

**UNHCR comments
on the Draft Law on the
“Transposition into Greek Legislation of the provisions of Directive 2013/33/EU of European
Parliament and of the Council of 26th June 2013 laying down standards for the reception of
applicants for international protection (recast, L180/96/29.6.2013), plus other provisions”.**

Introduction

UNHCR offers these comments as the Agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees¹. As set forth in its Statute, UNHCR fulfils its international protection mandate, *inter alia*, by “promoting the conclusion and ratifications of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”². UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)³, to which Greece is a Signatory State, according to which State parties undertake to “cooperate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention”. The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees (“the 1967 Protocol”)⁴. UNHCR’s supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (“TFEU”)⁵, as well as in Article 18 of the Charter of Fundamental Rights of the European Union (“EU Charter”)⁶. Declaration 17 to the Treaty of Amsterdam moreover, provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”⁷.

In November 2016 UNHCR provided its comments to the initial Draft Law on the “Transposition into Greek Legislation of the provisions of Directive 2013/33/EU of European Parliament and of the Council of 26th June 2013 laying down standards for the reception of applicants for international protection (recast, L180/96/29.6.2013)” (hereafter “RCD”) as it was communicated to UNHCR and published for public consultation. A new Draft Law, including the new provisions for the transposition of the RCD (as these were formulated after the public consultation) as well as amendments to other law provisions regulating migration and refugee issues, was communicated to UNHCR in September 2017 to which UNHCR had also provided comments. In March 2018 a third version of the Draft Law was

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428 (V), Annex, UN Doc. A/1775, Par. 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (“Statute”).

² Ibid. (8)(a).

³ UNTS No 2445, Vol.189, p.137. Ratified by Greece by Legislative Decree 3989/19-26.9.1959 “for the ratification of the multilateral Convention relating to the Status of Refugees” (Official Gazette A’ 201).

⁴ UNTS No. 8791, Vol. 606, p. 267. Ratified by Greece by Reform Law 389 of 26.4/4.6.1968 “for the ratification of the Protocol of New York of 31.1.1967 relating to the Status of Refugees” (Official Gazette A’ 125).

⁵ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ C 115/47 of 9.05.2008, <http://www.unhcr.org/refworld/docid/4b17a07e2.html>

⁶ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, at: <http://www.refworld.org/docid/3ae6b3b70.html>

⁷ European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Amsterdam*, 2 October 1997, Declaration on Article 73k of the Treaty establishing the European Community <http://www.refworld.org/docid/3dec906d4.html>

communicated to UNHCR, following related request, while the Draft Law was already finalized by the Leading Ministry (MoMP) and was submitted to the Secretariat of the Government for dissemination to the co-competent Ministries. On April, 19th, the Draft Law was submitted to the Hellenic Parliament.

Regarding this last Draft which was submitted to the Parliament, UNHCR would like to welcome the fact that a number of provisions that were in the latest version of the Draft Law as shared with UNHCR in March 2018, and which were of concern, have been taken out; in particular, the shortening of deadlines in all types of asylum procedures and at all stages (regular, accelerated, borders, at appeal stage etc.) and the abolition of the explicit reference to persons with post-traumatic disorder syndrome, particularly survivors and relatives of victims of shipwrecks, from the categories of vulnerable individuals. UNHCR would like to note, however, that while some of its comments provided in November 2016 and September 2017 were incorporated in the new Draft Law, other parts of the comments were not endorsed and thus remain valid.

The present Commentary refers to the version of the Draft Law as it was submitted to the Parliament and includes the past comments by UNHCR which were not endorsed and are referring to provisions that, in UNHCR's view, are most critical (**PART I**), and comments to new provisions that are introduced with the Draft Law amending legislation related to asylum procedures (mainly L.4375/2016) (**PART II**).

Lastly, UNHCR would like to express its satisfaction about the openness and informal consultation on the legislative work that was established between the Organization and the Greek Authorities (in particular, Asylum Service and Legal Unit of the Minister's Office). As regards the formal sharing of draft legislative texts, UNHCR looks forward to seeing this practice being pursued, ideally, at a stage that allows the Organization to contribute timely to a constructive consultation process.

PART I Comments on most critical provisions transposing the RCD

PART A of the Draft Law: Transposition of the RCD

Article 2 Definitions⁸

As a general comment, UNHCR is of the view that, when referring to definitions that already exist in Greek legislation, the draft law should refer to the relevant legislation (e.g. L.4375/2016). It would be advisable to avoid having the same concept/term defined in various legal texts in the Greek legislation (e.g. applicant for international protection is defined in law 4375/2016, in P.D. 141/2013 and in the current Draft Law), as this creates confusion and could result in differing interpretations. It is therefore suggested, that, instead of defining the term again, the Draft Law make a direct reference to the existing legislation.

UNHCR would like to welcome the endorsement of UNHCR's recommendation to adopt a definition for "applicants with special reception needs" corresponding to the wording of Article 20 of the Draft for the definition of vulnerability in the context of reception. However, the remaining recommendations that were made by UNHCR as regards Article 2 concerning the definitions of "family members", "unaccompanied minor" and "applicants with special reception needs" remain valid and are of great importance.

