



RSA Comments on the amended Commission proposal for an Asylum Procedures Regulation

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Introduction*

On 23 September 2020, as part of the package of legislative proposals of the New Pact on Migration and Asylum, the European Commission presented an amended proposal for a common procedure for international protection in the European Union¹ to its earlier proposal tabled on 13 July 2016.² The amendment of that proposal aims mainly at: (a) establishing a common asylum procedure, applicable to all claims made in European Union (EU) Member States; (b) simpler, clearer and shorter procedures guaranteeing quality and efficiency of decision-making, to ensure more efficient use of resources and improvement of the rights of applicants.³

As a preliminary remark, the proposal is marred by a palpable lack of evidence base to support the assumptions behind the suggested amendments to asylum procedures. First, while continuing not to comply with its duty to report to the Council and European Parliament on the application of the existing Asylum Procedures Directive since July 2017,⁴ the Commission cites an unpublished study to support its assessment of the implementation of the Directive. Formulating a legislative initiative under such conditions is in clear violation of the institutional obligations of the Commission as guardian of the *asylum acquis* and of the legitimate expectations of EU co-legislators to be sufficiently informed, in line with the law in force, on the functioning of policy areas in which they are called to legislate.

Second, the Commission refers to a rise in arrivals of nationals of countries subject to a recognition rate below 20% in recent years as a phenomenon entailing increased pressure on EU Member States,⁵ so as to justify differential treatment of applications concerning countries with a low recognition rate.⁶ This assumption is dispelled by the current situation of arrivals in Greece as, according to official Reception and Identification Service (RIS) statistics, more than two thirds of arrivals in the first half of 2020 originated from Afghanistan (36.8%), Syria (19.1%) and Turkey (12%).⁷ First instance recognition rates during that period in Greece were at 76.4% for Afghanistan, 91.8% for Syria and 65.6% for Turkey, while the overall recognition rate at Asylum Service level reached 68.9%, according to official Eurostat statistics.⁸ Up-to-date statistics therefore demonstrate that **the majority of arrivals come from countries with high changes of obtaining international protection**, as far as the South-Eastern external borders of the EU are concerned.

* RSA thanks Prof. Lilian Tsourdi, Assistant Professor of European Law at the Faculty of Law of the University of Maastricht for contributions to the observations developed in this paper.

¹ European Commission, *Amended proposal for [an Asylum Procedures Regulation]*, COM(2020) 611, 23 September 2020.

² European Commission, *Proposal for [an Asylum Procedures Regulation]*, COM(2016) 467, 13 July 2016.

³ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 3-4.

⁴ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 8.

⁵ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 1, 4.

⁶ Articles 40(1)(i), (5)(c) and 41(3)(c) and Recital 39a Asylum Procedures Regulation proposal.

⁷ RIS, *Ποές καταγεγραμμένων ΥΤΧ (ανά Υπηκοότητα)*, June 2020, available at: <https://bit.ly/35ZokvC>.

⁸ RSA, 'Majority of asylum seekers in need of international protection, according to Eurostat first instance asylum statistics', 3 September 2020, available at: <https://bit.ly/31PsfIF>.

Third, the Explanatory Memorandum presents the border procedure as a means to address “abusive asylum requests”,⁹ without however establishing any rational connection between abuse of the asylum system and the reasons for applying border procedures. According to Article 41 (3) of the proposal, the border procedure is mandatory in the cases of applicants who (a) mislead authorities by presenting false documents or information or withholding information or documents which may negatively affect their claim, (b) pose a threat to public order or national security, or (c) come from countries subject to an EU-wide recognition rate of 20% or lower. **None of the above circumstances substantiate a presumption of abusive intent on the part of the asylum seeker.** Furthermore, the Commission describes fundamental safeguards such as the right to remain on a country’s territory during the appeal procedure as “procedural loopholes”, in a manner that jeopardises the fundamental right to judicial protection.¹⁰ It also claims, without basis or justification, that asylum seekers cause delays in the procedure with the sole aim of frustrating their deportation from the EU, “misusing the protection provided by the asylum system”.¹¹

