'persons with special needs', the identification of these applicants and tome given to survivors of torture to prepare for the personal interview. The identification mechanisms inserted in the Commission proposal for amending the Reception Conditions Directive should facilitate the consistent application of this notion. The EASO training and other relevant support for identifying and dealing with vulnerable asylum seekers will further influence national practices. Same applies to the time to be given to survivors of torture to prepare for the personal interview. • Gender and age-sensitive interviewing of asylum seekers. National and EU level guidelines and regular training will be indispensible to ensure the convergence of national practices. Common procedural notions: • Time taken to carry out accelerated procedures. Since the notion of "reasonable time limits" may be interpreted differently between MS, the Commission's support in implementing the standard will be crucial to achieve a common denominator. National courts and the ECJ inputs should also provide MS with guiding principles for determining the length of accelerated procedures. • National lists of safe countries of origin. While the preferred option should significantly reduce the ambiguousness of the current standards, it is likely that national lists of safe countries of origin will not be identical, in particular in the first years of implementation. These divergences should be largely addressed by enhanced practical cooperation in the area of country of origin information which is part of the envisaged EASO' mandate. National courts are also expected to be active in assessing whether countries appearing on the list meet the material requirements set out in the directive. Improved efficiency and quality of decision making: The interpretation of the requirement to dispose 'sufficient numbers of personnel who have the necessary skills and expertise to be able to undertake their tasks' might vary between MS. The Commission's support would be crucial to develop together with MS guiding principles for determining "sufficient number of staff" taking into account e.g. caseloads, trends in asylum flows and backlogs. The EASO's support and other cooperation activities should also assist MS to develop common approaches to the qualifications of asylum personnel. Access to effective remedy

Assessment Criteria	Rating	Motivation of the rating and relevant aspects of the preferred policy option
		The notion of reasonable time limits for lodging appeals will leave room for different interpretations. Since procedural time limits are largely governed by the principle of procedural autonomy of MS, the ECJ interpretation of the notion, based, for example, on the principles of non-discrimination, effectiveness and judicial protection of rights guaranteed by Community Law will be instrumental to support MS in laying down the limits.
Financial feasibility	**3.5**	Some of the elements that form part of the preferred option could have important costs implications in some countries, depending on the existing arrangements in place. Elements that could require substantial financial inputs may result from, in particular: • Increased costs for support services and products, including the provision of interpretation arrangements and services, legal assistance, guardianship and medico-legal examinations and reporting. • Increased costs for staff involved in decision-making due to a reduction in the proportion of applications that can be treated through accelerated or border procedures, higher investments in the training of staff responsible for registering and processing applications and increased time inputs required for personal interviews and reporting on the latter. On the other hand, by streamlining and enhancing the quality of the first-instance examinations, as well as by reducing appeals and subsequent applications, it can lead, in a longer term, to a significant decrease in the financial and administrative costs of national asylum systems. By reducing differences of legal frameworks and decision-making practices and achieving further harmonisation of procedural guarantees and notions, the envisaged amendments can be expected to lead to a reduction of secondary movement and thus to reduce the costs incurred by MS, in particular, for the implementation of the Dublin system. For a detailed analysis see below under 6.4.1 and 6.4.2.
Political feasibility	**3.5**	Certain legislative elements of the preferred option may invite objections from some MS, which e.g. would prefer retaining a higher level of flexibility in the application of the directive, in particular those options that may have costs implications. Based on the consultation, MS are in principle in favour of considering the following elements: more clear rules on access to procedures, common rules on a single procedure, adjustment of the safe third country notion, improved arrangements for personal interviews, a revised list of grounds of accelerated procedures, more effective provisions for dealing with subsequent applications, common training requirements, and the scope of judicial review. Examples of elements where objections can be expected from some MS include: extending the right to legal assistance to first instance procedures, eliminating derogations from the requirements for the designation of safe countries, providing for suspensive effect of appeals and ex nunc review, and some of the additional guarantees for applicants with special needs. These provisions, however, are likely to be supported by the co-legislator the European Parliament and MS which have relevant arrangements in place. The co-decision procedure and majority vote in the Council create a favourable procedural environment for negotiating the envisaged provisions.
Social impacts	**4.5**	The preferred option contains essential elements capable to have positive social impacts as follows: • Increased access to protection and justice as national procedures would be better equipped to correctly identify genuine refugees and persons in need of subsidiary protection. The envisaged rules on legal assistance and access to files and suspensive effect of appeals would in particular facilitate access to justice. • Increased access to social protection as (i) persons seeking asylum would enjoy quicker access to social and healthcare in line with the Reception Conditions Directive, since access to procedures would be enhanced, and (ii) genuine refugees and persons in need of subsidiary protection would be able to access quicker social and economic entitlements set out in the Qualification Directive because of the increased fairness and efficiency of procedures. • Increased equality/non-discrimination: this will result, in particular, from (i) the envisaged guarantees and arrangements for handling applications of persons with special needs (e.g. for survivors of torture and other forms of violence, minors, mentally disabled persons etc.) which should increase their ability to comply with procedural obligations, and (ii) more balanced application of the safe country of origin notion (in terms of material requirements and examination of individual circumstances of the applicants), thus reduce the risk of discrimination based on nationality. • Better public health: as persons seeking asylum would enjoy quicker access to healthcare in line with the Reception Conditions Directive, survivors of torture would be timely identified and get access to professional expertise, improved communication with asylum seekers would enable MS to receive more complete information about personal circumstances of applicants, including those related to their health, and persons genuinely in need of protection would enjoy quicker access to health care benefits set out in the Qualification