Article 2 (k) Representative of an unaccompanied minor

UNHCR welcomes the fact that its comment regarding the definition of the "representative of an unaccompanied minor", was endorsed and that this definition is now aligned with the definition in L. 4375/2016. UNHCR would like to note, in addition, that it is important that these provisions are aligned with the provisions of the draft law on guardianship so as to prevent overlapping and conflict of laws.

⁸ Articles refer to the numbering of articles in the Draft Law.

Article 3 Complementary Definitions

With regard to the definitions included in this article, UNHCR recommends that they should be incorporated in Article 2 for reasons of consistency. More specifically, UNHCR welcomes that family links created after the flight from the country of origin and adult children with specific needs are included in the definition of “family members” under this article, but it notes that these categories should be incorporated in the definition of “family members” under Article 2. Furthermore, UNHCR recommends that the definition of “family members” is further extended to also include other close family members, such as dependent parents of an adult as well as siblings. Same sex couples should also be considered favorably in line with the principle of family unity.

UNHCR notes with satisfaction that the competent Authority for Reception is finally specified and is, depending on the case, either the Reception and Identification Service or the Directorate of Protection of Asylum Seekers of the General Secretary for Migration Policy of the Ministry for Migration Policy. Nevertheless, UNHCR would like to note that the designation of two authorities as competent, unless there is clarity on the division of competencies regarding the specific areas of reception, might lead to lack of accountability, and as a consequence, dysfunction, and possible gaps.

UNHCR also welcomes the fact that its comment about the need for an additional definition of the term “separated child” was fully addressed in the Draft Law, but is of the view that this definition should be incorporated under Article 2, where also “unaccompanied minor” is defined.

Article 4 Scope

UNHCR welcomes the provision of art.4 (1), last indent under which *“The provisions of this Law shall apply also to minors, unaccompanied or otherwise, regardless of whether they have lodged an application for international protection, without prejudice to any more favorable regulations”*.

Article 10 Detention of vulnerable persons and of asylum seekers with special reception needs

In accordance with Article 31 of the 1951 Convention, international human rights law⁹ and UNHCR’s Guidelines on detention of asylum seekers (“UNHCR Detention Guidelines”),¹⁰ UNHCR wishes to reiterate its position, that **detention of asylum seekers must remain exceptional** and should only be resorted to where provided for by law and **necessary to achieve a legitimate purpose**. Detention should be **proportionate to the objectives provided for by law** and applied in a non-discriminatory manner, **for a minimum necessary period**. The necessity of detention **should be established in each individual case, following consideration of alternative measures**. In addition, UNHCR stresses that apart from the high cost of detention and the negative effects on the physical and mental health of asylum seekers, detention, especially for long periods of time, negatively affects the smooth and full integration of persons who are later granted international protection. Therefore, it should be ensured, through appropriate screening and assessment of needs, **that persons who are bona fide asylum-seekers are not wrongly detained.**¹¹

UNHCR welcomes the fact that, in the present Draft, the provision allowing for the applicability of the administrative detention to all asylum seekers and not only to those who apply for asylum while they are already in detention for other reasons, which was inserted in previous versions of the Draft Law, has been deleted, following also UNHCR’s comments on this provision.

⁹ Including, in particular, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Convention on the Rights of the Child (CRC) and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

¹⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/50348953b8.html>

¹¹ UNHCR Detention Guidelines, ibid., para. 22

UNHCR welcomes the new provision of the draft law regularizing the exceptional conditions under which detention of vulnerable persons and of applicants with special reception needs would be allowed. However, as regards children, UNHCR reiterates its main position that children should never be detained, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Furthermore, children should never be criminalized or subject to punitive measures because of their or their parents' migration status, as this constitutes a violation of the rights of the child and contravenes the principle of the best interests of the child.¹²

Article 13 Education

UNHCR understands the paragraph 3 of the Article to refer to non-formal education that may be provided in the accommodation facilities, while the main goal remains that children receive formal education in the national public schools. UNHCR encourages the Greek Government to ensure access and integration of asylum seeking and refugee children within the national educational system in the public schools' environment in line with Article 22 of 1951 Convention and the Convention on the Rights of the Child. This approach provides a protective environment for refugee children within the community, supports a focus on quality within existing systems of teacher training, learning assessments, and certification, as well as promotes social cohesion between refugee and national children.

Moreover, UNHCR notes that the wording of para. 3 should be aligned with the wording of art. 14, para. 2, second indent, of the Directive which provides for an obligation to provide preparatory classes which is not reflected in the wording of the provision as the word "may" is used instead.

Furthermore, the wording of para. 4 should also be aligned with the wording of art. 14, para. 3, of the Directive so that when access to the education system is not possible "other education arrangements" are offered.

Article 14 Access to education for adult applicants

UNHCR welcomes the insertion of this provision allowing access of adult applicants for international protection to education under similar conditions to the conditions provided for Greek citizens and considers that it will play an important role to the smoother and faster integration of beneficiaries of international protection.

UNHCR regrets, however, the fact that the provision guaranteeing access for applicants to apprenticeship programs was deleted from the Draft Law.

