

**NATIONAL REPORT DONE BY THE ODYSSEUS NETWORK FOR THE  
EUROPEAN COMMISSION ON THE IMPLEMENTATION OF THE DIRECTIVE  
ON RECEPTION CONDITIONS FOR ASYLUM SEEKERS IN:**

**AUSTRIA**

by

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## **1. NORMS OF TRANSPOSITION**

- Q.1. Identify the main norm of transposition (indicate the title, date, number, date of entry into force and references of publication into the official journal) and indicate its legal nature (legislative, regulatory, administrative); indicate in your answer if this norm was only devoted to the directive or if it has been included in a more general text and indicate in that case by quoting precisely the numbers of the provisions adopted to transpose the directive.

For the purpose of this study, it must be illustrated in the beginning that Austria is a federal state consisting of the Federation and nine federal states, the Laender. Under the Austrian federal system, apart from the Federation also the Laender are authorised to issue legislative acts, the competences of the respective federal entities being laid down in Art 10-15 of the Austrian Constitution. The Laender have their own Parliaments (*Landtag*), responsible for formal legislation, and Governments as supreme administrative organs. For the purpose of the implementation of the present Directive, it has to be decided in the first step whether the Federation or the Laender are competent to issue legislation in the field of reception conditions for asylum seekers. At present, the federal entities are sharing the opinion that both sides are competent in the field (for a closer explanation see below at Q.3.), therefore no single basic norm of transposition can be identified, because the Federation and the Laender are responsible for different steps of the procedure. The Laender Acts have equal rank on their respective territories.

### 1) Federal Basic Welfare Support Act (Ref No 1/1)

Federal Law Gazette No 405/1991, last modified by FLG I 100/2005

Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird (Grundversorgungsgesetz - Bund 2005 - GVG-B 2005) vom BGBl 405/1991, last modified by BGBl I 100/2005

Date of publication of latest amendment: 16 August 2005

Entry into force: 17 August 2005 (entry into force of Title, Subtitle, Abbreviation and §§ 9 (3a and 3b) and 10 (1)) and 1<sup>st</sup> January 2006

Earlier amendment relevant for transposition of the Directive: BGBl I 32/2004

Date of Publication: 27 April 2004

Entry into force: 1<sup>st</sup> January 2005

English version see <http://www.unhcr.at/index.php/cat/102/aid/2358>

Actualised German version at <http://ris.bka.gv.at/bundesrecht/> (search page), see also at <http://www.unhcr.at/index.php/cat/98/aid/2339>

The law is applicable only to asylum seekers in the admissibility procedure, which is in line with the Agreement concluded between the Federation and the Laender (see below at Q.2), laying down the Federation's responsibility to grant reception conditions in this first stage of the procedure. Once asylum seekers are admitted to the regular procedure, the responsibility for reception of asylum seekers devolves upon the Laender.

Although there is no formal reference to the Directive, the law was basically intended to transpose the Directive. A reference can be found in the Basic Welfare Support Agreement (see Q.2. below at 1). The law also contains several provisions not covered by the Directive (eg Art 12 on advice on and support of voluntary return). Like the Laender Acts as well, it was designed also to transpose Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, by including special provisions on cases of mass influx of displaced persons, eg Art 11 paragraph 3).

2) Care Acts of the Laender:

### 2.1. Burgenland

Burgenland Care Act (Ref No 2/1)

Gesetz vom 18. Mai 2006 über die vorübergehende Grundversorgung von Asylwerberinnen und Asylwerbern und sonstigen hilfs- und schutzbedürftigen Fremden (Asylwerberinnen und Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) im Burgenland (Burgenländisches Landesbetreuungsgesetz - Bgld. LBetreuG) Landesgesetzblatt Nr 42/2006

Date of publication: 11 August 2006

Entry into force: 1<sup>st</sup> September 2006

According to § 12 (3) the law is designed to transpose EC Directives 2003/9/EC, 2001/55/EC, 2004/81/EC and 2004/83/EC.<sup>1</sup>

### 2.2. Carinthia

Carinthia Basic Welfare Support Act (Ref No 3/1)

Gesetz vom 4. April 2006 über Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Kärnten (Kärntner Grundversorgungsgesetz – K-GrvG), Landesgesetzblatt Nr 43/2006

Date of publication: 4 July 2006, entry into force: 5 July 2006

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<sup>1</sup> Rules on Directives 2001/55/EC (special rules in § 8), 2004/81/EC (§ 2 (1) No 6 declares the law applicable for people who are victims of human trafficking) and 2004/83/EC (§ 2 (1) No 2 declares the law applicable for people having been granted humanitarian status, No 3 on people who cannot be expelled for factual reasons and No 5 for people having been granted asylum during the first four months from the decision).

According to § 12 the law is designed to transpose Directives 2003/9/EC and 2001/55/EC (special provision in § 5).

### 2.3. Lower Austria

In Lower Austria a draft proposal for a Basic Welfare Support Act (Ref No 4/1) has been sent out for preliminary examination on 4 May 2006 to a range of institutions – the time limit for answers being 9 June – but has not been submitted to the Landtag yet. The discussion in the Landtag had been scheduled for June, but was finally postponed to autumn 2006. Possible changes to the draft at this stage may concern the inclusion of refugees who have been granted asylum into the scope of application and the reduction of reasons for withdrawal of benefits as provided for by the draft.

Date of publication: presumably not before January 2007

According to § 27 the law is designed to transpose Directives 2003/9/EC and 2001/55/EC, containing several special provisions concerning the group of people covered by the latter Directive.

### 2.4. Salzburg

In Salzburg a draft proposal for a Basic Welfare Support Act (Ref No 5/1) has been sent out for preliminary examination on 3<sup>rd</sup> July 2006, the time limit for answers being four weeks.

Date of publication: presumably not before January 2007

### 2.5. Styria

Styria Care Act (Ref No 6/1)

Gesetz vom 5. Juli 2005, mit dem die Landesbetreuung von hilfs- und schutzbedürftigen Fremden geregelt wird (Steiermärkisches Betreuungsgesetz – StBetrG), Landesgesetzblatt Nr 101/2005

Date of publication: 18 October 2005; entry into force: 19 October 2005

German version see also <http://unhcr.at/pdf/1531.pdf>

According to § 15 the law is designed to transpose Directives 2003/9/EC, 2001/55/EC and 2004/83/EC.<sup>2</sup>

### 2.6. Tyrol

Tyrol Basic Welfare Support Act (Ref No 7/1)

Gesetz vom 15. Dezember 2005, mit dem das Tiroler Grundversorgungsgesetz erlassen wird, Landesgesetzblatt Nr 21/2006

Date of publication: 14 February 2006, entry into force: 1<sup>st</sup> March 2006

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<sup>2</sup> Special rules on Directives 2001/55/EC (§ 9) and 2004/83/EC (§ 3 (1) No 2 and 4 extending the scope of application to persons who cannot be deported for legal or factual reasons, No 5 to persons against whom an expulsion order has been issued until the date of effectuation of the expulsion and No 6 to people having been granted asylum during 12 months from the decision).

According to § 22 the law is designed to transpose Directives 2001/55/EC, 2003/9/EC, 2004/83/EC.<sup>3</sup>

## 2.7. Upper Austria

In Upper Austria, a draft proposal for a Basic Welfare Support Act (Ref No 8/1) has been published on the website of the Landtag, which has been sent out for examination. The Government Bill has been submitted to the Landtag on 6 July, a decision may not be expected before the next session on 5 October.

see <http://www1.land-oberoesterreich.gv.at/ltgbeilagen//blgtexzte/20060951.htm>

Date of publication: presumably not before January 2007

Entry into force: first day of the month following publication

The draft proposal refers to the Basic Welfare Support Agreement (Ref No 1/2) in § 1 (1), but not to the Directive.

## 2.8. Vienna

Vienna Basic Welfare Support Act (Ref No 9/1)

Gesetz über Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Wien (Wiener Grundversorgungsgesetz – WGVG), Landesgesetzblatt Nr 46/2004.