Fourth, the provisions of the proposal bring about severe restrictions of established fundamental rights and **disregard the steady and significant evolution of the EU asylum acquis, achieved *inter alia* through the case law of the Court of Justice of the European Union (CJEU). Luxembourg jurisprudence has ensured the alignment of secondary legislation with primary EU law**, namely the Charter of Fundamental Rights, in areas such as exceptional deprivation of liberty of asylum seekers,¹² procedural safeguards in the examination of asylum applications,¹³ and the right to an effective remedy. **Falsely, and contrary to the Commission’s duty to conduct an *ex ante* assessment of compliance of its proposals with the Charter,**¹⁴ the Explanatory Memorandum provides that administrative detention is only applied based on the provisions of the Reception Conditions Directive and the Return Directive,¹⁵ and that derogations from automatic suspensive effect only apply to appeals concerning applications presumed to be unfounded.¹⁶ Through the proposal, the Commission attempts a **legislative downgrading of the existing EU acquis** on procedural safeguards in the asylum procedure that are necessary to guarantee protection from *refoulement* and the right to an effective remedy, **without offering sufficient and specific justification of the compatibility of the asylum procedure with the Charter in the absence of such safeguards, or of the necessity and proportionality of the proposed restrictions on fundamental rights.**

Finally, there are serious contradictions between the aims of the proposal and the means to achieve them, which are discussed in more detail below.

⁹ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 4, 5, 9, 16.

¹⁰ Article 20(1) Greek Constitution; Article 47 Charter of Fundamental Rights.

¹¹ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 2.

¹² CJEU, Case C-601/15 PPU *JN*, 15 February 2016; Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020.

¹³ CJEU, Case C-404/17 A v *Migrationsverket*, 25 July 2018.

¹⁴ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, SEC(2011) 567, 6 May 2011.

¹⁵ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 11.

¹⁶ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 12.

Analysis of key provisions

1. Accelerated procedure

Article 40(1)(i) inserts a new ground for the accelerated procedure, applicable to asylum seekers originating from a country subject to an annual EU-wide average recognition rate of 20% or lower. The provision thereby introduces differential treatment of refugees on the sole basis of nationality, in contravention of international refugee law.¹⁷ According to **Article 40(5)(c)**, this ground may also be applied to unaccompanied children. The provisions foresee exceptions where a significant change has occurred in the country of origin since the publication of relevant Eurostat data or where the applicant belongs to a category of persons to whom the 20% or lower rate cannot be deemed as representative.

RSA recalls that, under the – equally legally problematic – “safe country of origin” concept, EU law already provides for the possibility to use accelerated procedures when minimum standards are met, i.e. where based on a periodic assessment of the legal framework and practice in the applicant's country of origin,¹⁸ a rebuttable presumption of ineligibility for refugee status or subsidiary protection may be established. The Commission reminds in its proposal that the “safe country of origin” is maintained as a separate ground for applying the accelerated procedure.¹⁹

The CJEU affirmed in *A v Migrationsverket* that the “safe country of origin” provisions create a “special examination scheme based on a presumption of adequate protection”.²⁰ Taking into consideration the procedural disadvantage at which an applicant is placed in the accelerated procedure, Member States cannot resort to said presumption without fully applying the necessary procedural rules for its use.²¹ In *A v Migrationsverket*, the Court held that the Swedish practice of rejection of claims by nationals of countries subject to a recognition rate below 20% as manifestly unfounded was contrary to the Asylum Procedures Directive. **Article 40(1)(i)** would effectively permit national authorities to **rely on a presumption of unfoundedness of applications, while circumventing the institutional framework, transparency requirements and procedural safeguards attached to the “safe country of origin” concept, contrary to CJEU jurisprudence.**

In addition, reference to the average EU-wide recognition rate as the sole criterion for the determination of a presumption of unfoundedness of an asylum claim presupposes uniform and harmonised decision-making on refugee status determination across the Member States. In reality, however, **substantial disparities persist between European countries on the recognition of international protection needs** even for similar cases. By way of example, for nationals of Afghanistan, first instance recognition rates in 2019 ranged from 4.1% in Bulgaria to 93.8% in Italy.²²

¹⁷ Article 3 Convention Relating to the Status of Refugees.

¹⁸ Annex I Asylum Procedures Directive; Article 87(3)-(5) International Protection Act (IPA).

¹⁹ Recital 39a Asylum Procedures Regulation proposal.

²⁰ CJEU, Case C-404/17 *A v Migrationsverket*, 25 July 2018, para 25.

²¹ *Ibid*, para 31.

²² European Council on Refugees and Exiles (ECRE), ‘Asylum in Europe 2019: human rights under pressure’, 27 July 2020, available at: <https://bit.ly/2G494Tc>.

Accordingly, legal certainty militates against the use of recognition rates as a criterion for the placement or not of an application in the accelerated procedure.

Finally, the ambiguous formulation of exceptions from the acceleration ground also undermines legal certainty, given that the provision does not spell out the procedure and criteria on the basis of which Member States assess a significant change in the situation of the country of origin or the applicant's belonging to a particular group of people for whom the recognition rate is not representative.

RSA therefore recommends deletion of Article 40(1)(i) and Recital 39a.