Article 17 Material Reception Conditions

In combination with UNHCR's comment under Art.3 concerning the need to identify clearly the division of tasks between the two Authorities determined as "competent" for reception, it is unclear, particularly under Art.17, which is the "competent Authority for Reception" in order to take necessary measures on reception. More specifically, the decision making authority needs to be further specified as regards, for example, issues that are general and cross-cutting, such as the availability of reception places and the planning for the reception capacity in the country.

¹² UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 5, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <http://www.refworld.org/docid/5a12942a2b.html>

Article 18 Arrangements for the material reception conditions

In the proposed provision, the paragraph (c) of Article 18 (2) of the RCD is not transposed, although it is a mandatory standard of the RCD. It refers to the possibility of family members, legal counselors, UNHCR and NGOs to access reception facilities in order to assist asylum seekers.

UNHCR proposes to complement the provision so as to align it with the Directive.

Article 20 (1) General Principle for vulnerable persons and assessment of the special reception needs of vulnerable persons

UNHCR had welcomed, in the original Draft, the addition to the list of vulnerable persons with special reception needs, of children (that were not included in Article 14 of L. 4375/2016) and of victims of human trafficking and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence or exploitation.

UNHCR also welcomes the fact that its comment was accepted and that victims of female genital mutilation and persons with mental disorders are explicitly mentioned among vulnerable persons with special reception needs.

Furthermore, UNHCR had equally welcomed the fact that the Greek Authorities, in the transposition of the Directive, explicitly included in the above group, persons with post-traumatic disorder syndrome, particularly survivors and relatives of victims of shipwrecks. Unfortunately, UNHCR regrets to note that the reference to the above category of persons (persons with post-traumatic disorder syndrome, particularly survivors and relatives of victims of shipwrecks), is deleted in the present Draft, despite the fact that this category is explicitly included in the related provisions in L.4375/2016 concerning the categories of vulnerable for the purposes of first reception and asylum procedures. UNHCR proposes to include this category also in the para.1 of art.20 of the Draft Law.

Equally, UNHCR regrets the fact that cases of forced marriage, or domestic violence, honor crimes, of distinctions based on sex including gender identity, are no longer included in the draft provision, despite the fact that these categories of persons were included in the draft shared with UNHCR in September 2017. Furthermore, in addition to its previous comments regarding the addition of LGBTI persons and applicants with hearing or visual impairments, or illiterate or dyslectic applicants, who may experience difficulties in accessing their rights, in the indicative list of vulnerable groups with special reception needs, UNHCR is of the view that the list should also include the so called “non-believers”; apostates; and religious minorities.

Lastly, UNHCR recommends that in this provision it is explicitly stated that *“in the case of persons with a disability level of over 67% certified by the competent authority, they will be provided with a disability benefit for the duration of the examination of their application”*. It is noted that the above provision for asylum seekers with disabilities was also explicitly stated in previous P.D. 220/2007 (art. 12, para. 2), (a provision to be abolished following adoption of the present Draft Law), and it is recommended to be maintained.

Article 21 (1) Best interests of the child

UNHCR would like to note that the provision could be complemented with a provision for the issuance of a regulatory act to determine the procedure to be followed in order to assess the best interests of the child by the psychosocial support Unit of the Reception and Identification Service and social services of other competent authorities. The competent authorities and procedures for the assessment of the best interests of the child could be further determined by a Ministerial decision.

Article 22 (1) Competence of the authority responsible for the protection of unaccompanied children

UNHCR welcomes the distinction made in Article 22 (1), according to which there is a division of competence between the authority responsible for the protection of unaccompanied and separated children and the competent reception authority, as well as the detailed description of the competences of the responsible authority for unaccompanied and separated children.

Article 22 (2) (a) in conjunction with Art 22 (3) (a) Appointment of a representative for the unaccompanied child

UNHCR welcomes the provision which requires the appointment, as soon as possible, of a representative for the unaccompanied child, who acts in the child's best interests. Under Greek legislation and practice up until now, the Public Prosecutor for Minors or, in the absence of the latter, the territorially competent First Instance Public Prosecutor, acts formally as temporary guardian, while the substantial and permanent role of a guardian is not assigned to any appropriate person(s) as required by international standards and EU legislation.

Nevertheless, UNHCR would like to note that it must be ensured that these provisions are aligned with the provisions of the draft law on guardianship so to avoid overlap and conflict of laws.

Article 22 (3) Alternative care options for unaccompanied children

UNHCR welcomes the introduction of alternative care options, including foster care and supervised independent living, which will allow the selection of the modality which is most appropriate, necessary and constructive for the individual child concerned and in his/her best interests. Moreover, UNHCR notes that when children are placed in residential care, this should be organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation.

UNHCR would like to propose that a general provision is included providing that the selection of the appropriate reception modality is also based on the best interests of the children, based on the factors mentioned in 21 (1).

UNHCR would also like to stress that alternative care should be combined with a strategy for transition to adulthood through the identification of solutions for children prior to turning 18 as well as for unaccompanied children who are unable to be reunited with their families and who seek asylum in Greece.