Date of publication: 13 October 2004, entry into force: 1<sup>st</sup> May 2004<sup>4</sup>

German version see also <http://unhcr.at/pdf/1530.pdf>

## 2.9. Vorarlberg

Vorarlberg Social Aid Act (Ref No 10/1)

Gesetz über die Sozialhilfe (Vorarlberger Sozialhilfegesetz)

Landesgesetzblatt Nr 1/1998, published on 8 January 1998, modified by LGBl Nr 43/2001, LGBl Nr 58/2001, LGBl Nr 38/2002, und LGBl Nr 3/2006

Date of publication of last modification: 24 January 2006, entry into force: 25 January 2006<sup>5</sup>

German version see also <http://unhcr.at/pdf/1614.pdf>

Provisions on reception conditions for asylum seekers, have been included into the general Social Aid Act, the relevant paragraphs for the purpose of the Directive being §§ 1, 3 (4), 7a, 9-13, 15 (8) and 35 of the Social Aid Act.

Q.2. List by order of importance by using numbers (1, 2, 3) the others norms of transposition if there are more than one (indicate for each norm the title, date, number and references of publication into the official journal; include in your answer the administrative measures taken to ensure implementation of the

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<sup>3</sup> Special rules on Directives 2001/55/EC (§ 8) and 2004/83/EC (§ 4 lit a extending the scope of application to refugees who have been granted asylum, persons having been granted subsidiary protection and displaced persons, lit b to persons who cannot be deported for legal or factual reasons).

<sup>4</sup> Retroactive entry into force.

<sup>5</sup> § 7 Kundmachungsgesetz.

directive and of the transposition norms like regulations, administrative circulars, special instructions,...)

- Put as an annex to your report a paper copy of each norm in the original language with a reference number to help the reader to find it easily;
- Send us as an electronic version of each norm or a weblink to the text (this will be used for the website we are building);
- Provide the texts of any translation of the above norms into English if they are available.

**NOTE:** all laws are available after publication at [www.ris.bka.gv.at/auswahl](http://www.ris.bka.gv.at/auswahl) (search page in German). Since 2004 the official publication of all Federal Laws is done via Internet.

A selection of legal texts translated into English is usually published on the UNHCR website (<http://www.unhcr.at/index.php/cat/53>), most of the federal asylum acts have been translated by now (as far as the Aliens Police Act is concerned, only those parts relating to detention have been translated). The Welfare Support Acts of the Laender have not been translated by UNHCR.

### 1) Basic Welfare Support Agreement (Ref No 1/2)

Agreement between the Federation and the Laender concerning joint measures for the temporary granting of basic welfare support to aliens in need of assistance and protection [...]

Date of publication in the Federal Law Gazette: 15 July 2004

Entry into force: 1<sup>st</sup> May 2004

Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Österreich (Grundversorgungsvereinbarung - Art. 15a B-VG), BGBl. I Nr. 80/2004

English version at <http://unhcr.at/pdf/1503.pdf>

German version see also UNHCR at <http://unhcr.at/pdf/1480.pdf>

The main purpose of the Agreement was to clarify the distribution of competence within the federal system in order to facilitate the transposition of the present Directive. According to Art 1 paragraph 2 the Agreement is devoted also to Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. It contains a special provision concerning this group in Art 8.

According to Art 1 paragraph 1 the Agreement applies to “aliens in need of assistance and protection in Austria (asylum seekers, persons having entitlement to asylum, displaced persons and other persons who may not be deported for legal or practical reasons)”

### 3) Care Facility Entry Regulation (Ref No 1/3)

Verordnung der Bundesministerin für Inneres, mit der das unbefugte Betreten und der unbefugte Aufenthalt in den Betreuungseinrichtungen des Bundes verboten wird 2005 (Betreuungseinrichtungen-BetretungsV 2005 – BEBV 2005),

Bundesgesetzblatt für die Republik Österreich, BGBl. II Nr. 2/2005.  
Date of publication: 3<sup>rd</sup> January 2005 , entry into force: 4 January 2005

English version see <http://unhcr.at/pdf/1502.pdf>  
German Version see also <http://unhcr.at/pdf/1479.pdf>

4) Rules of the House (Ref No 1/4)

Verordnung des Bundesasylamtes zur Erlassung einer Hausordnung für die Betreuungseinrichtungen des Bundes.

Legislative regulation issued by the Federal Asylum Office on the rules of the house for care facilities run by the Federation, not published in the Federal Law Gazette (not necessary according to § 4 (1) No 2 of the Law on the Federal Law Gazette (BGBIG)).

Note: this regulation might have been replaced by new rules together with the new legislation in force from 1<sup>st</sup> January 2006.

5) Asylum Act 2005 (Ref No 1/5)

Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005 – AsylG 2005)  
Bundesgesetzblatt für die Republik Österreich, BGBl. I Nr. 100/2005  
Date of publication: 16 August 2005, entry into force: 1st January 2006

English version see <http://unhcr.at/pdf/1723.pdf>  
German Version see also <http://unhcr.at/pdf/1478.pdf>

6) Aliens Police Act 2005 (Ref No 1/6)

Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel (Fremdenpolizeigesetz 2005 – FPG)  
Date of publication: 16 August 2005, entry into force: 1<sup>st</sup> January 2006  
Bundesgesetzblatt für die Republik Österreich, BGBl. I Nr. 100/2005, last modified by BGBl. I Nr. 157/2005

English version see <http://unhcr.at/pdf/1706.pdf> (covering parts on detention)  
German Version see also <http://unhcr.at/pdf/1508.pdf>

7) Detention Regulation (Ref No 1/7)

Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes (Anhalteordnung - AnhO), BGBl. II Nr. 128/1999, last modified by BGBl. II Nr. 439/2005

English version see <http://unhcr.at/pdf/1712.pdf>  
German Version see also <http://unhcr.at/pdf/1711.pdf>

8) Aliens Employment Act (Ref No 1/8)

Bundesgesetz vom 20. März 1975, mit dem die Beschäftigung von Ausländern geregelt wird (Ausländerbeschäftigungsgesetz - AuslBG) BGBl. Nr. 218/1975 last modified by BGBl. I Nr. 157/2005

- 9) Information sheet on rights and duties of asylum seekers ([Ref No 1/9](#))
- 10) Information sheet on the asylum procedure ([Ref No 1/10](#))
- 11) More Laender legislation:
  - a) Social Aid Legislation

The competence to issue legislation in the field of social aid lies with the Laender. Apart from Vorarlberg, which has included welfare support for asylum seekers in its Social Aid Act, other Laender rather exclude asylum seekers from social aid than include them. See further in the relevant questions on social aid.

Burgenland: Gesetz vom 4. November 1999 über die Regelung der Sozialhilfe (Burgenländisches Sozialhilfegesetz 2000 - Bgld. SHG 2000), LGBl. Nr. 5/2000, last modified by LGBl. Nr. 29/2004 ([Ref No 2/2](#))

Carinthia: Kärntner Sozialhilfegesetz 1996 - K-SHG 1996, LGBl Nr 30/1996 (republished), last modified by LGBl Nr 68/2005 ([Ref No 3/3](#))

Lower Austria: NÖ Sozialhilfegesetz 2000 (NÖ SHG), LGBl 9200, latest version LGBl 9200-3, 3rd amendment 48/04 ([Ref No 4/2](#))

Salzburg: Gesetz vom 13. Dezember 1974 über die Sozialhilfe im Lande Salzburg (Salzburger Sozialhilfegesetz), LGBl Nr 19/1975, last modified by LGBl Nr 20/2006 ([Ref No 5/3](#))

Styria: Gesetz über die Sozialhilfe (Steiermärkisches Sozialhilfegesetz - SHG), LGBl. Nr. 29/1998, last modified by LGBl. Nr. 103/2005 ([Ref No 6/3](#))

Tyrol: Gesetz vom 15. Dezember 2005, mit dem die Grundsicherung in Tirol geregelt wird (Tiroler Grundsicherungsgesetz – TGSG), LGBl Nr 20/2006 ([Ref No 7/1](#))

Upper Austria: Landesgesetz über die soziale Hilfe in Oberösterreich (Oö. Sozialhilfegesetz 1998 - Oö. SHG 1998), LGBl.Nr. 82/1998, last modified by LGBl.Nr. 9/2006 ([Ref No 8/2](#))

Vienna: Gesetz über die Regelung der Sozialhilfe (Wiener Sozialhilfegesetz - WSHG), LGBl. Nr. 11/1973, last modified by LGBl. Nr. 15/2005 ([Ref No 9/3](#))

Vorarlberg: Gesetz über die Sozialhilfe (Sozialhilfegesetz), LGBl. Nr. 1/1998, last modified by LGBl. Nr. 3/2006 ([Ref No 10/2](#))

#### b) Hospital legislation.

The organisation and financial fundament of hospitals also lies within the competence of the Laender on the basis of legislation on basic principles provided by federal legislation (special form of distribution of competences under Art 12 of the Austrian Constitution). For the purpose of this study, these Acts are of minor importance, because they only include one provision pertaining to asylum seekers, excluding repayment of costs of hospitalisation.