2. Border procedure

The establishment of a single border procedure combining the examination of asylum applications and the preparation of return following a negative decision is the cornerstone of the legislative package presented by the Commission.²³ However, reinforcing the border procedure as a mandatory, systematic, broader and longer stage of European asylum systems is all but a change of course in refugee protection. On the contrary, the proposal codifies and further entrenches the failed operational approach tested by the EU until now, which has led to prolonged mass confinement of people in inhuman conditions on the Greek islands and to a gradual dismantling of procedural safeguards and of the quality of the asylum procedure, with damaging effects on both refugee rights and the functioning of the Greek administration.²⁴ **Full rejection of the border procedure as the main ingredient of the management of asylum claims in the EU is urgently needed to avoid the perpetuation of the situation unfolding on the Eastern Aegean islands over the past four years.**

Scope

The proposal foresees the use of border procedures following a claim made at the external borders, apprehension for unauthorised crossing of external borders, disembarkation in the context of a search and rescue operation, as well as relocation from another Member State.²⁵ Its use is liable to be significantly broadened: the border procedure is optional for the processing of (a) admissibility or (b) merits where acceleration grounds are applicable,²⁶ but mandatory in the case of applicants who (a) mislead authorities by presenting false documents or information or withholding information or documents which may negatively affect their claim, (b) pose a threat to public order or national security, or (c) come from countries subject to an EU-wide recognition rate of 20% or lower.²⁷

Exemptions of applications from the border procedure are foreseen where: (a) adequate support cannot be provided to applicants in need of special procedural

²³ Recitals 40-40a Asylum Procedures Regulation proposal. See also European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020, 4.

²⁴ RSA & Stiftung PRO ASYL, *Submission in the M.S.S. [Group] and Rahimi cases*, July 2020, available at: <https://bit.ly/3llZefv>.

²⁵ Article 41(1) Asylum Procedures Regulation proposal.

²⁶ Article 41(2) Asylum Procedures Regulation proposal. See also Article 43(1) Asylum Procedures Directive; Article 90(1) IPA.

²⁷ Article 41(3) Asylum Procedures Regulation proposal.

guarantees;²⁸ (b) medical reasons so require;²⁹ (c) detention grounds do not apply and the procedure cannot be applied without detention;³⁰ (d) the case concerns unaccompanied children or families with children below the age of 12, and no public order or national security grounds apply.³¹ Albeit broader than those of the Asylum Procedures Directive, the aforementioned provisions **impose minor constraints on the scope of the border procedure**, which are already narrowly interpreted in the implementation of domestic law transposing the Directive. As regards special procedural guarantees in particular,³² Greek first- and second-instance asylum authorities deem that adequate support is provided, as a rule, to cater for special procedural needs in the fast-track border procedure implemented on the Eastern Aegean islands, even in the case of particularly vulnerable persons such as victims of torture.³³ An express and categorical exemption of all vulnerable groups from the border procedure is necessary to ensure that the requisite care is afforded to asylum seekers with special procedural or reception needs.

Fiction of non-entry and deprivation of liberty

According to **Articles 41(6)** and **41a(1)**, the individual is considered not to have entered the territory of the Member State both during the examination of the asylum claim and following its rejection in the border procedure. The fiction of “non-entry” throughout the border procedure is **in contradiction with the applicant’s right to remain on the territory of the Member State** until the delivery of a decision on the asylum application,³⁴ inferred from a series of references to loss of the right to remain upon rejection of the claim in the same articles of the proposal.³⁵ RSA also recalls that the applicant is already present in a facility at the borders of the Member State for a period of up to ten days in the context of the pre-entry procedure, albeit under a similar regime of fictional non-entry.³⁶

Under the proposal, the fiction of non-entry into the country is applied even where the border procedure is implemented not in locations in proximity to the border or transit zone designated by Member States at their discretion pursuant to **Article 41(13)**,³⁷ but in other locations on the territory for a temporary period due to inability of authorities to carry out the procedure close to the border pursuant to **Article 41(14)**. Similar to this, **Article 41a(2)** permits Member States that “cannot accommodate” people in proximity to the border to resort to the use of “other locations” within their territory. Read in conjunction, the above provisions **leave wide**

²⁸ Article 41(9)(b) Asylum Procedures Regulation proposal.

²⁹ Article 41(9)(c) Asylum Procedures Regulation proposal. Note that, based on an *effet utile* reading, medical reasons do not refer to compatibility of detention with the state of health of the applicant, as the latter is covered by the next point of paragraph 9.

³⁰ Article 41(9)(d) Asylum Procedures Regulation proposal.

³¹ Article 41(5) Asylum Procedures Regulation proposal.

