Ad-Hoc Query on a full and ex nunc examination by the court in accordance with article 46 (1) of the recast Asylum Procedures Directive

Requested by NL EMN NCP on 5 January 2015

Compilation for wider dissemination produced on 9 April 2015

Responses from Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovak Republic, Slovenia, Sweden, United Kingdom plus Norway (20 in Total)

1. Background Information

Recently the draft legislation for the implementation of the recast Asylum Procedures Directive (APD) has been submitted to the Dutch Parliament for parliamentary consideration. A new element is the introduction of a full and *ex nunc* examination by the court (in accordance with article 46 (1) APD). Members of Parliament have raised a number of questions on this subject, including ones about the practise in other Member States. Therefore we would like to ask you the following questions.

According to art 46 (1) APD all Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against a decision on their application for international protection. According to art 46 (4) APD this effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to the Qualification Directive (2011/95/EU) at least in appeals procedures before a court or tribunal of first instance.

According to art 46 (10) APD Member States may lay down time limits for the court or tribunal.

1. Will the implementation of a full and *ex nunc* examination according to art 46 (1) APD in your Member State, result in a closer examination by the court or tribunal than in the current situation? Please elaborate.
2. Do you foresee any changes in your legislation in order to comply with the obligation to ensure a full and *ex nunc* examination of both facts and points of law in appeals procedures? If so, please eleborate.
3. Do you have time limits laid down in your current legislation for the court or tribunal or are you planning to lay down such time limits when implementing the APD? If so, what are these time limits?

We would very much appreciate your responses by **Monday 2 February 2015**.

2. Responses[1]

	Austria	**Yes**	

[1] If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

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	Belgium	**Yes**	1. The Council for Aliens Law Litigation (CALL) is an administrative Appeal Court competent for handling appeals against the first instance negative asylum decisions of the Office of the Commissioner General for Refugees and stateless Persons (CGRS). In principle this Appeal Court has full jurisdiction and can confirm, reform or annul the CGRS decision. These appeals against the first instance decision should be introduced within 30 calendar days and have an automatic suspensive effect. Until recently there was only an annulment procedure with the Appeal Court without suspensive effect for decisions "not to take the asylum application in to consideration". These type of negative decisions were taken for subsequent asylum applicants, EU-citizens, asylum applicants from safe countries of origin, and applicants with a refugee status in another member state. However this appeal procedure has been judged not to be an effective remedy in certain situations by the Constitutional Court. As a consequence, a change of law entered into force on 1 June 2014, allowing for full judicial review against inadmissibility decisions on subsequent applications and applications form safe countries of origin. In General, the current appeal procedure is already largely in compliance with the recast of the Asylum Procedures Directive (APD). The impact of the implementation of the new APD will therefore be limited. 2. Currently we are still evaluating to what extent the current appeal procedures meet the requirements of the new APD. In order to comply with the APD, it is also planned to simplify and streamline the appeal procedures. In this regard, reference may be made to the Josef case[2] where the ECHR judged that in certain situations the Belgian appeal procedure to contest removal is too complex and difficult to be considered as an effective remedy. 3. There are time limits for the Appeal Court laid down in the Immigration Act (Article 39/76 § 3 Immigration Act). The time limits depend on the type of the procedure (accelerated, border procedure, etc..) or the decision type. In case of a normal asylum procedure the time limit for the Appeal Court is 3 months. In the framework of the implementation of the APD, it is intended to streamline the time limits for the various procedures.
	Bulgaria	**Yes**	1. According to the Bulgarian legislation, at the present time, asylum seekers receive legal aid, including at the administrative and court phase of the examination of the application for international protection. 2. At the present time, reasonable time limits are envisaged in the national legislation in order for the right to an effective remedy in the appeals procedure to be exercised. 3. In accordance with the national legislation, there is no specialized court which examines the appeals of asylum seekers. In relation to this, the legal proceedings are conducted under the general rules to Bulgarian courts.