Burgenland: Gesetz vom 27. April 2000 über die Krankenanstalten im Burgenland (Burgenländisches Krankenanstaltengesetz 2000 - Bgld. KAG 2000), LGBl. Nr. 52/2000, last modified by LGBl. Nr. 82/2005

Carinthia: Kärntner Krankenanstaltenordnung 1999 - K-KAO, LGBl Nr 26/1999 (republished), last modified by LGBl Nr 85/2005

Lower Austria: NÖ Krankenanstaltengesetz (NÖ KAG), LGBl 9440, latest version LGBl 9440-25, 23rd amendment 133/05

Salzburg: Salzburger Krankenanstaltengesetz 2000 – SKAG, LGBl Nr 24/2000 (republished), last modified by LGBl Nr 32/2006

Styria: Steiermärkisches Krankenanstaltengesetz 1999 – KALG, LGBl. Nr. 66/1999 (republished), last modified by GBl. Nr. 114/2002

Tyrol: Gesetz vom 10. Dezember 1957 über Krankenanstalten (Tiroler Krankenanstaltengesetz - Tir KAG), LGBl. Nr. 5/1958, last modified by LGBl. Nr. 3/2006

Upper Austria: Oö. Krankenanstaltengesetz 1997 - Oö. KAG 1997, LGBl.Nr. 132/1997 (republished), last modified by LGBl.Nr. 99/2005

Vienna: Wiener Krankenanstaltengesetz 1987 - Wr. KAG, LGBl. Nr. 23/1987, last modified by LGBl. Nr. 44/2005

Vorarlberg: Gesetz über Krankenanstalten (Spitalgesetz), LGBl. Nr. 54/2005, last modified by LGBl. Nr. 7/2006

- Q.3. Explain which level of government is competent to adopt the legal norms on reception conditions for asylum seekers (specify in particular in case of a federal or regional State, if it is the federal/central power or the components; in case, specify below when it is impossible for you to answer a question because it is about the competence of the components and it is impossible for you to gather reliable information about all of them)

Under the Austrian Constitution, it does not seem entirely clear whether the duty to grant adequate reception conditions to asylum seekers falls within the scope of asylum, which is within the competence of the Federation (Art 10 paragraph 1 No 3 and 7 of the Austrian Constitution), or social aid, falling within the competence of the nine Laender). For a long time, the reception of asylum seekers was effected basically by the Federation on the basis of the “Federal Care Provision Act” (now Federal Basic Welfare Support Act). However, this system did not cover all asylum seekers but left a large number of them in homelessness. Some Laender therefore also took some responsibility and created care systems on the basis of their competence in social aid. Since it was at the time seen as a matter of social law, the Federation took up this responsibility without constitutional obligation under the system of competences, acting not as an authority, but as a private actor (*Privatwirtschaftsverwaltung*). In 2003 the Supreme Court (*Oberster Gerichtshof*), as the last instance court in private law matters, issued a significant decision on the federal care system, ruling that even if the Federation was not acting under administrative law, it was still bound by fundamental rights laid down by the Constitution, above all the equality principle. Therefore, no asylum seeker could be denied benefits of federal care, if he or she fulfilled the requirements laid down by law. In view of rising numbers of asylum seekers and the date of transposition of the Directive pending, the Federation demanded more action from the Laender and after three years of negotiations on a new repartition of duties, the Federation and the nine Laender concluded an agreement, which is provided for in Art 15a of the Austrian Constitution as a constitutional instrument. This Basic Welfare Support Agreement (“*Grundversorgungsvereinbarung*”, [Ref No 1/2](#)) stipulates that the Federation is responsible for granting reception conditions in the first phase of the procedure, the admissibility procedure (Art 3 of the Agreement; see below Q.11.), while the Laender are responsible after an application for asylum has been declared admissible (Art 4). The theoretical background of this repartition of duties is that while an asylum seeker has not yet been admitted to the asylum procedure, he or she is subject to aliens law as a part of legislation guaranteeing public order and security. Therefore, at this stage of



the procedure, the asylum seeker's neediness is not a criterion for his or her admission to federal care, but all asylum seekers are taken into federal care. This solution also serves their availability for the carrying out of the admissibility procedure. After having been admitted to the procedure and thus residing legally on the territory, his or her welfare falls within the scope of social aid.<sup>6</sup> The costs of all measures provided for by the Agreement are partitioned between the Federation and the Laender (Art 10; see also Q.10.). The Agreement aims at granting equal benefits all over the country (Art 1 paragraph 1) and lays down which benefits must be granted by the parties, but it does not convey rights to individuals itself.

As a result, this means that the Federation as well as the Laender must adopt legislation in order to grant reception conditions to the degree of their responsibilities under the Agreement. Although it seems clear that for the purpose of transposition of rules of European Law, the Federation remains solely responsible, it seemed necessary to reveal the Austrian system of competences. Moreover, it has to be added that only the Ministry of the Interior replied to the practical questionnaire distributed for the sake of this study. Apparently, the federal entities decided that since the Federation is accountable to the European Commission for the transposition of the Directive, additional information from the part of the Laender was not deemed necessary. Therefore, the information used in the following derives from an analysis of the Laender legislation as far as available, as well as telephone interviews with Government officials and NGOs.

Apart from the special system in reception conditions for asylum seekers, it can be resumed that social aid legislation in general falls within the competence of the Laender (but is in most Laender subsidiary to the Welfare Support Acts). Moreover, the Laender are competent in the fields of youth welfare and hospitals.

Aliens Legislation falls within the competence of the Federation, to a certain extent conditions covered by this questionnaire are provided by the Asylum Act 2005 (eg documents or information rendered to asylum seekers during the asylum procedure) or the Aliens Police Act 2005; legislation on employment is equally the Federation's competence, as well as – for the present study – legislation on the school system (with special competences of the Laender in a series of organisational questions) .

The Federation is competent for the general legislation on youth welfare, while the Laender are responsible for implementing legislation.

Q.4. Explain the legal technical choices done to transpose the directive (comment on the nature and level of the norms used to do the transposition: legislative, regulatory, administrative like instructions, etc). Add any other element about the technique of transposition of the directive which is interesting for the implementation of Community law.

The only permissible way to grant benefits to persons under the Rule of Law as understood by the Austrian Constitution is by formal legislation, because only this choice provides the possibility that the norm be reviewed by the Constitutional Court as to its constitutionality. Regulations may only be issued on the basis of a law. As explained in Q.3., the Basic Welfare Support Agreement is an agreement between the federal entities which does not convey rights to individuals. The Agreement has been transposed or will be transposed by the Federation and the Laender by law.

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<sup>6</sup> Marth. Bundesbetreuungsgesetz "neu": Grundversorgungsvereinbarung und Betreuung von Asylwerbern, SIAK-Journal 2005, p 13.

Additionally some laws and proposals contain an authorisation of administrative bodies to rule specific questions by legislative regulation. Subordinate regulations may always be issued according to Austrian constitutional law. In cases where the reception of asylum seekers (meaning the supply of all or nearly all benefits granted to asylum seekers, as accommodation, food, counselling, payment of benefits provided in money) has been accorded to NGOs (eg Vorarlberg, Salzburg, Vienna...), the Land remains the responsible political organ. However, the quality of reception conditions to be met and the rules of the house have not been fixed by law but have been included in the contracts with the NGOs.