Article 22 (3) (e) Accommodation of children with adult relatives

UNHCR welcomes the provision in Article 22 (3) (e) which ensures that the best interests of the child are taken into consideration when children are accommodated with adult relatives responsible for their care under Greek Law. UNHCR, however, recommends that for children accompanied by other adult relatives that are not, according to the Greek legislation, their legal guardians (they are separated children according to the Convention of the Rights of the Child), a Best Interests Assessment should be conducted so as to assess and take into consideration the appropriateness of an existing care arrangement of a separated child. If found appropriate and in the best interests of the child, steps should be taken to formalize the relationship, for instance through appointment of the relative as representative by the Public Prosecutor or as a permanent guardian through a civil court decision.

Moreover, UNHCR recommends that the same procedure of formalization is followed not only with adult relatives, but also with other persons or families preferably with the same ethnic and cultural background, who are assessed as appropriate caregivers and could undertake the care and representation of the child following an authorization by the competent Public Prosecutor or through a court decision.

This practice of community-based care is already used on an ad hoc basis in a number of reception facilities nationwide and allows unaccompanied children to be protected through social support networks within their own communities and culture which in turn supports their development and identity needs.

Article 22 (3) (g) Supported Independent Living for children over 16 years old

UNHCR welcomes the provision of Article 22 para. 3 (g) which provides for accommodation of children over 16 years old in supervised apartments.

UNHCR welcomes this legislative initiative, as it considers that Supported Independent Living (SIL) for young adolescents significantly contributes to the empowerment of young people to become independent and to their transition positively into adulthood in line with their evolving capacities, development needs, and best interests. It is one step in a gradual approach which sees children transition from residential care (shelter), to semi-independent apartments, through to adulthood, integration and independence. This transition should be implemented in line with the individual's wishes, capacities and life skills.

However, under the current system of temporary guardianship exercised by the Public Prosecutors under PD 220/2007, this provision may not be effectively implemented unless a comprehensive system of special guardianship is in place.

For these reasons, and in order to avoid contradictions in the legal basis for the Supported Independent Living, UNHCR would like to propose that reference be made to the relevant provisions of special guardianship under the current legal framework and, namely Article 1532 of the Greek Civil Code, so that the latter is not only applied in cases of poor exercise of parental care or in cases where the parents are not in a position to exercise the parental care, but to include also cases where there is total absence or loss of parental care, as in the cases of unaccompanied children.

Furthermore, UNHCR would like to note that it must be ensured that these provisions are aligned with the provisions of the draft law on guardianship, so as to avoid overlap and conflict of laws (see comment above in Article 20 para. 1).

Article 23 Victims of Torture

UNHCR would like to note that according to the proposed provision, only Public Hospitals can certify victims of torture. In UNHCR's view this could lead to incapacity of having a certification of a victim of torture as public hospitals in Greece do not avail of doctors having the expertise to identify victims of torture and provide certification. Moreover, the draft provision does not make reference to the competent services of the Reception and Identification Service who are competent to identify Victims of Torture according to art. 14, para. 8, of L. 4375/2016 and who are specifically trained according to art. 11, para. 10, of the same Law.

Based on the above, UNHCR suggests that the wording of this provision be changed to "certified by a competent authority".

Article 24 Appeals

UNHCR regrets the fact that the provision regarding administrative review against the decision on discontinuation or limitation of material reception conditions which was inserted in the previous draft, was removed from the Draft Law, meaning that the only remedy available to the applicant is the lodging of an appeal before an Administrative Court.

In UNHCR's view this could lead to serious delays and could result in the impossibility for certain asylum seekers to seek a remedy against the decision withdrawing or limiting reception conditions due to Court expenses that they cannot afford. The provision of legal aid according to the provisions

of L. 3226/2004 is positive but its application in practice regarding asylum seekers presents serious gaps (lack of interpretation for the application for free legal aid, lack of supporting documents etc.).

In view of the above UNHCR would like to propose the re-introduction of the provision of additional administrative review mechanisms against the decision on discontinuation or limitation of material reception conditions.

Articles of the RCD that have not been transposed in the Draft Law

UNHCR notes that Articles 28 on “Guidance, monitoring and control system” and Article 29 on “Staff and resources” of the RCD have not been transposed in the current Draft Law. As regards Article 28, UNHCR stresses the importance and utmost need to establish in the Greek legal framework monitoring and control systems including standardized approaches to collect and use statistics to monitor and report in the field of 1) pressure/capacity; 2) inflow/outflow of applicants from reception facilities, 3) the costs of reception facilities and 4) quality of service provision. UNHCR strongly recommends that the Draft Law clearly specifies which specific Greek authorities, under the oversight of the competent Authorities for Reception, will be responsible for the monitoring and control of accommodation facilities in the country, as well as the authorities responsible for developing internal regulations for operation, as well as minimum standards and procedures in conjunction with Article 27 (2) of L. 4375/2016. Moreover, individual independent complaints mechanisms should be made available to applicants especially, but not only, in all collective accommodation facilities and private accommodation. Article 28 of the recast RCD strengthens existing monitoring provisions through the insertion of a national monitoring mechanism and a specific obligation to report to the European Commission. UNHCR considers that such a requirement for systematic reporting would enable the European Commission to carry out its responsibility to ensure compliance with EU law more effectively.