[2] Application n° 70055/10, judgment of 27 February 2014

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	Croatia	**Yes**	1. No, article 46 (1) of APD won't have any particular influence on Administrative courts. According to current legislation Administrative courts decide on the basis of an oral hearing, in limits of complaint requests, but they are not bounded by complaint's reasons. Also, courts freely assess evidences and determine facts. It means that courts take in account all facts which were previously determined in procedure for granting international protection (not obliged) and facts that court have determined by itself. 2. No. 3. Law on Administrative Disputes stipulates that court announces judgment on the final schedule hearing or 8 days after that because of complexity of the case. However, Act of Asylum stipulates a special time limits for court decision: - in procedures at border crossing points and transit zones, time limit is 5 days since file is delivered to the court; - in accelerated procedure court must decide within 15 days since file is delivered to the court; - inadmission applications, detention -15 days. Also, in the draft of new Law we are proposing to order time limit of 8 days for court decision on suspensive effect (when administrative authority's decision has no suspensive effect: accelerated procedure, inadmissibility, detention) and shorter time limit (8 days) in procedures at border crossing points and transit zones
	Cyprus	**Yes**	
	Czech Republic	**Yes**	1. See answer no.2 for general introduction. CZ does not expect any closer examination at the court level in the first phase due to the limited transposition of the respective provision. There are changes planned for the second phase (e.g. the courts shall be provided with more factual information like COI etc. in order to be capable to make a closer examination), however, the discussion has not started yet and moreover this question is in the competence of the Ministry of Justice. 2. When the new APD proposal was presented by the Commission we analyzed this issue and we reached a conclusion that our current law complies with the directive (it is governed by the Code on Administrative Courts Procedure); also the Ministry of Justice did not react anyhow on this proposal. Therefore, CZ did not object this provision during negotiations at the Council. However, during the legislation process (late 2014) the obligation to ensure ex nunc examination provoked far greater discussion than we expected. The agreement was reached at the deputy ministers' level that our current law is compatible with the provision, however, further attention has to be paid to this issue and further changes are needed in the future. To conclude, at this first phase, no amendment is made as a reaction to this APD provision as the administrative courts have the power to do ex nunc examination at some level. But the Ministry of Justice has the task to elaborate further on this issue and propose changes that can be implemented in the Code on Administrative Courts Procedure in the future. 3. The current law imposes time limits for courts in asylum matters only for cases where parallel extradition (or similar) process (Ministry of Justice competence) is in place in order to avoid prolongation of the extradition custody. It is proposed to broaden the scope of cases - the amendment of the asylum act that is currently in the legislation process imposes time limits for courts also for

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			those asylum cases where the applicant is detained or is subject to Dublin procedure - again with the aim to minimize the length of detention. Both limits are 60 days for administrative courts as well as for Supreme Administrative Court as the cassational complaint is accessible for the applicants.
	Denmark	**Yes**	
	Estonia	**Yes**	
	Finland	**Yes**	1. The article does not require changes in Finnish law or practice. 2. No. 3. 3. The time limit for appeal is 30 days.
	France	**Yes**	1. Established by the law of July, 25th 1952, the Refugee Appeals Board that became in 2007 the National Court for the Right of Asylum (Cour Nationale du Droit d'Asile, CNDA) is already a specialized administrative court in charge of ruling on full remedy actions made against the OFPRA's rejection decisions (OFPRA: French Office for the Protection of Refugees and Stateless Persons), under the control of Council of State, appellate body. According to the Council of State's jurisprudence, the appeal to the CNDA for asylum seekers or people looking for subsidiary protection has the character of a full remedy action: it means that the CNDA is entrusted "not to appreciate the legality of the decision (OFPRA's) referred to the Court on the single basis of the elements held by the OFPRAS's director when he ruled on the application, but to decide on the right of those concerned to be granted refugee status (or subsidiary protection) from all factual circumstances justified by either one or the other concerned party on the date of his own decision. On this specific point, French law is consistent with the new directive. The Article 46 (1) transposition does not imply any modification. 2. Please see answer above (question 1). 3. The current legislation does not foresee any deadline for the Court to take its decision. The draft law that aims at transposing the directive, on the contrary, foresees such deadlines. It foresees a period of common law (currently fixed to 5 months) and a short period (currently fixed to 5 weeks) when the Court rules on applications for asylum under "accelerated procedure" (procédure accélérée).
	Germany	**Yes**	1. In the appeal procedure against a decision refusing international protection, the court will decide on the basis of the factual and legal situation at the point of time of the hearing. Regarding the question whether the applicant needs international protection, the court will take into account all facts and points of law which are relevant at the point of time of its decision. 2. As the German appeal procedure is in compliance with the provisions of article 46 of the directive, no modifications have been planned. 3. If the application for asylum is rejected as manifestly unfounded, the action has no suspensive effect. The applicant must file an expedited motion (Eilantrag) within one week, on the basis of which the court will decide whether it orders the suspensive effect. The