This system chosen has a significant effect on the possibilities to enforce asylum seekers' rights. At current, the Laender which have not yet enacted legislation, are granting benefits de facto by applying the Basic Welfare Support Agreement. They have issued (non-official) regulations telling the administration how to apply it in practice (eg Lower Austria *Normerlass*). Some Laender have not foreseen a legal entitlement to benefits under their legislation. Since the distribution of competences under the constitution is unclear, in such Laender it is difficult for asylum seekers (and their legal advisor) to determine which action to take in order to claim benefits in case of refusal, before which authorities and against which federal entity (Federation or Laender)<sup>7</sup>. Several institutions are preparing claims/applications before the Constitutional Court to test the system. The Independent Administrative Tribunal for Upper Austria (second instance authority according to legislation) has submitted an application to the Constitutional Court<sup>8</sup> in which it challenged its competence to decide on welfare of asylum seekers, arguing that the competent authority must be the Independent Federal Asylum Tribunal under Art 129c paragraph 1 No 1 of the Constitution because reception conditions constitute an "asylum affair"<sup>9</sup> (see below Q.22.).<sup>10</sup>

It is important to note that the European Convention on Human Rights has the status of Constitutional Law in Austria, so that laws, regulations or administrative decisions can be challenged before the Constitutional Court in view of their conformity with the Convention, especially with the guarantees provided by Art 3 and 8.

Q.5.            Mention if there is a general tendency to just copy the provisions of the directive into national legislation without redrafting or adaptation them to national circumstances? If yes, give some of the worst examples and explain if there is a risk that those provisions remain unapplied or will create difficulties of implementation in the future.

In view of the relatively complicated system of distribution of competences in Austria with regard to reception of asylum seekers, the Directive has been transposed in an individual way in the Basic Welfare Support Agreement. The Laender have either chosen individual ways of transposing the Agreement (eg Vorarlberg Social Aid Act) or copied to a large extent the provisions of the Agreement or of the Federal Act. Most of them did not visibly take into

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<sup>7</sup> A lawyer from Linz/Upper Austria, has filed an action for the granting of reception conditions against Upper Austria before an ordinary court.

<sup>8</sup> Reference numbers VwSen-700000/7/ST/Ri and VwSen 700001/7/SR/Ri. The application is apparently not published.

<sup>9</sup> See already the decision of the Constitutional Court of 8 March 2006, G41/05 ua, in which the Court has turned down similar applications for formal reasons (below Q.9.).

<sup>10</sup> Apparently Vienna is also weighing possibilities to file a complaint under Art 138a of the Constitution, arguing that other Laender had broken the Basic Welfare Support Agreement by not taking into care the number of asylum seekers assigned to them.

account the specific guarantees foreseen by the Directive. Therefore, not all of the Laender Acts are very detailed. Only the draft proposal for Lower Austria is more elaborated, and contains a series of provisions, which have been taken over from the Directive, because they were not included in the Agreement (eg the list of vulnerable persons whose interests have to be taken into account, § 6 (4)). This is, however, rather a positive example, because Lower Austria took into account the Directive when transposing the Basic Welfare Support Agreement, which other Laender did not. Also Salzburg can be mentioned as a positive example here.

Q.6. Have all the texts necessary to ensure the effective implementation of the new rules of transposition been adopted, prepared or at least foreseen in the future (for example a regulation completing a new law and the necessary instructions telling the administration how to apply the new rules)?

As far as existing or previewed legislation is concerned, references can be found at Q. 1 and 2. The Federation has issued the above mentioned regulations concerning prohibition of unauthorised entry (Ref No 1/3) and rules of the house (Ref No 1/4). Administrative instructions are hardly ever published in the legal information system database, and could not be gathered from the Ministry of the Interior, so all information given on such instructions are taken from information given by NGOs and other internet sources. Several provisions of the Directive were not transposed in federal legislation explicitly, others were introduced into the Federal Basic Welfare Support Act in the form of a general guarantee, lacking however concrete instructions concerning procedures to be applied or measures to be taken by the authorities in order to grant the effective implementation of these rules.

As far as the Laender are concerned, the above mentioned legislation has either been adopted or is currently in the legislative process. No information on further implementing texts, apart from the legislation given, could be gathered. According to § 7 (1) of the Styria Care Act the Government is authorized to issue a legislative regulation prohibiting unauthorised access to care facilities run by the Land “if this is necessary in the interests of order in the care facility, of the prevention of attacks against life, health, the freedom of humans or property of beneficiaries, or the protection of equipment of the centre”. In case this regulation has been published already, it can however not be found in the legal information system.

In view of the postponal of the Landtag discussion in Lower Austria and the state of the procedure in Salzburg and Upper Austria, their respective Acts might be adopted in October 2006 at the earliest and enter into force at the beginning of 2007.

It seems that in some Laender necessary administrative regulations have been adopted, particularly with a view to granting benefits as stipulated under the Agreement from now on.<sup>11</sup> Practical rules are also contained in specific contracts concluded between the Federation or the Laender with NGOs. But these provisions differ from Land to Land and are not public.

As far as the new (or forthcoming) legislation of the Laender is concerned, it must be said that the Basic Welfare Support Acts are rather imprecise and leave a large margin of appreciation to the officials in charge, without providing the necessary rules how to make use of their discretionary power. The legitimacy of such legal provisions under the rule of law as

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<sup>11</sup> eg in Lower Austria, where according to the person in charge of drafting the Basic Welfare Support Act an administrative instruction exists.

understood by the Austrian Constitution may be doubtful. The Acts contain very general guarantees of benefits granted to asylum seekers, including only a list taken over from the Basic Welfare Support Agreement. Since the Agreement was only devoted to the repartition of duties between the Federation and the Laender and not to the granting of rights to individuals, the Laender Acts are generally short of the much more detailed guarantees foreseen by the Directive, because they put more emphasis on copying the Basic Welfare Support Agreement and did not always take into account the provisions of the Directive. While these Acts are intended to transpose the Directive, the effectiveness of its implementation may be doubted. This accounts mainly for those Laender which issued legislative acts soon after the Agreement entered into force. Laender which only recently issued legislation show a more differentiated picture.

## 2. BIBLIOGRAPHY

Q.7. Has an in-depth preparatory study been made public about the changes at the occasion of the transposition? If yes, thanks for trying to provide us a copy (*please contact to answer this question adequately the body and person who was responsible for the preparation of the transposition of the directive in the public administration*).

For the Federation see the document [Ref No 1/11](#) (Government Bill on the Basic Welfare Support Agreement). The legal project for the Federal Welfare Support Act was based on a report of the Parliamentary Committee responsible for Internal Affairs, and has been changed during the legislation process, which can be followed at:

[http://www.parlament.gv.at/portal/page?\\_pageid=908,658639&\\_dad=portal&\\_schema=PORTAL](http://www.parlament.gv.at/portal/page?_pageid=908,658639&_dad=portal&_schema=PORTAL)

The reasons for the amendments proposed at the occasion of the implementation of the Agreement can be found in the protocols of the legislation process in Parliament, at:

[http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ\\_00055/SEITE\\_0112.html?P\\_PM=SEITE\\_0112](http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ_00055/SEITE_0112.html?P_PM=SEITE_0112)

For the Laender see:

Burgenland – reasoned Government Bill see [Ref No 2/1](#)

Carinthia – reasoned Government Bill see [Ref No 3/2](#)

Lower Austria – reasoned draft proposal (explanatory notes see [Ref No 4/1](#))

Salzburg – reasoned draft proposal (Ref No 5/1)

Styria – reasoned Government Bill see [Ref No 6/2](#)

Tyrol – reasoned Government Bill see [Ref No 7/2](#)

Upper Austria – reasoned draft proposal see [Ref No 8/1](#)

Vienna – reasoned draft proposal see [Ref No 9/2](#)

Vorarlberg – reasoned Government Bill see [Ref No 10/2](#)

There were no other extensive preparatory studies done about necessary changes at the occasion of the transposition neither on the level of the Federation or in the Laender. The results of the usual preparatory work done in the course of the legislative process are incorporated in the explanatory notes which are attached to draft proposals and Government Bills and are published with those. The explanatory notes issued relating to the Basic Welfare Support Agreement have definitely known a thorough preparation and have been copied to a large extent by the Laender in the explanatory notes of their drafts and bills.