Assessment Criteria	Rating	Motivation of the rating and relevant aspects of the preferred policy option
		Directive. • Good governance: would be better achieved within MS through increased transparency of access and examination procedures, promoting a specialised and well prepared determining authority, strengthening the quality of administrative decision making and streamlining examination procedures. Increased preparedness of asylum personnel and better scrutiny of cases will be instrumental to prevent abuse of procedures. Improved access to effective remedy would lead to better supervision of governmental decisions and practices in the area of asylum by independent judiciary.
Impacts n fundamental rights	**4.5**	The preferred option would promote the following rights of the EU Charter: • Article 18: Right to asylum (enhanced access to examination procedures; improved procedural guarantees, notably for persons with special needs; increased access to effective remedy; more consistent use of accelerated procedure, accompanied by sufficient safeguards; more rigid application of the safe country of origin notion). • Article 19: Protection in the event of removal, expulsion or extradition (better protection against rejection at the border and enhanced access to examination procedures; improved procedural principles and guarantees, notably for persons with special needs; better access to effective remedy; limitations to using the accelerated procedure; improvements of the substantive criteria for defining third countries of origin as safe; more rigid application of the safe country of origin notion). • Article 23: Equality between men and women (guarantees and arrangements for persons with special needs and requirements to take into account gender aspects, in particular those related to personal interviews. • Article 24: The rights of the child (guarantees and arrangements for persons with special needs) • Article 35: Health care (enhanced access to procedures; guarantees and arrangements for survivors of torture) • Article 47: Right to an effective remedy and to a fair trial (right to legal assistance, suspensive effect of appeals, full and ex nunc review of first instance decisions, enhanced "equality of arms" in appeal proceedings.
Impacts on third countries	-	As refugee flows are mainly determined by push factors, it is impossible to determine precisely to what extent the preferred option would have an impact on the overall asylum flows to the EU – see below under 8.2.1.

6.4. Potential magnitude of financial impacts

6.4.1. Potential costs

As indicated above in section 2.2, there are serious limitations to quantify financial impacts of the envisaged measures. As shown in the table below, the total numbers of asylum seekers in the MS potentially affected by the amendments are often the only possible indications of the potential magnitude of costs. This analysis concerns the principal aspects of the proposal.