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			Asylverfahrensgesetz [*German Asylum Procedure Act*] sets out that the court should decide on expedited motions within one week. A failure to observe the time-limit does not lead to any procedural effects. There is another time-limit in the airport procedure. If the application for asylum is rejected as manifestly unfounded, the entry [*into the country*] will be refused. In such a case an expedited motion must also be filed on which the court must decide within two weeks. If the decision is not made within this time-limit, entry must be admitted. Regarding the implementation of the procedures directive we do not plan any modifications to the existing time-limits.
	Greece	**Yes**	
	Hungary	**Yes**	1. The recent introduction of the "full and ex nunc examination" according to APD art. 46 (1) will not result in any closer examination of an individual case by the courts as in compliance with Hungarian administrative law, courts seized of a judiciary review of an asylum procedure (or any other procedure) must conduct a full and ex nunc examination in all cases anyways. In this sense, the general administrative laws apply to asylum procedures, which fulfill the new criteria of the APD. 2. The proposal for amending the Hungarian Asylum Act has been prepared and will be soon deliberated by the Parliament, however as I mentioned above, regarding the "full and ex nunc examination" no amendments are needed. 3. In our current legislation the time limits to be applied are that of the general rules of administrative law.
	Ireland	**No**	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Italy	**Yes**	1. Probably not. Currently, in Italy the judicial authority to which the applicant can appeal already produces a full and ex nunc examination of acts and facts regarding an application for international protection that had a negative outcome. The applicant can provide the judge with new facts and elements that were not or could not be known at the time of the first decision, taken by one of the *Territorial Committee for the Recognition of International Protection*. Both legislation and case-law point to this. In fact, according to Italian legislation: a. the judicial authority «can make, even ex officio, the preliminary inquiry that are necessary for the definition of the dispute» (Article 19 (8), Legislative Decree No 150 of 2011); b. the *National Commission for the Right of Asylum* makes sure that accurate and regularly updated information (on the general situation in the applicants' countries of origin) are made available to the Territorial Committees «and are also provided to the judicial authorities called to hand down a judgment on appeals against a negative decision» (Article 8 (3), Legislative Decree No 25 of 2008). c. the judge has the authority to recognize «the applicant's status of refugee or of person to whom subsidiary protection is granted» (Article 19 (9), Legislative Decree No 150 of 2011). By contrast, according to case-law, the powers of inquiry not only of *Territorial Committees* but also of the judicial authority should be enhanced: «The judge is to cooperate in the ascertainment of the conditions allowing the foreigner to enjoy international protection» (Court of Cassation, Judgment No 27310 of 21 October 2008).