Q.8. Quote any recent scientific book or article published about the directive, the transposition rules or the question of reception conditions for asylum seekers in general (answer even if this literature is only available in your language and provide the complete title in your language (without translation) with all references; indicate author, title, in case name of periodical, year and place of publication).

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Gerda Marx, Umsetzung der Aufnahmerichtlinie in Österreich, migraLex, Vienna 2005, p 82

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Nicolas Raschauer/Wolfgang Wessely, Anhaltung von Fremden im Transitbereich, migraLex, Vienna 2005, p 88

Peter Steiner, Dolmetschkosten im Krankenhaus, RdM (Recht der Medizin), Vienna 2005/ No 67

Johannes Fessl, Verstößt das Bundesbetreuungsgesetz gegen die Kompetenzverteilung des B-VG?, ZUV (Zeitschrift der Unabhängigen Verwaltungssenate), Vienna 2004, p 123

Michaela Möstl, Krankenversicherung für hilfs- und schutzbedürftige Fremde in Österreich, ASoK (Arbeits- und SozialrechtsKArtei), Vienna 2004, p 234

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Q.9. Quote any interesting decision of jurisprudence based on the implementation of the new rules of transposition of the directive (indicate references of publication if any)?

#### Constitutional Court

VfGH 08.03.2006, G41/05 ua (no number in the Collection of Decisions yet)

Full text available at [www.ris.bka.gv.at/vfgh](http://www.ris.bka.gv.at/vfgh) (search page)

The Constitutional Court turned down several applications of Independent Administrative Tribunals in the Laender (UVS) for a constitutionality test of § 9 (2) and (3) of the Federal Care Provision Act (old name of the Federal Basic Welfare Support Act Ref No 1/1) and for abrogation of the said provisions. The provisions have been newly published in 2004 – before the end of the procedure. Therefore the Constitutional Court ruled that the authorities did no longer have to apply the provisions in question, whereas the new provisions had not been challenged, so that there was no competence for the Constitutional Court to abrogate the provisions in question in the law currently in force.

#### Constitutional Court

VfGH 26 September 2005, A 10/05 (no number in the Collection of Decisions yet)

Full text available at [www.ris.bka.gv.at/vfgh](http://www.ris.bka.gv.at/vfgh) (search page)

The Constitutional Court turned down an appeal of an asylum seeker who sought damages for state liability for failing to transpose the Directive. Since the claimant relied on facts upon which a decision could have been given by an administrative or a judicial organ, the Constitutional Court declared itself incompetent to decide on the matter. Irrespective of the

fact that the Federal Welfare Support Agreement does not grant a legal claim to asylum seekers, the claimant would have had to address the ordinary courts and sue either the Federation (for Labour Legislation) or the Land Tyrol (for Social Aid Law).

VfGH 09 March 2005, B 1290/04 (no number in the Collection of Decisions yet)

The Constitutional Court ruled that the legal advisor, who is responsible to represent unaccompanied minor asylum seekers, remains responsible after an application has been turned down for inadmissibility until the minor is assigned to a care facility in the Laender and that he or she may file an appeal for the client. Only when the asylum seeker has been assigned to a care facility, the youth welfare office of the Land concerned will take over responsibility.

see also UBAS 02.06.2005, 258.291/0-X/24/05 (available at [www.asylanwalt.at](http://www.asylanwalt.at))

containing a lengthy discussion as to why the initial reception centre cannot be considered a care facility an applicant has been assigned to)

### Supreme Court

OGH 19 October 2005, OGH 7 Ob 209/05v

The High Court ruled that in the present case an unaccompanied minor asylum seeker must be placed under the guardianship of the youth welfare office, even when his or her accommodation, food, clothing, schooling and medical care are covered by reception conditions according the Welfare Support Agreement. The decision on guardianship has to be taken with respect to the welfare of the child, irrespective of the fact that the minor is over 14 years old and may therefore take care of minor affairs himself. In the present case the applicant, who had lost both father and mother, claimed that he did not speak German well and needed someone to support and assist him and take care of his affairs by way of an overall responsibility such as provided for by the legal system.

### Independent Administrative Tribunal for Upper Austria

It should be added that this decision appears to be rather unique:

UVS Oberösterreich 13 March 2006, VwSen-400775/7/SR/Ri

(see also already on 8 February 2006, VwSen-400764/3/SR/Ri)

Full text available at <http://www1.land-oberoesterreich.gv.at/uvs/> (search page)

The Independent Administrative Tribunal for Upper Austria ruled that an asylum seeker, whose application has been turned down in the first instance, may not be taken in detention, if upon an individual examination of the asylum seeker's situation there is no need to safeguard his or her return. Detention can be justified if there are reasons to presume that the asylum seeker would go into hiding. Since he was granted reception conditions and there are no reasons to assume that these would be withdrawn, and in view of the conduct of the asylum seeker in Austria, no individual security need could be established. The authority would have had to apply more lenient measures.

### Independent Administrative Tribunal for Upper Austria

UVS Oberösterreich 16 March 2006, VwSen-700002/6/WEI/An

The Tribunal repealed a decision on withdrawal of reception conditions because the first instance authority had not been able to demonstrate that the asylum seeker had committed an aggressive attack, due to its failure to carry out an investigation procedure and to adequately reason its decision. (see below at Q 21.E.)

### **3. GENERAL INFORMATION ABOUT THE SYSTEM OF RECEPTION CONDITIONS**

*The purpose of the following two questions is to help the reader to understand easily and quickly the system of reception conditions in your Member State and also to avoid that you have to repeat general elements in other parts of the questionnaire. **Please do not write more than one or maximum two pages and do not include large historical developments.***

Q.10. Describe in general the system of reception conditions in your Member State (in particular which are the main actors in charge of reception conditions?)

As explained above at Q.3., the system of reception conditions in Austria is marked by political discussions on whether the Federation or the Laender are responsible for granting reception conditions which led them to conclude the Basic Welfare Support Agreement (Ref No 1/2), which partitions the duties between the parties. The Agreement obliges the parties to transpose its provisions into their own legislation, which all of them have done or envisaged. Carrying out the procedure on *granting asylum* remains a federal competence and is done by the branch offices of the Federal Asylum Office which are situated in the Laender.

The Agreement stipulates that the Federation is responsible for asylum seekers during the admissibility procedure and therefore has to take care of all the duties relevant in this first stage (information, documentation etc). Currently, there are five federal care facilities, among which two initial reception centres (*Erstaufnahmestellen – EAST*<sup>12</sup>, which are responsible for carrying out the admissibility procedures and are attached to relatively large accommodation centres), two smaller facilities<sup>13</sup> used for asylum seekers who are in a procedure in which the Dublin II-Regulation is applied. Moreover, there is an initial reception centre at Vienna International Airport (see below, at Q.11.). If an application has been declared inadmissible, the asylum seeker will remain in one of these centres until his or her departure from Austria. If an application is declared admissible, the asylum seeker shall be assigned to a care facility in one of the Laender. A coordination office (*Koordinationsstelle*) set up by the Federation in the initial reception centres is responsible to arrange this assignment and to organise the transport of asylum seekers to their new place of residence (Art 3 paragraph 2 of the Basic Welfare Support Agreement). According to § 6 (1) of the Federal Basic Welfare Support Act (Ref No 1/1), the office shall seek the accordance of the responsible office in the Land.

The Laender are obliged to take over a certain quota of asylum seekers which is determined in relation to the percentage of their population. They are obliged to provide for the necessary “infrastructure” (accommodation and other material support of asylum seekers) which they can either organise themselves or outsource. If they do not take the due amount of persons into their care, the additional costs incurred by another entity will have to be compensated at the end of the settling period. The maximum costs for benefits are also laid down in the Agreement, which are used not only for settlement between the Federation and the Laender, but also for compensation paid to accommodation providers and for the calculation of the amount of money paid to asylum seekers who are not accommodated in a care facility but live individually. The Laender also decide on dismissal of asylum seekers from care in accordance with the Federal Asylum Office and have further organisational duties supporting the Office in carrying-out the asylum procedure and facilitating the repartition system. They remain

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<sup>12</sup> EAST Ost in Traiskirchen, Lower Austria and EAST West in Thalham. Lower Austria.