³² Article 24(3) Asylum Procedures Directive; Article 67(2)-(3) IPA.

³³ 4th Appeals Committee, Decision 12645/2020, 21 July 2020; 14th Appeals Committee, Decision 4334/2020, 9 April 2020.

³⁴ Article 9 Asylum Procedures Regulation proposal.

³⁵ Articles 41(12), 41a(2), (5) and (6) and Recitals 40e and 40i Asylum Procedures Regulation proposal.

³⁶ Article 6(3) Screening Regulation proposal.

³⁷ Recital 40c Asylum Procedures Regulation proposal.

discretion to Member States and bring about a spatial expansion of the exceptional regime of border procedures to the entirety of their territory.

The broad interpretation of the fiction of non-entry under the proposal entails **automatic and indiscriminate de facto deprivation of liberty for asylum seekers subject to the border procedure.** Although the Commission implies the possibility for the procedure to be carried out without detention, **administrative practice in all countries using the fiction of non-entry demonstrates the generalised use of detention, whether de jure (e.g. Belgium, France, Portugal) or de facto (e.g. Germany, Hungary).**³⁸ This infringes upon the fundamental right to liberty, insofar as the requirements set by the Reception Conditions Directive and the Return Directive for the use of detention are not met.³⁹

Furthermore, the proposal casts serious uncertainty on the legal basis for detention in the various stages of the border procedure and the compatibility thereof with the constraints set by Article 6 of the Charter and Article 5(1)(f) of the European Convention on Human Rights (ECHR). On the one hand, during the examination of the asylum application, Member States may impose detention under Article 8 of the Reception Conditions Directive.⁴⁰ Where the applicant is not detained upon the rejection of the claim, they may apply detention under Article 15 of the Return Directive.⁴¹ Yet, whereas the Return Directive provisions apply during the return border procedure,⁴² if the applicant was already detained when the application was rejected, the proposal permits the continuation of detention “for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process”.⁴³ The latter provision **introduces at EU level a new regime of immigration detention for persons subject to an obligation to leave the territory of Member States** through an incorrect reference to prevention of entry into the territory as legal basis. Such a construct also exceeds the limits set by Article 15 of the Return Directive for the use of detention for the purpose of removal. Accordingly, the proposal attempts an **unacceptable circumvention of the legal framework set by the Return Directive in terms of common standards and procedures for the removal of people from Member States.**⁴⁴ In addition, the aforementioned provisions are problematic from the perspective of legislative technique, given that the Commission seeks to regulate detention measures in an instrument governing the asylum procedure instead of the relevant legislative acts, namely the Reception Conditions and Return Directives.

Finally, RSA highlights that the introduction of a general non-entry fiction throughout the border procedure **poses practical barriers on compliance with procedural**

³⁸ Asylum Information Database (AIDA), *Boundaries of liberty: Asylum and de facto detention in Europe*, March 2018, available at: <https://bit.ly/361p1EI>; European Asylum Support Office (EASO), *Border procedures for asylum applicants in EU+ countries*, 2020, 11, available at: <https://bit.ly/3kRLDLR>.

³⁹ On the interpretation of Hungarian practice, see CJEU, Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 226 et seq.

⁴⁰ Article 41(9)(d) Asylum Procedures Regulation proposal.

⁴¹ Article 41a(6) Asylum Procedures Regulation proposal.

⁴² Article 41a(3) Asylum Procedures Regulation proposal.

⁴³ Article 41a(5) Asylum Procedures Regulation proposal.

⁴⁴ CJEU, Case C-61/11 PPU *El Dridi*, 28 April 2011, para 32.

safeguards such as legal assistance, as it renders the granting of power of attorney in line with domestic legislation impossible.⁴⁵

Time limits

Article 41(11) sets a 12-week deadline for the processing of an asylum application at first and second instance in the border procedure, which may be extended to 20 weeks in times of crisis.⁴⁶ Although the 4-week deadline currently in force under Article 43(2) of the Asylum Procedures Directive only refers to the first instance procedure, the proposal attempts a **substantial extension of the permitted timeframe of the procedure**. Where the applicant's right to remain is withdrawn due to the submission of a non-suspensive appeal,⁴⁷ the separate 12-week deadline for the return border procedure is triggered under **Article 41a(2)**, which may also be prolonged to 20 weeks in times of crisis.⁴⁸ Consequently, an applicant may remain in a first-instance asylum border procedure for a total period of 20 weeks and, following a negative decision challengeable by a non-suspensive appeal, remain in the border procedure for another 20 weeks, without there being a violation of EU law.

In contradiction to the overall objective of faster procedures set by the Commission,⁴⁹ the proposed provisions result in granting **undue discretion** to administrative authorities, liable to **increase the duration of border procedures and corollary deprivation of liberty**.