Therefore, UNHCR recommends the transposition of Article 28 and further specialization including the appointment of competent authorities to monitor the efficiency of the reception system and develop national tools and procedures.

PART II Comments to provisions related to the asylum procedures

Part C of the Draft Law: Amendment of Asylum Procedures

Article 28 (1) Creation of working groups at the Asylum Service

UNHCR recommends that the new provision regarding the creation of working groups using staff of the Asylum Service or Appeals Authority for specific activities, be complemented with an explicit reference that actions by these working groups would follow the rules of adjudication as provided in L.4375/2016, particularly, in articles 39 and 40. This will guarantee respect for procedural safeguards for all cases examined by these ad hoc working groups.

Article 28 (2) [in combination with Article 28 (23)] Selection process of the Director of the Appeals Authority

UNHCR had advocated for the adoption of the provision of Article 5 of L.4375/2016 that had introduced guarantees for the independence of the Appeals Authority. These provisions ensured, in UNHCR’s opinion, the character of the Appeals Authority as a “court or tribunal” in the meaning of Article 46 of the APD, as elaborated and interpreted under the jurisprudence of the CJEU. It is UNHCR’s view, that even if the Administrative Director of the Appeals Authority is not a decision-making authority, as applications for international protection are examined by the Independent Appeals Committees, the selection process for the incumbent of this position must be accompanied with guarantees of independence.

In view of the above, UNHCR welcomes the draft provisions of art. 28 (2) in combination with para. 28 (4) providing of a selection process for the Director of the Appeals Authority following a selection procedure before a Selection Committee with guarantees of independence.

Article 28 (3) Replacement of the judges-members of the Independent Appeals Committees in case of delays

With the proposed amendment of art. 4 para. 4 of L. 4375/2016 the possibility to replace the Judges – members of the Committees is provided, when there are “important and unjustifiable delays in the processing of cases”.

UNHCR considers that the scheme of the Independent Appeals Committees put into place by L. 4399/2016, involving the participation of judges on duty as members of the Committees, can be sustainable and productive if the judges-members exclusively work with the Committees and do not have parallel tasks in the Courts. This would help guarantee efficiency and securing of procedural safeguards, through the specialization in the asylum procedure and refugee law, including the interview with applicants for international protection.

In view of the above, UNHCR considers that the proposed amendment will probably not bring in the anticipated result of speeding up the procedure, as it does not remedy the current workload of the members of the Committees.

Article 28 (5) Definition of “final decision”

UNHCR understands that the purpose of the proposed amendment is to render possible the removal of the applicant whose claim has been rejected, immediately after the issuance of a decision at second instance to the extent that s/he will not be considered as an asylum seeker. In this regard UNHCR considers that this purpose is achieved already with the legislation in force, since the provision of art. 37, para.1, of L. 4375/2016 explicitly provides that: “applicants are allowed to remain in the country until the conclusion of **the administrative procedure** of examination of the application for international protection [...].” This means that after the issuance of a decision by the Appeals Committees, with which the administrative asylum procedure is concluded, the rejected applicant has no right to remain in the country unless a suspension of execution is ordered after a recourse to judicial proceedings.

In this context, UNHCR takes note of the jurisprudence of the Greek administrative courts and the corresponding positive practice of the administration to refrain from removing a person who has challenged an administrative decision of rejection and has submitted an application for suspension, until the decision on the suspension is issued.¹³ In addition, if the suspension of removal is granted by the Court, the applicant receives his/her asylum seeker’s card back until the final decision in the main application for annulment. Therefore, s/he is treated as an asylum seeker during this period.

Furthermore, and for the same reasons, UNHCR considers that any such act of removal must not be executed before a reasonable period since the notification of the decision rejecting the asylum claim has passed, in order for the applicant not to be deprived in practice of the possibility to submit the application for annulment and ask for suspension of execution, as his removal, in practice, would mean that any such request would be made impossible. According to the ECtHR, if the ordinary appeal procedure does not have automatic suspensive effect it must be possible for the individual to use an urgent procedure to prevent the execution of a deportation order and await the outcome of the ordinary appeal.¹⁴

¹³ Ep. Spiliopoulos, Handbook of administrative Law 14th ed., 2011, Nomiki Vivliothiki para. 548, where also jurisprudence of the Suspension Committee of the Council of State is mentioned.

¹⁴ *Čonka v. Belgium*, Application No. 51564/99, ECtHR, 5 February 2002; UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, available at: <http://www.refworld.org/docid/4bf67fa12.html>

Finally, UNHCR notes that the eventual amendment of L. 4375/2016, according to the proposal, would require the corresponding amendment of a multitude of other provisions of the Law, as the terms “final decision” and “asylum applicant” or “applicant for international protection” are found in many provisions. The non-parallel amendment of these provisions might lead to serious problems of interpretation leading to difficulties in the application of the law.

In summary, UNHCR considers that the amendment is not needed as the suspensive effect of the procedures ending with the end of the administrative procedures, is, in any case, already explicitly provided for in the law. If the amendment remains, corresponding amendments should be brought to other provisions of the law accordingly.