<sup>13</sup> In Bad Kreuzen, Upper Austria and in Reichenau, Lower Austria.



responsible for reception of asylum seekers until a final decision on the application has been issued. However, if the asylum procedure is not closed within 12 months from the date it has been recorded, the cost will have to be carried by the Federation again according to the amount fixed by the Agreement.

Several federal entities have issued a call for tender and consequently outsourced the management of care facilities or the provision of social counselling to private organisations. Often in these calls for tender the requirements to be met have been set, and organisations have been chosen according to a rating of the services offered. In the federal care facilities, reception conditions are provided by the company European Homecare, which has won the contract to provide accommodation, food, social care and other benefits to asylum seekers in the federal care facilities.

According to the information that could be gathered, the current system of care in the Laender is the following:

In Burgenland, Carinthia, Lower Austria and Styria material reception conditions are organised basically, if not exclusively by the Government. NGOs have been commissioned with the provision of care activities, and also provide information (partly limited, eg not really in Carinthia), legal and social counselling.

Salzburg (Caritas), Vorarlberg (Caritas), Upper Austria (Caritas and Volkshilfe) have concluded contracts with NGOs which organise the whole reception system (ie receipt of applications, communication of decisions, running of care facilities or payment and monitoring of private guesthouses providing reception conditions in kind, payments to asylum seekers, information, legal and social counselling). Formal decisions are being taken by the Governments.

Tyrol is the only Land where care is effected by the Government.

In Vienna the responsible organisation is the Fonds Soziales Wien (a fund financed by the Government which has taken over a series of tasks in the area of social affairs of the Land from the governmental department of social affairs), which has contracts with about 15 NGOs running different projects (social care, accommodation of unaccompanied minor refugees, women). The fund is responsible for distributing asylum seekers to the care facilities and has commissioned Caritas (*Caritas Asylzentrum*) with the running of a basic care and welfare service centre, where health insurance is organised and reception conditions provided in money are paid to asylum seekers. Also, the Fonds Soziales Wien has commissioned several NGOs with care provision to asylum seekers. Furthermore, a number of NGOs provide information, legal and social counselling. Since asylum seekers have no legal title to benefits under the Basic Welfare Support Act, the Fonds Soziales Wien does not decide by formal decisions under the Administrative Procedures Act.

Since Vienna currently fulfils its quota by about 150%, it has issued an instruction that only those asylum seekers can be granted reception conditions who have been resident in Vienna before 1<sup>st</sup> May 2004 (date of entry into force of the Basic Welfare Support Agreement). After the entry into force of the Basic Welfare Act, it turned out that there were a lot more asylum seekers living in Vienna in self-organised accommodation than had been expected. A great number of these people were as a consequence granted reception conditions (in money) by the Land. There is fear in Vienna, that if a general entitlement to all residents was granted, a lot of asylum seekers would come to Vienna on their own initiative.

The Ministry of the Interior has a contract with organisations which provide care to persons who are in detention pending deportation, including asylum seekers (*Schubhaftbetreuung*).

These organisations are not supposed to provide legal counselling. One of them relies to almost 100% to funding of the Ministry of the Interior and the European Refugee Fund, its independence from the government may therefore be called into question.

In the Laender where a legal basis does not exist, benefits according to the Basic Welfare Support Agreement are currently granted de facto. This means that there are no administrative decisions on the granting or withdrawal of benefits and consequently no legal remedies. This is the case in Lower Austria, Salzburg and Upper Austria. The same accounts for Vienna, which was the first Land to proceed to legal transposition, but failed to introduce a legal entitlement and a means to appeal against negative decisions into the Vienna Basic Welfare Support Act (but there is access to the civil courts in cases of withdrawal).

- Q.11. A. Explain if you have different types and levels of reception conditions following the different stages of the asylum procedure (this implies that you have to give briefly the necessary explanations about the asylum procedure). Make if relevant for reception conditions a distinction between the following procedural stages: determination of the responsible Member State on the basis of the Dublin II Regulation, special procedures at the border (including transit zones in airports), accelerated procedures, admissibility procedures, eligibility procedures and the different possibilities of appeals (suspensive or not) against a refusal of the asylum request. Indicate what the main differences of reception conditions are between the different stages (if necessary by detailing between the different elements of reception conditions, in particular housing) and explain what the evolution of reception conditions is following the different stages of the procedure.

According to the Asylum Act 2005 (Ref No 1/5), the procedure is split into two stages, an admissibility procedure and the “ordinary” procedure on eligibility. There are special provisions for procedures carried out at airports and for applications filed by family members of a refugee or an asylum seeker (which do not have an effect on reception conditions). To be brief, the following description is as short as possible and therefore cannot take into account all details of the procedure.

During the admissibility procedure the Federation is responsible for granting reception conditions. An application for asylum is usually first made before a police organ, but has to be recorded at an initial reception centre (*EAST*) to start the procedure (§ 29). From that moment, the Federal Asylum Office has to declare an application inadmissible (*Zurückweisung*) within a period of 20 days<sup>14</sup> after the application has been recorded at the initial reception centre, otherwise it must declare the application admissible. An application for international protection can be declared inadmissible basically if an asylum seeker could have seek protection in a safe third country (§ 4 (1) Asylum Act 2005)<sup>15</sup> or if another state is responsible to carry out the asylum procedure on the basis of a contract or the Dublin II Regulation (§ 5 (1) Asylum Act 2005)<sup>16</sup>. It can also grant asylum or declare the application unfounded

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<sup>14</sup> Exceptions are possible in Dublin II consultation procedures and when an asylum seeker fails to contribute to the procedure or eludes from the procedure (§ 28 (2) Asylum Act 2005).

<sup>15</sup> The application may not be turned down if a negative decision would violate Art 8 ECHR, if the asylum seeker is a national of an EEA-country or if a very close relative (as laid down by the Act) has been accorded international protection in Austria.

<sup>16</sup> Unless there is a real risk that protection cannot be granted in such a country, for very specific reasons lying in the person of the asylum seeker.

(*Abweisung*). If an appeal against a negative decision declaring the application unfounded is lodged which has or is granted suspensive effect, the application is considered admissible. For the period of 20 days after the application has been recorded, the asylum seeker's residence is tolerated (*geduldet*) on the territory of the district administrative authority where the asylum seeker receives welfare support, after that time he or she is tolerated on the whole Austrian territory if not admitted to the regular procedure (§ 12 – unless there is a right to residence on a different legal basis). Negative decisions in the asylum procedure are combined with an expulsion order<sup>17</sup>. An appeal against a negative decision on admissibility does not have suspensive effect, but the appeal against an expulsion order can be granted suspensive effect by the second instance – the Independent Federal Asylum Tribunal – within a period of seven days. During this period the expulsion order must not be effected. Unless the asylum seeker is taken in detention, he or she remains in a federal care facility until the final decision on admissibility or the – voluntary or forced – departure from the country.

Dublin II procedure: An application can be rejected in the admissibility procedure if the asylum seeker may seek protection in a safe third country (§ 4 Asylum Act, which does not make a difference for reception conditions) or if another country is responsible to conduct the asylum procedure according to the Dublin II Regulation (or according to another treaty referring to such responsibility; § 5). According to § 39 (3) No 4 Aliens Police Act ([Ref No 1/6](#)) an asylum seeker may be arrested and according to § 76 (2) No 4 he or she may be detained by the police authorities, if because of the result of the police interrogation, search or photographing and fingerprinting it can be assumed that the application of the asylum seeker will be rejected for lack of responsibility of Austria for its examination.

If an asylum seeker is in detention, reception conditions are not granted (§ 2 (3) Federal Basic Welfare Support Act, [Ref No 1/1](#)). The rights of the asylum seeker during detention are laid down in the Detention Regulation (Anhalteordnung, [Ref No 1/7](#)), which also allows for medical care and other guarantees. If they are not detained, asylum seekers who are in a procedure under the Dublin II Regulation (mainly families) are sometimes not accommodated in an initial reception centre, but moved to live in one of the federal care facilities outside an initial reception centre (“care centres”, § 1 No 4 Federal Basic Welfare Support Act).