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			In other words, rather than expressing a judgment on the *Territorial Committees*' work, the judicial authority is called to "autonomously" pronounce its decision on the international protection application based on of the inquiry's outcome acquired in the trial, even ex officio. The judge's activity ends with an act that has the same effects as the acts ending the proceedings instituted by the *Territorial Committees*. 2. Probably not (See Answer 1). 3. No. Current legislation provides that in the case of appeal to the judicial authority «the dispute is dealt with on an urgency basis» (Article 19 (10), Legislative Decree No 150 of 2011). The provision does not lay down specific time limits, but requires that the office gives priority to these proceedings over other cases.
	Latvia	**Yes**	1. There is full and *ex nunc* examination already carried out by the court in the appeal procedures in Latvia. 2. No changes are foreseen. 3. Yes, there are time limits in place for the examination by court in current legislation: 5 working days in case of inadmissible application, 5 working days in case of accelerated procedure, 1 month in case of loss or withdrawal of refugee status or subsidiary protection, 3 months in case of unfounded application. The following time limits for the court are foreseen when the new legislation is adopted: 5 working days in case of inadmissible application, 20 working days in case of accelerated procedure, 3 months in case of unfounded application.
	Lithuania	**No**	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Luxembourg	**Yes**	1. No. In Luxembourg in accordance with articles 19 (3) and (4) (normal asylum procedure) and article 20 (4) (fast-track procedure) of the amended law of 5 May 2006 (Asylum Law) the decisions taken by the Minister in charge of immigration refusing to grant international protection (refugee status or subsidiary protection) must be duly motivated. These articles grant the applicant the right to file an appeal for annulment and/or reversal before the First instance Administrative Court (in the normal and fast-track procedures). Only in the normal asylum procedure there is the possibility to file an appeal against the decision of the First instance Administrative Court before the Administrative Court. However, in any case, the First instance Administrative Court as well as the Administrative Court are entitled to conduct a full and ex nunc examination of both facts and points of law, to the extent that article 12 of the amended law of 21 June 1999 on the procedure of the administrative courts establishes that the President of the Court can take all the necessary measures in order to guarantee the interests of the parties. Article 14 also establishes the possibility of the Court after studying the case to order further instruction measures and proof if required. Also the principle of equality of arms between the administration and the plaintiff is guaranteed. 2. No.

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			3. No. In the current situation no time limits for the Court have been laid down in our national legislation. There are no plans to implement time limits in the future.
	Malta	**Yes**	
	Netherlands	**Yes**	1. In Dutch administrative law the IND is credited a certain margin of appreciation when assessing the credibility of an asylum claim. This means that the Court exercises restraint when assessing the decision on the credibility taken by the IND. The assumption underlying this practise, is that the IND is better equiped to make a comparative and therefore more objective assessment than the Court. Indeed, the IND has access to similar asylum cases (including the ones where protection is granted), while the Courts only see a fraction of that case load. Also the IND has better access to COI and tools such as medical examination, language analysis or age assessment. This does not mean that an examination in law does not take place. Yet, the judges do not take their own assessment of the credibility as their measure, but instead examine whether the assessment by the IND in fairness supports the conclusion laid down in the decision. Also, judges will examine whether the decision meets the legal standards on accuracy and transparancy. As a result, the judge will examine a case without taking upon himself the assessment that has to be performed by the IND. With the implementation of article 46 (1) APD it is expected that the courts will exercise less restraint, resulting in closer examination by the judges. 2. In order to comply with article 46 (1) APD changes in the Dutch legislation are foreseen. Also, in anticipation to the closer examination by the judges, the IND has decided to motivate it's decisions (i.e. the credibility assessment) more extensively than before. 3. In the current situation no time limits for the court have been laid down in our national legislation. However, the following time limits for the courts are foreseen when the new legislation is adopted: 4 weeks if the case is inadmissible or manifestly unfounded, 23 weeks if the case is unfounded.
	Poland	**Yes**	1. No. 2. No. The Head of the Office for Foreigners is the first instance organ. The Refugee council is the second instance organ, examining appeals from the first instance decisions. The Council is composed of 12 members appointed by the Prime Minister for the period of five years. Members of the Council shall have an expertise in the refugee matters. At least half of them shall have university degree in law. The Council ensures examination of facts and points of law. 3. Foreigner refused protection in the first instance has 14 days for submitting an appeal to the Refugee Council and the Council shall examine the case in one month. Foreigner can complaint the decision of the Council against the Voivodship Administrative Court. The time limit for submission of the appeal is 30 days. According to the Polish law administrative courts have no time limits for examination of cases. No changes are predicted.