Elements of preferred option	MS potentially affected on the basis of responses to the consultation and analysis of transposition	Estimated potential magnitude of impacts.
a) Activities of MS asylum personnel to provide information i) to asylum seekers on the elements of the revised directive b) Activities related to mapping, identification and exchanges of good practices, in the context of practical cooperation	26 MS	Based on a calculation of the hourly labour costs of MS asylum personnel at a rate of EUR 23.84, the likely **total administrative costs** of the preferred policy option amount to **2,857,555 EUR.** See annex 24 for more details.
Enhancing access to procedures *at the*	5 MS (EL, ES, IT, CY and	56 985 applications were submitted in

maritime borders **Arrangements on counselling and advice at the entry points**	MT) **Overall impacts** will vary significantly between MS: - some MS (IT, HU, SK, SL, AU, FR, NL and the UK) will be affected to a lesser extent, since they have similar arrangements in place. - a majority of MS will need to provide for additional arrangements.	those MS in 2008. It is not possible to establish the number of affected asylum seekers, since statistical reports do not indicate the location in which applications are submitted. Given that the directive encourages asylum seekers to lodge an application as soon as possible, at least 241 725 applicants per year, if the current numbers persist, may be affected. If the arrangements lead to an increase in registered applications by 5 %, the number of applications in the Union would amount to 265 897. Provided 24 172 additional applicants need interpretation services (0,5 hour / 80 EUR) and legal advice (0,5 hour /) 11, 5 EUR), the total additional costs for 26 MS would amount to ***2 211 793 EUR[110]. The actual costs might, however, be lesser, since not all applicants would be in need of such services.***
Elimination of the possibility to omit a person interview	10 MS (CY, EE, FR, GR, MT, PL, FR, SL, SP and the UK.)	If 5 % of applicants are not offered a personal interview, the proposed provision will affect at least 5 582 applicants per year in the 10 MS. 2 hour interviews would require ***266 149, 76 EUR*** per year[111].
Making the transcript of a personal interview and giving the possibility to an applicant to provide comments on its content.	4 MS (EL, CY, MT and SE)	The total number of applications in those MS in 2008 is 50 305. Provided the above acts add 1 hour to a personal interview, the costs would amount to ***1 199 271 EUR.***
Provision of free legal assistance at first instance	11 MS (EL, CY, CZ, DE, FR, IE, IT, MT, LV, SK and SL)	The total number of applications in those MS in 2008 is ***125 255. Provided all applicants request legal assistance, the costs of 1 hour of legal assistance would range. They might amount to 1 440 432 EUR, based on the rates in HU, or to 6 889 025 EUR, based on the rates in LT. In practice, the costs should be lesser, since not all the applicants would request legal services.***
Issuing medico - legal reports	Amendments would affect to different extents all 26 MS. Lesser financial impacts are expected in MS which have already similar arrangements	The costs of issuing a medico-legal report *per capita* might range from **200 EUR** (AU, RO) per consultation / per capita to **965 EUR** per consultation/per capita (IE). Some 20 % of asylum