If consultations pursuant to the Dublin II Regulation are initiated, the asylum seeker has to be informed within 20 days. The time limit of 20 days for declaration of inadmissibility of an application is not applicable in this case (§ 28 (2) Asylum Act 2005, [Ref No 1/5](#)).

Airport procedure: A special regime is provided for cases of asylum applications at Vienna International Airport, where an initial reception centre (to carry out the admissibility procedure) is installed, but no care facility. An asylum seeker who makes an application for asylum after having arrived at the airport or during a deportation via the airport has to be brought to the initial reception centre, unless the Federal Asylum Office allows his or her entry to the country if a rejection or a dismissal of the application is unlikely. As long as the entry is not permitted, the asylum seeker must remain within the border control area or the initial reception centre. Nevertheless, he or she is always allowed to leave the country (§ 31f Asylum Act 2005). The Federal Asylum Office has to inform UNHCR of the decision envisaged within one week after the asylum seeker has been brought before the Office. An

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<sup>17</sup> Exception: if the asylum seeker has the right to residence on a different legal basis or if the expulsion would constitute a breach of Art 8 ECHR (§ 10 (2) Asylum Act). If the effectuation of an expulsion order would constitute a breach of Art 3 ECHR which is not permanent, the Federal Asylum Office has to declare that the deportation has to be suspended (§ 10 (3)).

application can only be dismissed (refusal of asylum) or rejected for protection in a safe third country if UNHCR agrees. Consultations under the Dublin II Regulation must be initiated within one week. The time limit for appeals is one week; the Independent Federal Asylum Tribunal must take a decision within two weeks. The authorities do not issue an expulsion order (because the asylum seeker has not entered the country yet) but may proceed to the execution of the refusal of entry (*Zurückweisung*) after a final decision has been taken. Apparently, the Federal Basic Welfare Support Act is not deemed applicable to the transit zones of the airport and the care facility does not appear on the official statistic published on the website of the Ministry of the Interior. However, care is provided by an NGO (Caritas) in the special transit zone, and given the definition of a federal care facility in the Act as “any accommodation outside an initial reception centre, where welfare supply for the basic needs of asylum seekers is actually granted” (§ 1 No 4 Federal Basic Welfare Support Act), the care facility should be considered a federal care facility under the Act. The Caritas “airport social service” (Sozialdienst am *Flughafen*) offers accommodation for 35 persons and is co-financed by the Federal Government, the Government of Lower Austria (where Schwechat is actually situated) and Caritas. Asylum seekers are not allowed to leave the special transit zone, unless for the purpose of departure from Austrian territory or in case of authorisation (eg for medical purpose). Under Austrian usage, the asylum seeker’s obligation to stay at the airport is not considered detention, but a means to “secure the refusal of entry to the territory” (*Sicherung der Zurückweisung*). However, the Constitutional Court has in cases under the old legislation accepted that depending on the circumstances confinement could amount to detention.<sup>18</sup> The maximum period of confinement of an asylum seeker to the special transit zone is six weeks (§ 32 (4) Asylum Act 2005).

*After an application has been declared admissible*, the asylum seeker may remain in the federal care facility for a maximum period of 14 days until he or she can be assigned to a care facility of a Land (§ 6 (2) Federal Basic Welfare Support Act). From the decision on the admissibility onwards, the asylum seeker has a right to residence in the Austrian territory. From the moment of assignment to a local care facility, the Laender are responsible for granting reception conditions. Apart from different organisational duties of the Federation and the Laender under the Basic Welfare Support Agreement, the benefits which are to be granted to asylum seekers according to the Agreement by the Federation and the Laender are the same, as listed in Art 6 of the Agreement and special benefits for unaccompanied minor refugees in Art 7. However, since there are in the end ten different regimes of reception, and since the actual guarantees have to be provided for by law, conditions actually granted can vary in legislation and in practice.

The Laender remain responsible until a final decision on the application is issued or the asylum seeker has left the country.

Until an agreement between the coordination office and the Land can be reached, the asylum seeker may remain in federal care for a maximum period of 14 days. According to the information gathered by NGOs, there are cases where Laender refuse to take over asylum seekers assigned to them by the coordination office, or where no assignment decision is issued, in such cases the asylum seeker will often remain in the federal care facility (initial reception centre) for some time without legal basis and is then dismissed without formal decision, hence without the possibility to file an appeal, since the federation is no longer competent under the federal care system. **The Laender do not accept or refuse to take over asylum seekers from the coordination office by formal decision, so that there is no legal**

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<sup>18</sup> Raschauer/Wessely, *Anhaltung von Fremden im Transitbereich*, migraLex 2005, p 89.

**remedy against a negative decision in that stage of the system either.** (See Q 15 for details).

- B. Indicate precisely for which stage(s) of the asylum procedure the answers on reception conditions you give below are valid.

A differentiation will be made between conditions during the admissibility procedure ruled by the Federal Basic Welfare Support Act and conditions guaranteed in the later stage under the Laender Acts, as far as information could be gathered. A reference to the Dublin II procedure or the procedure at the airport will only be made if relevant under the particular question.

#### **4. GENERAL RULES ON RECEPTION CONDITIONS**

- Q.12. A. Are material reception conditions provided in kind, in money or in vouchers or in a combination of these elements (see article 13, §5 which is an optional provision)? Distinguish between the different elements (housing, food, clothes, health, transportation, pocket money,...). **If reception conditions are provided in money (in general or in some cases, for instance when no places are anymore available in accommodation centres), indicate the precise amount given to the asylum seekers. Indicate in your answer what is provided in general and if there are exceptional cases.** Specify in your answer if reception conditions are different from the general system of social aid for nationals or aliens and if yes, if and when (which stage of the asylum procedure) can asylum seekers have access to the general system of social aid?

A combination of these elements is possible, depending upon the individual system in the care facility: there is organised accommodation, where food is also provided, organised accommodation where food is not provided but foodstuffs are given in kind or a certain amount for food is paid in money or in vouchers, and individual, eg self-organised accommodation, where benefits are provided in money. In the federal care facilities and the majority of the other facilities, reception conditions like housing and food are provided in kind and a pocket money of 40,- Euro per month as well as a sum of 150,- Euro per year for clothing is paid to the asylum seekers. Apparently European Homecare also has a repertory of clothes given to asylum seekers when they arrive at an initial reception centre if needed, especially in winter. If an asylum seeker is accommodated individually, reception conditions are provided in money.

Other benefits are provided in a combination of these elements, depending on the system provided for by the Government or NGO responsible. In Salzburg schooling material has to be bought by asylum seekers themselves and is later refunded upon presentation of the receipt, a certain amount for clothing is given in vouchers. In Vorarlberg pocket money is paid to a bank account which is opened for each asylum seeker upon arrival.

The benefits to be granted are listed in the Basic Welfare Support Agreement ([Ref No 1/2](#)) and have been taken over by legislation of the federal entities either by reference to Art 6 and 7 of the Agreement<sup>19</sup> or by listing them anew<sup>20</sup>; (note: Art 7 refers to minor refugees, see below Q.31.)

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<sup>19</sup> § 2 (1) and § 1 No 3 Federal Basic Welfare Support Act; § 1 (1) draft proposal for Upper Austria; § 7a (1) Vorarlberg Social Aid Act.

Benefits according to Art 6 include:

- accommodation, ensuring the respect of human dignity and family unity<sup>21</sup>
- food
- a monthly pocket money (of €40,-) which is not paid to asylum seekers in individual accommodation
- if necessary a medical screening at reception of an asylum seeker
- health insurance under the Austrian insurance system (by payment of the insurance premium)
- other necessary benefits not covered by health insurance upon individual decision
- measures for persons in need of special care
- information, counselling and social care effected by qualified staff with a view to their guidance in Austria and to voluntary return
- costs of transport in case of change of accommodation and of citation to a public authority
- costs of travel to school and costs of schooling material
- measures to ensure a structured daily routine where necessary (aimed at minors)
- provision of clothing
- costs of funeral
- counselling, travel costs and a nonrecurring financial aid in special cases of voluntary return

Art 9 of the Agreement sets the maximum cost for the benefits mentioned, which are used for the calculation of refund between the federal entities, but also applied to asylum seekers when they receive reception conditions in money<sup>22</sup>:

The amounts paid in case of individual accommodation are the following (in Euro):

- for food for adults and unaccompanied minors	180,-
for other minors	80,-
- for accommodation of a single person	110,-
for families (minimum two persons)	220,-
- schooling material per child per year	200,-
- for clothing per person per year	150,-
- for transport to school (up to a maximum amount fixed by law) - the actual costs	

Higher amounts may be paid in Burgenland (§ 9, in individual cases), Tyrol (§ 9, to avoid undue hardship – up to the maximum amount of social aid granted to nationals) and Styria (§ 11, in well-founded cases, eg to avoid undue hardship, or if it serves the integration of the asylum seeker – up to the maximum amount of social aid granted to nationals).