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	Portugal	**Yes**	
	Romania	**Yes**	
	Slovak Republic	**Yes**	1. Currently, when examining the legitimacy of the issued decision the court considers facts of the case at the time when the contested decision was issued (by the responsible authority). According to the new provision which will be based on the transposition of the Procedural directive the court will consider facts of the case during announcement or issuing of the decision (by the court). The proposal of the Procedure Code also envisages this provision. The new legal provision will be important especially when examining the right to subsidiary protection based on the Article 15 c of the Qualification Directive. Not just courts but also legal representatives and respective authority will have to work with the information (regarding the country of origin) which is up-to-date at the time of issuing the decision. 2. Due to the transposition of the Procedural Directive, the Act no 99/1963 Coll. the Civil Procedure Code will be amended. As for the ex nunc examination, Article 250 q (1) will be amended as follows: When examining the legitimacy of the decision on asylum and subsidiary protection, the court will consider facts of the case during announcement or issuing a decision. 3. The time limits for appellate authorities are laid down in the Article 21 (3) and (4) of the Act no 480/2002 Coll. on Asylum as follows: (3): A remedy against a decision under Paragraphs 1 (a remedy against a decision of the Ministry not to grant asylum, to withdraw asylum, not to extend subsidiary protection and to withdraw subsidiary protection) and 2 (a remedy against a decision rejecting an application for granting asylum as inadmissible or as manifestly unfounded) shall be decided by the Regional Court within 90 days from the delivery of the remedy. (4): A remedy against a decision under Paragraph 3 (previous sentence – against the decision of the Regional Court) shall be decided by the appellate court (the Supreme Court) within 60 days from the delivery of the remedy to the appellate court.
	Slovenia	**Yes**	1. Current legislation alias International Protection Act (IPA) meets all requirements in accordance with article 46 (1) Article of the Asylum Procedure Directive (APD) and also element of a full and *ex nunc* examination by the court. 2. Since IPA is already harmonised with the APD we do not foreseen any changes on this particular matter. 3. IPA already contains time limits for a court or tribunal. 75. Article of the IPA defines rules in judicial protection procedure as following; *(1) The Administrative Court shall decide the suit against the decision in the regular procedure in 30 days and the suit against the decision in the accelerated procedure in seven days after the suits have been received. If the Administrative court ascertains that the factual situation has not been established correctly and fully, or if a wrong conclusion was made based on the established facts, the Court has the duty to perform the main hearing; (2) The Administrative shall decide the suit against a decision issued by virtue of this Act in seven days unless otherwise provided by this Act; (3) The Supreme Court shall decide the appeal in 15 days after receiving the appeal; (4) In the judicial protection procedure by virtue of this Act the law governing administrative disputes shall apply unless otherwise provided by this Act.*
	Spain	**Yes**	