In light of the reasons stated above, RSA recommends deletion of Articles 40 and 41a and Recitals 40-40j.

3. Appeals

Deadlines for lodging appeals

Article 53(7)(a) of the proposal lays down a minimum deadline of one week for the submission of appeals against inadmissibility decisions, negative decisions in the accelerated procedure and decisions rejecting an application as implicitly withdrawn, while **(b)** foresees a deadline from two weeks to two months for all other cases.

The proposed provisions **do not comply with the obligation to guarantee reasonable time limits for the effective exercise of the right to appeal**.⁵⁰ According to CJEU jurisprudence in *Diouf*, truncated appeal deadlines may be imposed based on the nature of the procedure, i.e. the need to rapidly process unfounded or inadmissible cases,⁵¹ so long as time limits are sufficient for the individual to prepare and submit an

⁴⁵ Article 71(1) IPA.

⁴⁶ Article 4(1)(b) Crisis Regulation proposal.

⁴⁷ Articles 41(12)(b)-(c) and 54(3) Asylum Procedures Regulation proposal.

⁴⁸ Article 5(1)(a) Crisis Regulation proposal.

⁴⁹ Recitals 39a and 40a Asylum Procedures Regulation proposal. See also European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020, 4-5.

⁵⁰ Council of State, Decision 3581/1999; Decision 3030/2008, 17 October 2008.

⁵¹ CJEU, Case C-69/10 *Diouf*, 28 July 2011, para 65.

appeal.⁵² In *Diouf*, the Court concluded that a 15-day deadline to appeal in the accelerated procedure was not insufficient.⁵³ As a minimum standard, appeals in cases covered by the accelerated procedures or other circumstances where a presumption of unfoundedness apply should be subject to a deadline of at least two weeks.

Suspensive effect

Article 54(3)-(5) of the proposal sets out derogations from the appellant's right to remain and the automatic suspensive effect of appeals against negative asylum decisions and return decisions. These raise a number of serious concerns.

First, both the existing provisions of the Asylum Procedures Directive⁵⁴ and their suggested amendments **lack clarity as to the practical implementation of suspensive effect** pursuant to paragraph 3, in combination with the guarantees of time, interpretation and legal assistance in paragraph 5, notably as regards the authority competent for such a determination and the procedure to be followed with a view to assessing whether the conditions of paragraph 5 are met or whether automatic suspensive effect must be granted. Such ambiguity **intensifies risks of exclusion from the possibility to exercise the right to an effective remedy.**⁵⁵

Second, the obligation on the appellant to lodge a separate request to suspend the execution of the return decision pending the outcome of the appeal constitutes an **additional, superfluous procedural step in the second instance examination procedure, in contradiction with the objective of simpler procedures.**⁵⁶ It also **adds disproportionate burden on Greek appeal authorities and causes delays in the processing of cases**, taking into account the existing short deadlines foreseen by the law for the examination of appeals. **The practice of Appeals Committees in the course of 2020 confirms the unnecessary administrative burden** resulting from such a measure, as Committees tend to dismiss requests for suspensive effect as having no purpose (*άνευ αντικειμένου*), after having issued a positive or negative decision on the merits of the appeal.⁵⁷

Third, **Recital 66** refers to a narrowly defined applicability of derogations from the right to remain solely in cases where the asylum claim is presumed to be unfounded. However, Article 54(3) foresees *inter alia* non-suspensive appeals in inadmissibility decisions based on the "first country of asylum" concept, in implicit withdrawals and in withdrawals of international protection for reasons of exclusion, public order or national security.⁵⁸ The proposal thus **extends derogations from the appellant's right to remain to a range of cases where no presumption of unfoundedness applies.**

⁵² *Ibid*, para 66.

⁵³ *Ibid*, para 67.

⁵⁴ Article 46(6)-(7) Asylum Procedures Directive; Article 104(2)-(3) IPA.

⁵⁵ Article 20(1) Greek Constitution; Article 47 Charter; Article 13 ECHR.

⁵⁶ Amended Asylum Procedures Regulation proposal, Explanatory Memorandum, 3.

⁵⁷ 4th Appeals Committee, Decision 12645/2020, 21 July 2020; 6th Appeals Committee, Decision 5692/2020, 28 February 2020; 10th Appeals Committee, Decision 7465/2020, 24 April 2020; 13th Appeals Committee, Decision 2727/2020, 9 April 2020; 19th Appeals Committee, 19883/2020, 11 August 2020.

⁵⁸ Article 54(3)(b), (c) and (e) Asylum Procedures Regulation proposal.