Article 28 (6) Definition of Subsequent Applications

In UNHCR’s view this provision, in combination with the proposed amendment of the definition of “a final decision” of article 28 (5) of the Draft, creates an inconsistency which does not seem to be in line with the Asylum Procedures Directive (APD) (recast).

More specifically, art. 2 (q) of the Directive provides that a ‘subsequent application’ means a further application for international protection made after a **final decision** has been taken on a previous application. The proposed amendment provides that a subsequent application is an application which is submitted “after a decision that cannot be challenged with the remedy provided in art. 64 of the Law”. If the amendment proposed in art.24 (5) is maintained and the definition of “final decision” changes (so as to mean the decision of the Appeals Committees and not the Decision of the Administrative Court of Appeal), the related provision on the subsequent application should read “a subsequent application is an application which is submitted after a final decision” in order to be in accordance with the Directive.

In view of the above UNHCR is of the view that either the amendment proposed in art. 28 (5) is not maintained or art. 28 (6) is aligned with art. 28 (5) so that a subsequent application can be submitted after the issuance of a “final decision”.

Article 28 (7) Support by EASO staff

UNHCR is welcoming the overall support that has been provided to the Greek authorities competent for asylum procedures by the European Asylum Support Office, contributing to the effective response by Greece to the high numbers of asylum seekers arriving in Greece in 2015-2016.

According to the proposed provision, the potential use of EASO staff is expanded to all asylum procedures, including regular asylum procedures. However, the proposed amendment does not provide any further detail or explanation of EASO’s role, obligations, and accountability, except that EASO staff under this provision need to be Greek language speakers. UNHCR recommends that reference is made in the Draft Law to the issuance of a separate regulatory act which will specify the functions and specific responsibilities of EASO staff working within the framework of the Asylum Service/Greek Administration, required qualifications, as well as reporting lines, distribution of supervisory roles, liability and accountability, to ensure that the relevant national legal framework governing the functioning of the public sector is applied.

Article 28 (8) Limitations to the right to ask for a re-opening of the case

With the proposed Article 28 (8) the right of the applicant to ask for the re-opening of his/her case when his/her application has been considered as implicitly withdrawn and discontinued by the competent authorities, is limited. More specifically, the applicant can ask for the re-opening of his/her case only if s/he establishes with specific elements that the decision to discontinue was issued “under circumstances independent from his/her will”. This seems not to be in line with art. 28, para. 2, of the

Asylum Procedures Directive (APD) (recast) which does not subordinate the right of the applicant to ask for the re-opening of his case to any condition. The introduction of a condition to the exercise of this right results in the reversing of the burden of proof, shifting from the administration to the applicant, while according to the Directive the burden of proof lies with the administration.

In view of the above UNHCR proposes that the amendment is deleted from the Draft Law.

Article 28 (9) Timeframes for regular and accelerated procedures

With the proposed amendment, the timeframe for the Determining Authority to issue a decision in the context of accelerated procedures is reduced to 30 days (from 3 months as it stands today). UNHCR welcomes any measure resulting in reasonable time frames for processing applications for asylum, provided that the minimum time required to guarantee the quality of the procedure is respected, as it is in the interests of all parties that quality decisions are issued within a short period and in an efficient and fair manner.

However, UNHCR considers that the timeframe of 30 days for the conclusion of the examination procedure (including preparation for the interview, conduct of interview, possible complementary interviews, research made by the case worker, drafting of the decision and notification of the decision) might prove not adequate and could result in quality gaps while it is also questionable that the administration will be in a position to observe such a tight timeframe. UNHCR notes in this regard that short deadlines may not, *ipso facto*, be unreasonable or unfair. However, these can only work if appropriate modalities are in place, and adequate resources allocated for case processing.

Consequently UNHCR suggests to keep the timeframe as is (3 months) or at least not reduce the timeframe under accelerated procedures below 2 months. It has to be noted that the timeframe of 2 months for the conclusion of accelerated procedures is also suggested by the European Commission in its proposal for a new Asylum Procedures Regulation¹⁵ (art. 40, para. 2, of the Proposal).

Article 28 (13) Exception from the right to remain in case of subsequent applications

With art. 28 (13) the provisions of art. 41 of the APD (Recast) on exceptions to the right to remain are transposed into the Greek legislation. Article 41 of the Directive allows MS to derogate from a series of procedural guarantees in case of subsequent applications, including the exceptions from the right to remain on the territory and derogations from time-limits as well as from the automatic suspensive effect of appeals.

However, the transposition proposed in the draft provision seems to be incomplete as, **a)** no reference is made to the language of art. 41, para. 1, last indent, to ensure that “a return decision will not lead to direct or indirect refoulement”, and **b)** there is no provision guaranteeing the right of the applicant to request a suspensive effect of his appeal, as is imposed by art. 46, para. 6, last indent, of the Directive, in combination with art. 46 para. 6 (b).