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	Sweden	**Yes**	1. In Sweden it´s the Migration Board that is the first instance for asylum decision and also have credibility for the information collected by the Board. Within the Migration Board there is a COI system (collecting information from different sources) that is accessible to the Court as well as to the public to a great amount. Within the Court the Migration Board is a part of the process. Furthermore the Migration Board gives judicial statements regarding certain countries that are in some distress. As today we don´t see or expect a closer examination by the Courts. If some doubts of a situation in a country occur a solution is to refer back the case to the Migration Board, which is also today in practice. 2. In Sweden is an ongoing process to adapt the national law to the new ADP. Changes in law are foreseen. What changes is too early to state. Motivations of decisions is extensively developed in Sweden already but might be developed further. 3. No time limits in law for the time being. Adaption to the directive could give effects in national law.
	United Kingdom	**Yes**	1. The UK has not opted in to the recast Asylum Procedures Directive (APD) 2. N/A 3. The time limits of appealing to the First Tier Tribunal are set out in The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber Rules 2014. The relevant rules are 19 and 20 which in so far as they relate to time limits state: **Notice of appeal** **19.**—(1) An appellant must start proceedings by providing a notice of appeal to the Tribunal. (2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought. (3) If the person is outside the United Kingdom, the notice of appeal must be received — (a) not later than 28 days after their departure from the United Kingdom if the person— (i) was in the United Kingdom when the decision against which they are appealing was made, and (ii) may not appeal while they are in the United Kingdom by reason of a provision of the 2002 Act; or (b) in any other case, not later than 28 days after they receive the notice of the decision. **Late notice of appeal** **20.**—(1) Where a notice of appeal is provided outside the time limit in rule 19, including any extension of time directed under rule 4(3)(a) (power to extend time), the notice of appeal must include an application for such an extension of time and the reason why the notice of appeal was not provided in time.

			(2) If, upon receipt of a notice of appeal, the notice appears to the Tribunal to have been provided outside the time limit but does not include an application for an extension of time, the Tribunal must (unless it extends time of its own initiative) notify the person in writing that it proposes to treat the notice of appeal as being out of time. (3) Where the Tribunal gives notification under paragraph (2), the person may by written notice to the Tribunal contend that— (a) the notice of appeal was given in time; or (b) time for providing the notice of appeal should be extended, and, if so, that person may provide the Tribunal with written evidence in support of that contention. (4) The Tribunal must decide any issue under this rule as to whether a notice of appeal was given in time, or whether to extend the time for appealing, as a preliminary issue, and may do so without a hearing. (5) Where the Tribunal makes a decision under this rule it must provide to the parties written notice of its decision, including its reasons
	Norway	**Yes**	Norway is not bound by the Asylum Procedures Directive. However, Norway has human rights obligations – in particular linked to the ECHR and Article 13 ECHR and the relevant jurisprudence of the ECtHR. The Norwegian Supreme Court concluded in a plenary decision (dissenting votes 14-5) of 21 of December 2012 (HR-2012-02398-P: case no. 2012/688) that the judicial review of the validity of administrative decisions, also in cases involving human rights, including immigration cases, must be assessed on the basis of the facts existing at the time when the decision was made, i.e. on an *ex tunc* examination. After an extensive review of theory, preparatory works of acts and case law the Supreme Court's majority held that the judicial review of administrative decisions that Norway's human rights obligations do not give grounds *for any other solution*, including in immigration cases. The obligation to ensure an effective right of review under Article 13 of the EHRC is safeguarded through the system we have in Norway today. The Supreme Court also held that the Norwegian Immigration Appeals Board's hearing satisfies the requirements as regards an effective right of review by a national authority, as these requirements are set out in the case law of the European Court of Human Rights. The Immigration Appeals Board is to be regarded as a court under the ECHR system, and the decisions of the Board are based on an "*ex nunc* assessment". The Court also stressed that in accordance with internal rules and established practice, the Immigration Appeals Board considers petitions for the reversal of decisions, including when they are based on circumstances that have arisen since the case was last heard i.e. an *ex nunc*

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			assessment. The Immigration Appeals Board has a legal obligation to consider petitions for reversal. In asylum cases, this follows directly from the Immigration Act section 73, cf. section 90 last subsection. The Supreme Court underlined that the Immigration Appeals Board has an obligation to consider a petition for reversal of a decision on the merits of the case if there is a genuine risk of a human rights violation, and that the public administration will consider the new circumstances invoked by applicants. The case concerns the validity of the rejection of an application for asylum and residence in Norway for an Iranian family with children who, at the time of the decision, had lived here for a long time. Read the whole decision here

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