Restoring the right to remain and automatic suspensive effect in all appeals is necessary to **safeguard the right to judicial protection** and to **ensure sound use of resources and efficient asylum procedures**.⁵⁹

Second level of jurisdiction

Article 53(9) prohibits onward appeals against decisions taken in the border procedure, with the declared aim of improving the efficiency of the procedures.⁶⁰ Such a measure not only amounts to unjustified discrimination of asylum seekers as regards access to judicial protection, but also runs counter to the right to legal protection from courts enshrined in the Greek Constitution.⁶¹ Under the Constitution, **no prohibition or restriction may be imposed on judicial review of administrative acts**⁶² such as the decisions of Appeals Committees on asylum appeals.

In addition, according to **Article 54(7)**, onward appeals do not carry automatic suspensive effect. In light of the above observations on **Article 54(3)-(5)**, notably the need to avoid additional workload on Greek administrative courts,⁶³ RSA reiterates the need for appellants to benefit from the right to remain on the territory during the examination of their appeal.

For those reasons, RSA recommends the following amendments:

Article 53: 7. Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1:
(a) at least ~~one~~ **two** weeks in the case of a decision rejecting an application as inadmissible, ~~as implicitly withdrawn~~ or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply;
(b) between a minimum of ~~two weeks~~ **one month** and a maximum of two months in all other cases.

...

~~9. Member States shall provide for only one level of appeal in relation to a decision taken in the context of the border procedure.~~

Article 54: 3. ~~The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one of the following decisions: (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure; (b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements]; (c) a decision which rejects an application as implicitly withdrawn; (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded; (e) a~~

⁵⁹ Recitals 14 and 33 Asylum Procedures Regulation proposal.

⁶⁰ Recital 65 Asylum Procedures Regulation proposal.

⁶¹ Article 20(1) Greek Constitution.

⁶² Council of State, 1619/2012, 4 May 2012.

⁶³ Apostolos Gerontas, *Επιτομή Διοικητικού Δικονομικού Δικαίου*, 2nd edn (Sakkoulas 2020), 8.

decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation).

4. In the cases referred to in paragraph 3, a court or tribunal shall have the power to decide, following an examination of both facts and points of law, whether or not the applicant shall be allowed to remain on the territory of the Member States pending the outcome of the remedy upon the applicant's request. The competent court or tribunal may under national law have the power to decide on this matter *ex officio*.

5. For the purpose of paragraph 4, the following conditions shall apply: (a) the applicant shall have a time-limit of at least 5 days from the date when the decision is notified to him or her to request to be allowed to remain on the territory pending the outcome of the remedy; (b) the applicant shall be provided with interpretation in the event of a hearing before the competent court or tribunal, where appropriate communication cannot otherwise be ensured; (c) the applicant shall be provided, upon request, with free legal assistance and representation in accordance with Article 15(4) and (5); (d) the applicant shall have a right to remain: (i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired; (ii) where the applicant has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant shall be allowed remain on the territory.

6. In cases of subsequent applications, by way of derogation from paragraph 6, point (d) of this Article, Member States may provide in national law that the applicant shall not have a right to remain, without prejudice to the respect of the principle of non-refoulement, if the appeal has been made merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal from the Member State, in cases where it is immediately clear to the court that no new elements have been presented in accordance with Article 42(4).

7. An applicant who lodges a further appeal against a first or subsequent appeal decision shall ~~not~~ have a right to remain on the territory of the Member State **pending the outcome of the remedy**, without prejudice to the possibility for a court or tribunal to allow the applicant to remain upon the applicant's request or acting *ex officio*.

Recital 66: Applicants should, in principle, **in all cases** have the right to remain on the territory of a Member State until the time-limit for lodging an appeal before a court or tribunal of first instance expires, and, where such a right is exercised within the set time-limit, pending the outcome of the appeal. It is only in the limited cases set out in this Regulation, where applications are likely to be unfounded, that the applicant should not have an automatic right to remain for the purpose of the appeal.

RSA recommends deletion of Recitals 66a and 66b.

4. Subsequent applications

Article 43(c) inserts an exception to the asylum seeker's right to remain on the territory of the Member State where they lodge a subsequent application within one year from the rejection of a previous application, with the sole aim to delay or frustrate the execution of a return decision, where "it is immediately clear to the determining authority that no new elements have been presented". The provision **raises risks of arbitrary use and interpretative ambiguity**, particularly as regards the manner in which

authorities assess the objective element of an “immediately clear” lack of new elements, as well as the subjective element of the individual's intention merely to frustrate the return procedure.

RSA therefore suggests deletion of Article 43(c) and Recital 44a.