110 Hourly rates are based on figures reported by HU which has similar arrangements in place.

111 Estimates are based on the average hourly labour costs of asylum officials (EUR 23.84).

	(centres for the care of torture victims) in place[112].	applicants might be in need of medical examination, as assessed by the International Rehabilitation Council for Torture Victims. This would imply that the total number of beneficiaries of this service in the EU might amount to **48 400** persons per year.
Enhancing access to effective remedy	8 MS (CY, IT, CZ, SK, GE, MT, SP and the UK)	The total number of negative decisions in those MS in 2008 is 45 140.
Approximation of accelerated procedures	Amendments would affect to different extents all 26 MS. 5 MS (BG, PL, SK, SL and the UK) will be mostly affected.	Up to 20 % of cases are currently channelled in accelerated procedures. The total number of applicants concerned might amount to some 49 000 applicants per year, based on EUROSTAT data for 2008.
Amendments of material requirements for the designation of safe countries of origin	2 MS (FR and the UK)	The total number of applications in those MS in 2008 is 72 390. In FR, 8,8 % of applications fall under the safe country of origin notion.
Elimination of derogations from the principle of a single determining authority.	3 MS (EE, BE and FR)	The total number of applications in those MS in 2008 is 53 260.
Setting time limits for first instance procedures	6 MS (CY, FI, FR, LU, and SE)	The total number of applications in those MS in 2008 is 74 395.

6.4.2. Potential savings

a) Common procedural standards should lead to more consistent application of the Qualification Directive, thus diminishing secondary movements caused by protection related considerations. This should **reduce the costs for the implementation of the Dublin system.** This system involves four categories of expenses: administrative costs related to the operation of Dublin units, operational and material costs of requests handling, costs relates to transfers, and costs related to the reception of applicants during the determination process, such as accommodation, allowances, health care, legal aid or costs of administrative custody measures. Due to the limited information available on these costs and the large disparities between these costs in different States participating in the Dublin System, only certain indications are possible. For example, handling outgoing or incoming requests in NOR costs approximately 880 € whereas in EE this does not exceed 15 €. The most costly part of the procedure is transfers: in IE, the overall cost of outgoing transfers in 2005 exceeded 100 000 € whereas the annual operation of the Dublin unit amounted to 250 000 € for that period. As for the total amount of reception related expenditures, it depends largely on the length of the Dublin procedure which varies from 22 days on average in the UK to 3 months in FI[113].

b) Enhancing quality and fairness of first instance determinations should produce higher recognition rates and improve defendability of first instance decisions. This may lead to

[112] These include UK, NL, HU, AU and IE.

[113] For more information see Commission report on the evaluation of the Dublin System (SEC(2007) 742), p 14.

significant administrative and financial savings off-setting initial financial investments, since an appeal at least doubles[114] the examination costs per capita, requires additional expenditures for legal assistance, and increases reception costs. Positive impacts are, in particular, expected with regard to reducing reception costs. MS spend all together 1.5 billion per year for reception services[115]. While it is difficult to estimate reception costs per capita due to the lack of coherent data and cost divergences between MS, there are indications that one reception day may cost up to 30 EUR per capita. This implies that reception costs in a regular first instance procedure (6 months as proposed in the preferred option) may amount to 5 400 EUR per capita whilst every additional month of reception would require extra 900 EUR. Given estimates that some 110, 900 appeals were lodged in the EU in 2007, one month of appeals proceedings might produce reception costs close to 100 000 EUR. Since the duration of the appeal process often takes more than 6 months, the reception costs per capita in the appeal stage is expected to be significantly higher than in first instance procedures. Since the length of appeal proceedings varies significantly in and between MS, a precise estimation of reception costs is not feasible. If appeal proceedings take 1 year, which is a likely scenario in many MS, the overall reception costs at the appeal stage might reach at least 1 200 000 EUR per year.

6.4.3. Assistance from the European Refugee Fund and from the Asylum Support Office

All national measures to be taken to implement the envisaged measures are **eligible for co-funding under the ERF at a level of 50% or 75%[116]**. The financial envelope of the ERF for the period 1.1.2008 to 31.12.2013 has been fixed at **EUR 628 million**.

The **EASO support activities** will help MS optimise national resources and identify the most cost-efficient ways to meet the envisaged standards. The EAC and other forms of institutional support to training will instrumental in assisting MS to adapt the current instruction and training programmes to comply with the directive's requirements.

6.4.4. Tackling any increase in abuse of the asylum system

Asylum procedures, as any other administrative procedures, may be subject to abuse. Three main forms of asylum specific abuse are identifiable.