Furthermore, even though art. 41, para. 2 (c), of the Directive allows for a derogation from art. 46, para. 8, which imposes that the applicant is allowed to “remain in the territory of the State pending the outcome of the procedure to rule whether or not s/he may remain on this territory”, the applicant should, nonetheless, be allowed to exercise an effective remedy pursuant to Article 46 (1) and to request an *interim* measure to remain on the territory pending the outcome of the decision of a court or tribunal.

UNHCR is of the view that, if this provision is maintained, it could undermine the suspensive effect that can be sought pursuant to Article 46(6) of the Directive. Indeed, the application of the proposed amendment may result in a denial of the suspensive effect of an appeal as it prevents the applicant from remaining on the territory pending the outcome of the procedure to decide on his/her request

¹⁵ COM(2016) 467 final

by a court or tribunal. UNHCR suggests therefore that the applicant should at least have a right to request the suspensive effect (i.e. an interim measure preventing the removal) and be allowed to stay on the territory pending the outcome of the request in order to preserve his right to an effective remedy.

Based on the above UNHCR proposes that, if this amendment is maintained, art. 41, para. 1, of the Directive should be fully transposed, namely include explicit reference to the respect of the *non-refoulement* principle. In addition, UNHCR proposes that a right for the applicant to request that s/he is allowed to remain in the territory of Greece is provided for, and that this provision is complemented by a provision allowing the applicant to stay in the territory of Greece pending the outcome of the above request to remain.

Article 28 (14) and art. 28 (16) Notification not feasible – border procedures

With the proposed amendment of art. 28 (14), in the context of border accelerated procedures of art. 60 para. 4 of L. 4375/2016, the timeframe to appeal a first instance decision is reduced to 15 days (from 60 days currently). Furthermore, with the proposed amendment of art. 28 (16) the same timeframe, regarding the regular procedure, is reduced to 30 days (from 60 days currently).

Article 61, para. 6, of L. 4375/2016 introduced a presumption that, after a certain period of time (currently 60 days) the applicant who has not been notified a negative decision cannot be considered not to have a “real knowledge” [“πλήρης γνώση”] of the negative administrative act. This presumption serves the purpose of economy of administrative processes as the asylum case cannot be pending endlessly.¹⁶

In UNHCR’s view, the proposed reduction from 60 days to 15 days for the border procedure and to 30 days for the regular is far too short to conclude that the applicant has a “real knowledge” of the negative administrative act of rejection of the application for international protection. In this sense, the proposed time limit after which the applicant cannot appeal a negative decision, seriously undermines the right of the applicant to an effective remedy.

Furthermore and irrespective of the time limit, UNHCR proposes that the provision of art. 61, para. 6, be fleshed out so as to provide that it applies only when it is proven that all measures/actions provided in the law for the notification of the applicant according to art. 40 L.4375/2016 have been pursued and have been unsuccessful (i.e. the applicant was invited for the notification and did not show up on a specific date, the applicant cannot be reached etc.)

In view of the above UNHCR proposes that these amendments to art. 60 para. 4 and 61, para. 6, of L. 4375/2016 are deleted from the Draft Law and that the provision of art. 61, para. 6, is fleshed out as proposed above.

Article 28 (16) Notification not feasible – Regular procedures

See above comment on art. 28 (14).

Article 28 (17) Submission of documents before the Appeals Authority

With the proposed provision, applicants for international protection can only submit additional submissions before the Appeals Committees two days before the hearing (instead of the previous day before the hearing, allowed by the legislation in force). Given that, especially in what concerns the border procedure, all applicable timeframes are very tight, the proposed provision, in UNHCR’s view, further restricts the possibility for the applicants to adequately prepare their case and to exercise their

¹⁶ Similar provisions exist in the Greek administrative and civil procedure law, where the corresponding time limits are much broader. For instance the time limit to appeal a first instance administrative Court decision which has not been notified is one (1) year from the issuance of the decision.

right to an effective remedy. Additionally, it is questionable if the proposed amendment is in line with the Asylum Procedures Directive which requires “*that an effective remedy provides for a full and ex nunc examination of both facts and points of law*” (art. 46 para. 3) which means to assess the situation as is at the time of the examination of the claim by the Court or Tribunal and, therefore, thoroughly prepared submissions containing potentially new elements, need to be presented to the Appeals Committees.

Therefore, UNHCR recommends that the language of the provision currently in force in L.4375/2016 is maintained.

Article 28 (18) Outdated appeals

With this draft amendment, an appeal submitted after the time limits provided in the law have elapsed, is only admissible if reasons of *force majeure are provided in writing*. UNHCR would like to note that this provision introduces an exception to similar provisions in force in general administrative law introducing a discrimination for asylum seekers on no obvious ground. More specifically, according to the Code of Administrative Procedure (art. 10, para. 6, L. 2690/1999), applicable to all actions of the Administration, including the Appeals Committees, «*excess of timeframes is only allowed in case of force majeure and also when the concerned person invokes the occurrence of facts known to the Service.*» In this sense the proposed provision introduces a double limitation both in what concerns modalities of proof (no other means but written evidence are accepted) and reasons (facts known to the Administration are not taken under consideration).

Therefore UNHCR, taking also into consideration the vulnerability of asylum seekers that may affect their capacity to adduce the required evidence, proposes the deletion of the above amendment.