5. Selected provisions of the original Commission proposal

Beyond the amendments introduced by the amended proposal, RSA highlights selected provisions of the Commission proposal tabled in 2016, which raise serious concerns regarding refugee protection and the fair and efficient conduct of the asylum procedure.⁶⁴

Legal aid

Article 15(1) of the proposal sets out the obligation of Member States to provide, upon request, free legal assistance and representation to asylum seekers during the first- and second-instance procedure. **In light of the provisions of the amended proposal**, introducing a disproportionate expansion of the border procedure and the reduced procedural safeguards foreseen therein, as well as restrictions on the exercise of the right to appeal, **the need to safeguard unhindered access of asylum seekers to legal aid and representation at first instance is all the more pressing.**

However, according to **paragraphs 3(b) and 5(b)** of the proposal, Member States may restrict the provision of free legal assistance in cases where the application or appeal has no tangible prospect of success. **The “merits test” places an additional burden of proof on the applicant** to persuade, prior to the examination of the claim or appeal, the Asylum Service or the Appeals Committee, through a duly motivated application written in Greek without knowledge of the language or the national legal system, without the assistance of a lawyer and without a right to be heard by the Appeals Committee, that their application or appeal is likely to succeed.

The merits test **renders the exercise of the right to an effective remedy pursuant to Article 47 of the Charter extremely difficult** for protection seekers, bearing in mind their vulnerable position in the asylum procedure,⁶⁵ their lack of familiarity with the language and the legal system, and the risk of harm they run in the case of an incorrect rejection of their claim.⁶⁶ Such a measure is liable to deny the right to legal aid to the majority of appellants in practice. At the same time, the merits test constitutes an **additional procedural stage in the examination of asylum applications, thereby exacerbating complexity and adding burden to the already heavy workload of administrative authorities.** The administration will be called to examine legal aid applications prior to deciding on applications or on the individual's right to remain on Greek territory for the purposes of the appeal procedure. Administrative courts will

⁶⁴ See further ECRE, *Comments on the Commission proposal for an Asylum Procedures Regulation*, November 2016, available at: <https://bit.ly/34aLIUq>.

⁶⁵ ECtHR, *M.S.S. v. Belgium and Greece*, App No 30696/09, 21 January 2011, para 251.

⁶⁶ ECRE/ELENA, *Legal Note on access to legal aid in Europe*, November 2017, 10, available at: <https://bit.ly/34rSUv6>; ECRE, *Information Note on the Asylum Procedures Directive*, Δεκέμβριος 2014, 26, available at: <https://bit.ly/3b10Ju4>.

equally undertake the burden of examining appeals against Appeals Committee decisions denying legal aid.⁶⁷ Accordingly, the proposed provisions will prove to be damaging for national authorities as well. It is crucial to recall that the Greek legislature took account of the above points and **rejected the introduction of a merits test in Article 71(3) IPA as part of its reform by L 4686/2020.**⁶⁸

The provision of legal aid is necessary to ensure asylum seekers' effective access to a fair procedure and to legal protection,⁶⁹ while it continues to be marred by severe and systematically documented gaps in Greece even in the absence of a merits test. In this regard, RSA notes that countries such as the Netherlands, Sweden, Austria, Denmark, Spain, Malta and Slovakia do not condition legal aid to asylum seekers upon a merits test.⁷⁰

RSA therefore recommends deletion of Article 15(3)(b) and (5)(b).

Safe third country

The establishment of the "safe third country" concept as a mandatory ground for inadmissibility of asylum applications raises serious legal and political concerns in principle.⁷¹ It: (a) codifies a problematic practice that finds no basis in the Refugee Convention and has been insufficiently interpreted in EU law; (b) expressly runs counter to the EU's commitment to a fairer distribution of global responsibility for refugee protection, pursuant to the New York Declaration of 19 September 2016; (c) undermines the delivery of EU foreign policy objectives laid down in Article 21 of the Treaty on European Union (TEU), for it negatively affects the Union's credibility in third country relations and exposes it to their demands, as illustrated in the last four years of implementation of the EU-Turkey Statement.⁷² RSA stresses that, under the current conditions of suspension of readmissions under the EU-Turkey deal in force since 5 March 2020 for an indefinite period of time, the Greek authorities systematically violate their obligation to examine asylum applications on their merits due to the refusal of the third country to allow the applicant to enter its territory.⁷³

In addition, **Articles 45, 46 and 50** of the proposal unduly expand the scope of application of the "safe third country concept" as a ground for inadmissibility of asylum applications in a manner that infringes the necessary safeguards for the use of presumptions of inadmissibility and reduces minimum standards of protection in third countries.