First, persons refused entry or apprehended during their illegal stay on the territory may misuse the asylum procedure seeking to regularise their presence and/or obtain asylum related benefits, such as reception conditions. Admittedly, such persons may be among those applicants who will benefit from the provision of information and advice on access procedures, as described in the preferred option. Yet, it is essential that persons seeking protection enjoy unrestricted access to the asylum procedure. This is a clear requirement flowing from the ECJ's case law regarding access to rights guaranteed by Community Law. The availability of information on the right to apply for asylum and other access related services are vital in this respect. Essentially, the preferred policy option aims to increase awareness of the procedure for applying for protection at entry points to the EU and to facilitate access to the competent authorities. Where certain persons so informed choose to abuse the

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114 In the context of the consultations, MS were asked to provide information on the costs of appeal procedures and, if possible, the breakdown of these costs. However, no such data were provided. A single indication can be found in the Report by the UK Home Office "Management of asylum applications by the UK Border Agency" of 8 January 2009, available at www.nao.org.uk

115 This data, however, include services provided to other third country nationals in some countries; for more information see *IA on the revision of the Reception of the Reception Conditions Directive.*

116 The Community contribution is 50% as a rule, but increased to 75% for actions addressing specific strategic priorities and in the MS covered by the Cohesion Fund (Article 14(4)).

system by knowingly making an unfounded application the Directive provides for swift and efficient procedures for dealing with these claims. Such procedures may be carried out at the border with a view to facilitating faster removals. The envisaged measures on access to procedures should be considered in conjunction with other elements of the preferred options identified in respect of both the Asylum Procedures Directive and the Qualification Directive. Improved efficiency and quality of examinations as well as better defined grounds of international protection should enable the competent authorities to quicker distinguish between asylum seekers and other migrants in mixed arrivals, thus **optimising labour and administrative resources needed to establish and complete applicable procedures**. The preparedness of the asylum personnel to identify timely fake stories would also be improved. Furthermore, better awareness of the asylum procedure, of the obligations of applicants and of the consequences of lodging abusive claims among third country nationals present at entry points should contribute to discouraging attempts to misuse the asylum procedure. In view of the above, any potential increase in unfounded claims would be off-set by improved efficiency and quality in processing the applications. The preferred option is not expected to aggravate backlogs.

Second, asylum seekers may try to include false elements in their applications in order to improve their chances to receive protection. These elements may concern their background and identity, nationality, personal history, the situation in their country of origin and the reasons for which they may be persecuted. While **some applicants manifestly abuse** asylum systems (for example, in cases when asylum seekers falsely associate themselves with a particular ethnic group (Somalis, Chechens)), **others may follow misleading advice** from other asylum seekers or smugglers. With regard to the first category of abusive claims, the proposal preserves the current standards which allow MS to consider such applications as manifestly unfounded and to accelerate their examination. The envisaged measures on quality decision making should further enhance the preparedness of the asylum personnel to identify such cases. This element is essential to preserve the integrity of asylum systems. As to the second category of applications, the preferred option increases awareness of asylum seekers of applicable requirements through facilitating access to professional advice and counselling, thus promoting applicants' cooperation with the asylum authorities.

Third, asylum seekers may try to frustrate the enforcement of negative decisions, **thus extending their stay in the host MS.** The proposal again maintains the current arrangements allowing MS to consider such applications as manifestly unfounded and accelerate their examination. The preferred option further enables the determining authority to quickly subject **repeat applications** to the admissibility test, allows MS to derogate from the principle of automatic suspensive effect of appeals in such cases, and, in the case of multiple repeat applications, remove the applicant from the territory.