Article 28 (19) Time limits to issue decision on second instance – Replacement of a member

With the first paragraph of the proposed amendment, shorter timeframes for the issuance of decisions at second instance are introduced under the accelerated procedures. More specifically, decisions are to be issued within 40 days after the lodging of the appeal under accelerated procedures (instead of 2 months currently). While UNHCR welcomes any measure resulting in greater efficiency in the processing applications for asylum, provided that the minimum time required to guarantee the quality of the procedure and the procedural safeguards are respected in practice, UNHCR suggests that acceleration of the processes requires a comprehensive approach that includes but is not limited to the adoption of shorter deadlines (see above comment on art. 28(3) of the draft) and that also includes considerations regarding the allocation of sufficient resources to the relevant authorities so that they are able to meet these targets.

UNHCR welcomes the introduction of the draft provision of the second paragraph of art. 28(19) allowing for the replacement of a member of a Committee when there is a serious impeachment that lasts for a considerable duration, as its application will solve practical issues that have arisen and have led to an absence of quorum within the Independent Appeals Committees and to considerable delays.

Article 28 (20) Alternative methods of notification

With the proposed provision, “alternative” methods for the notification of decisions of second instance are introduced. More specifically, these decisions can be notified to persons other than the applicant including the lawyer who signed the appeal or who was present at the hearing or who submitted a memo before the Committee, or the Director of the Reception and Identification Center, where the applicant had declared that s/he resides.

UNHCR is concerned about these proposed amendments as their application could prevent the applicant to exercise his/her rights for judicial protection, in particular, to challenge a negative decision before the Courts as provided in article 64 of L. 4375/2016.

More specifically, with the proposed amendment, first, the burden to notify the applicant is shifted to a lawyer that might no longer represent the applicant, and second a notification can be addressed to the Director of the RIC, without any guarantee that the applicant will actually be notified with the decision afterwards or that certain actions in order to notify him/her will take place.

Furthermore, the proposed provision allows for the notification to be carried out by the posting of the decision to a specific web site. This not only raises serious confidentiality concerns; it also implies that all applicants have internet access and the ability to use a device in order to access the web, which may not be the case. As such, its applicability and efficiency as a method of notification is problematic and may prevent applicants from exercising their rights.

That being said, UNHCR acknowledges the practical difficulties in locating applicants for the purpose of notifying decisions, and therefore proposes that any provision of alternative methods of notification be sufficiently complemented so as to provide that it applies only when it is proven that all measures/actions provided in the law for the notification of the applicant according to art. 40 L.4375/2016 have been pursued and have not been successful (i.e. the applicant was invited for the notification and did not show up on a specific date, the applicant cannot be reached etc.).

In view of the above UNHCR proposes the deletion of the above provision for what concerns notification to persons that do not represent the applicant at the time the notification is made and recommends to limit it to persons that have accepted to receive notifications on the part of the applicant, according to Greek law («αντίκλητο»). Furthermore, UNHCR suggests that in case of notification to the Director of the RIC, this notification will not produce its effects before the notification is known (or it can be reasonably expected that is known) to the applicant. Lastly, UNHCR proposes that the provision be complemented by the provision dealing with the exhaustion of notification methods provided in art. 40 of L. 4375/2016.

Article 28 (22) Assignment of competency for the examination of the backlog of the Appeals Authority

UNHCR welcomes the provision regulating the competency for the examination of the pending appeals (backlog) of the Appeal Authority, involving almost 3,000 cases, as already proposed by UNHCR. UNHCR urges the authorities to prioritize the adoption of the measures for the implementation of this provision as the asylum seekers' rights to a fair procedure are seriously hampered by the non-finalization of the adjudication of the cases and Greece continues to be exposed to the EC infringement procedures as these delays may not be in compliance with the Asylum Procedures Directive.

Article 29(3) Specialized Section to the Administrative Courts

UNHCR welcomes the amendment allowing for the creation of specialized Sections to Administrative Courts in order to deal with cases related to international protection, as it considers that, if materialized, it could contribute to the development of specialization of judges to these types of cases, and, therefore, also to the acceleration of examination of cases.

Proposed amendment of art.1, para. 1, of L. 4375/2016 related to the structure of the Asylum Service

With the opportunity of the present Draft law bringing amendments also to L. 4375/2016, UNHCR would like to propose to consider to revise the structure of the Service in order to increase its functionality, processing capacity and effectiveness. In particular, due to the sharp growth of the Asylum Service (it tripled its staff capacity in only one year-2016 and almost 200 new staff is expected in the course of 2018) in order to respond to the increased needs, currently it is constituted by 30 departments employing almost 800 staff reporting directly to the Director of the Asylum Service, seriously lacking a middle-management layer that would facilitate effective management. UNHCR would like to suggest to consider upgrading the level of the Asylum Service "functioning at the level

of a Directorate" (art.1, para.1, of L.4375/2016) at an administrative service level (Special Secretary, General Directorate or else) that would allow, according to public administration rules, for the creation of middle-management positions (Deputy Directors or else).

May 2018
UNHCR Greece