⁶⁷ Article 20(3) second sub-paragraph Asylum Procedures Directive.

⁶⁸ RSA, *Comments on the reform of the International Protection Act*, April 2020, 8-10, available at: <https://bit.ly/3mwWOL8>.

⁶⁹ Article 20(3) third sub-paragraph Asylum Procedures Directive.

⁷⁰ ECRE/ELENA, *Legal Note on access to legal aid in Europe*, November 2017, 6.

⁷¹ Minos Mouzourakis, 'Ο ορισμός της ασφαλούς τρίτης χώρας στη μεταρρύθμιση του Κοινού Ευρωπαϊκού Συστήματος Ασύλου' (2018) 1 Εφαρμογές Δημοσίου Δικαίου 11-17.

⁷² Yiota Massouridou, 'Η «Δήλωση ΕΕ-Τουρκίας» και οι συνακόλουθες διαδικασίες ασύλου στα νησιά του Αιγαίου. Είναι η Τουρκία ασφαλής τρίτη χώρα για τους Σύρους πρόσφυγες σύμφωνα με το ενωσιακό δίκαιο;' (2020) 2 Διδικ 227-234.

⁷³ Article 38(4) Asylum Procedures Directive; Article 86(5) IPA.

Methodology

Contrary to the precepts of sound law-making, the Commission proposal to transform the Asylum Procedures Directive into a Regulation not only fails to achieve deeper harmonisation of national procedures, but creates **extensive Member State discretion as regards the use of the “safe third country” concept**. It allows the use of the concept to countries included in the EU list of safe third countries, to additional countries designated as safe in national lists, or even to countries beyond EU or national lists,⁷⁴ thereby undermining legal certainty for both asylum seekers and administrative authorities.

The proposal also repeals the obligation in Article 38(2)(b) of the Directive on Member States to enact **methodology rules** on the criteria for designating a country as safe and on the procedure to be followed for the individualised assessment of the applicability of the criteria in the personal circumstances of an applicant. **Recent CJEU jurisprudence has clarified that such methodology rules are a necessary precondition** for the use of the concept as an inadmissibility ground.⁷⁵ Under a correct reading of the Court's reasoning in *LH* and *FMS*, in conjunction with the position elaborated by the Court in *A v Migrationsverket* – discussed above – relating to Member States' duty to enact and observe the full procedural rules for the use of presumptions in the asylum procedure, methodology on the “safe third country” concept should include detailed provisions on the procedural framework and steps to be taken by the determining authority to assess whether the asylum system and practice of a third country complies with EU law criteria in general terms and in the individual situation of the applicant. Methodology rules also cover credible sources of information upon which the authority should rely to assess whether the “safe third country” criteria are applicable in the individual case of the applicant, and which should include reports from reliable human rights organisations on the situation of asylum seekers in the third country, in line with the case law of the European Court of Human Rights (ECtHR).⁷⁶

Safety and connection criteria

Article 45(1)(e) of the proposal, visibly inspired by the Turkish legislative framework on international and temporary protection, downgrades the minimum level of protection granted by the third country to protection “in accordance with the substantive standards of the Geneva Convention, or sufficient protection... as appropriate.” However, no distinction is drawn in the Convention between substantive and non-substantive standards so as to justify a selective interpretation of its contents in the implementation of the Regulation. RSA recalls that secondary legislation must comply with the Refugee Convention, in line with Article 78(1) of the Treaty on the Functioning of the European Union (TFEU).⁷⁷

⁷⁴ Article 45(2) Asylum Procedures Regulation proposal.

⁷⁵ CJEU, Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, para 48; Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, para 158.

⁷⁶ ECtHR, *Ilias and Ahmed v. Hungary* [GC], App No 47287/15, 21 November 2019, paras 99, 235.

⁷⁷ Minos Mouzourakis, ‘Ο ορισμός της ασφαλούς τρίτης χώρας στη μεταρρύθμιση του Κοινού Ευρωπαϊκού Συστήματος Ασύλου’ (2018) 1 Εφαρμογές Δημοσίου Δικαίου 11-17.

As regards the criteria for the assessment of the existence of a connection between an applicant and a third country, based on which it would be reasonable for them to return thereto, the proposal deems transit, in conjunction with proximity to the country of origin, as sufficient evidence of such a connection.⁷⁸ The provision is in direct contravention of recent CJEU case law, according to which transit through a third country cannot *per se* constitute a criterion for the existence of an applicant with said country.⁷⁹

⁷⁸ Article 45(3)(a) Asylum Procedures Regulation proposal.

⁷⁹ CJEU, Case C-564/18 *LH*, 19 March 2020, paras 45-50; Joined C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 158-159.



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