7. EVALUATION AND MONITORING CRITERIA

This section lists indicators to monitor progress made by the preferred option towards addressing current problems and the specific policy objectives identified, and to assess the effectiveness and the efficiency of the preferred policy option. More specifically, these indicators will be used by the Commission when evaluating and reporting to the EP and the Council on the implementation of the Directive. To ensure consistency with the Qualification Directive, it is envisaged to issue a report every 5 years. The relevant indicators are the following:

1. Numbers of applications and persons having been included in an application as family members

2. Numbers of protection seeking unaccompanied minors

3. Numbers of applications having been withdrawn

4. Numbers of applications covered by negative first instance decisions

5. Numbers of persons covered by first instance decisions granting refugee status

6. Numbers of persons covered by first instance decisions granting subsidiary protection

7. Numbers of persons covered by first instance decisions withdrawing refugee status or subsidiary protection

8. Numbers of appeals against negative first instance decisions

9. Numbers of persons covered by final appeal decisions rejecting applications

10. Numbers of persons covered by final appeal decisions (i) granting refugee status, (ii) granting subsidiary protection or (iii) withdrawing refugee status or subsidiary protection

11. Numbers of Dublin requests for taking back or taking charge of applicants for international protection

12. Numbers of Dublin transfers

13. EURODAC hits

14. Costs relating to reception of applicants for international protection

15. Numbers of persons benefiting from ERF-funded measures related to asylum procedures

16. Level of ERF allocations per MS

17. Transposition by MS of the proposed amendments

18. Third countries designated as safe countries of origin and/or considered as safe third countries by MS

19. Numbers of applications processed through accelerated procedures.

Indicators concerning asylum seekers should, as far as possible, be broken down by: gender, age and nationality. Proportions should, as far as possible, be provided as a proportion of the total number of asylum seekers, and the specific category of asylum seekers referred to. The majority of the above indicators are accessible under the current arrangements. Thus, the data under points (1) to (10) is available pursuant to the Migration Statistics Regulation[117] which requires MS to provide data, ***disaggregated by age, sex and citizenship***, with regard to numbers of asylum seekers and persons covered by first instance and appeal decisions. The scale of secondary movements is identifiable on

[117] Regulation (EC) NO 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (OJ L 199, p. 123)

the basis of EURODAC hits and MS' reports under the Dublin and EURODAC Regulations, and MS are required to provide the data under point (18) according to the current directive. The value of reception costs will be established on the basis of annual and multi-annual ERF programmes and MS' reports on amount of social support for asylum seekers, as envisaged in the Commission proposal for amending the Reception Conditions Directive. Transposition measures referred to under point (17) will be notified to the Commission by MS in line with the Directive's reporting requirements.

A qualitative and quantitative leap in the collection and evaluation of information can be expected to take place through the establishment of EASO. It will not only institutionalise a comprehensive sharing of specific information on asylum processing through formalised procedures but will also ensure an in-depth systematic evaluation of the data collected. Three main elements of its mission are relevant:

- It will organise, promote and coordinate all activities enabling the exchanging of information and the identifying and pooling of good practice in asylum matters between the MS.

- It will organise, coordinate and promote the exchange of information between national asylum authorities and between the Commission and national asylum authorities concerning the implementation of all asylum instruments, gathering in particular information on the processing of asylum applications by national authorities.

- It will collect and evaluate information on the implementation of the asylum rules by MS as part of its task to draw up annual reports on the situation of asylum in the EU.

Additional information on implementation measures and decision-making practices as well as relevant statistics will further be collected in the context of **regular meetings with MS' experts within existing networks** (Contact Committees, Eurasil, *ad hoc* meetings with NGOs, UNHCR and other stakeholders).

The systematic availability over longer periods of time of the data covered by the Migration Statistics Regulation, along with the structured and thorough collection, evaluation and sharing of significant quantities of information that will be accomplished by the EASO can be expected to crucially contribute to addressing the deficits and shortage of data encountered in the context of the preparation of the proposal for the amendment of the Asylum Procedures Directive and more generally to ensure that any future EU actions in the area of asylum can be based on a solid body of factual and statistical evidence and other related data.