Carinthia additionally grants an amount of 10,- Euro for the purpose of leisure activities of persons living in organised accommodation (§ 6 (1) lit 1) and 3,63 Euro per person per tuition

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<sup>20</sup> § 4 Burgenland Care Act; § 3 Carinthia Basic Welfare Support Act; § 5 draft proposal for Lower Austria, § 6 (1) draft proposal for Salzburg; § 4 Styria Care Provision Act; § 5 Tyrol Basic Welfare Support Act; § 3 (1) Vienna Basic Welfare Support Act.

<sup>21</sup> Nearly all federal entities provide that accommodation must be “suitable”: Federation § 1 No 3, Burgenland § 4 (1) 1, Carinthia § 3 (1) lit a, Lower Austria § 5 No 1, Styria § 4 (1) No 1, Tyrol § 5 (1) lit a, Upper Austria § 3 (1), Vienna § 3 (1) No 1, Vorarlberg § 7a (1).

<sup>22</sup> § 9 Burgenland, § 6 (1) Carinthia, § 7 (1) Lower Austria, § 10 Styria, in Salzburg the Government may set maximum costs by regulation; § 5 Tyrol. Other Laender do not fix the sums in their legislation, but apply the Agreement in practice.

unity for German courses for unaccompanied minor aliens which cover a maximum of 200 tuition unities (§ 6 (1) lit m).

All Laender provide in their Hospitals Acts that unlike other aliens asylum seekers cannot be asked to pay the actual cost of hospitalisation<sup>23</sup>, but only the contributions determined under health insurance (which are covered by welfare support, see above).

In most of the Laender, granting of social aid is among other requirements subject to the fact that the asylum seeker has a right to residence on the Austrian territory. Since asylum seekers are only tolerated during the admissibility procedure, no access to social aid is granted in this stage of the procedure. After the application has been declared admissible or has become admissible by law, in most of the Laender social aid can only be granted if there is no possibility to ask for support on a different legal basis (eg Salzburg, § 6 (5) Social Aid Act; Lower Austria, § 4 (5)) or if no benefits are being granted on a different basis (eg Burgenland, § 2 (1); Upper Austria, § 6 (3)). In Tyrol (§ 4 (3) Basic Safeguard Act<sup>24</sup>), in the future legislation of Upper Austria (§ 7 (1) Government Bill for the Basic Welfare Support Act), in Styria (§ 4 (1) Social Aid Act) and in Vienna (§ 7a (4) Social Aid Act), it is explicitly excluded. In Carinthia (§ 3 (3) Social Aid Act) granting of social aid is possible to avoid undue hardship, in Vorarlberg, basic welfare support benefits are seen as a part of social aid and regulated in the Social Aid Act. In all Laender where access to benefits of social aid is not excluded, asylum seekers do not have an entitlement to benefits of social aid, these can be granted<sup>25</sup>, leaving a margin of appreciation to the officials in charge and causing considerable discrepancies in the practice of the Laender offices. While for example in Vorarlberg asylum seekers are granted social aid when they are dismissed from a care facility, in order to protect them from homelessness<sup>26</sup>, asylum seekers are generally not granted social aid in Upper Austria<sup>27</sup>, although this is not explicitly excluded under the present legislation.

Beneficiaries of social aid may be asked to repay the sums obtained if they have an income or acquire means another way *later*. In some of the Laender, this does not account for benefits granted under the welfare system. The exceptions are Vorarlberg, where the welfare system for asylum seekers has been incorporated in the Social Aid Act and therefore falls within the same rules (benefits granted can be reclaimed up to a period of 10 years from the date when they were granted; §§ 9 and 11 Social Aid Act). Lower Austria provides for a time limit of three years to reclaim benefits (§ 14 (1)). Burgenland (§ 5 (6)) and Tyrol (§ 10 (1)) only state that asylum seekers may be asked to repay benefits granted when they acquire financial means (with the exception in Tyrol of benefits granted to minors).

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<sup>23</sup> § 60 (1) No 2 Burgenland Hospitals Act; § 65 (2) lit b Carinthia Hospitals Rules, § 52 (2) No 2 Lower Austria Hospitals Act, § 68 No 2 Salzburg Hospitals Act, § 39 (2) No 2 Styria Hospitals Act, § 44 (2) lit b Tyrol Hospitals Act, § 63 (2) No 2 Upper Austria Hospitals Act, § 51 (3) No 2 Vienna Hospitals Act, § 87 (2) lit b Vorarlberg Hospitals Act.

<sup>24</sup> “*Tiroler Grundsicherungsgesetz*”, which is equivalent to the Social Aid Acts of the other Laender.

<sup>25</sup> In most Laender a formal decision under the Administrative Procedures Act is being issued (including the right to a reasoned decision and legal remedies), in others no such formal decision is issued to asylum seekers (§ 4 (5) Lower Austria Social Aid Act, § 6 (3) Upper Austria Social Aid Act). However, the granting of benefits is in any case still subject to fundamental rights, especially to the equality principle, under the Austrian Constitution.

<sup>26</sup> Information given by the competent district administrative authority for Bregenz (Vorarlberg).

<sup>27</sup> Information given by the competent district administrative authority for Linz (Upper Austria).

- B. **Can the reception conditions in kind, money or vouchers be considered as sufficient “to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence” as requested by article 13, §2 of the directive (which is a mandatory provision but leaves a certain space to Member States)?** In order to help to assess the respect of this rule when reception conditions are provided in money, include if necessary in your answer points of comparison with the minimum amount of social aid guaranteed for nationals in your Member State.

A person in self-organised accommodation may just about live on the amount paid<sup>28</sup>, but in comparison with the minimum amount of social aid for nationals it is significantly lower – it is about 50% of average social aid or even less. This fact has also been criticised by the Committee on Economic, Social and Cultural Rights in its observations of 25 January 2006 E/C.12/AUT/CO/3<sup>29</sup>.

The Ministry of the Interior argues that differences in the character of benefits under social aid and basic welfare support respectively are the reason for different amounts paid: While social aid is meant to support persons lacking sufficient means of subsistence who will be asked to repay benefits granted once he or she acquires means, the concept of basic welfare support is that it cannot be reclaimed when an asylum seeker acquires money later.

The amount of social aid varies in the Laender, regularly a certain amount for means of subsistence (*Lebensunterhalt*) and accommodation are being set by regulation. In some Laender two additional monthly rates are being paid. The actual figures for a single person are the following (for means of subsistence plus an additional allowance for accommodation, rates for 2006):

Burgenland	€424,50
Carinthia (rate for 2005)	€485,- plus €142,-
Lower Austria	€493,40 plus €92,30
Salzburg	€414,- plus €408,- (basis: 40 m <sup>2</sup> for a single person)
Styria	€499,- plus the actual rent if it is adequate
Tyrol	€421,30 plus actual rent for max 40 m <sup>2</sup> for a single person
Upper Austria	€532,20 plus the actual rent if it is adequate
Vienna	€420,- plus €252,-
Vorarlberg	€472,80 plus the actual rent if it is adequate

As for asylum seekers who live in organised accommodation where accommodation and food are being provided in kind, there has been criticism that food was sometimes insufficient and not good.<sup>30</sup> However, the underlying survey was based on a small and not representative sample. Other than that, there is no information on complaints about insufficient conditions of care. Reception conditions granted in kind can be considered sufficient to ensure a standard of living adequate for (physical) health, even if maybe not for personal well-being. The amounts

<sup>28</sup> It was considered insufficient or hardly sufficient by representatives of different NGOs, and sufficient by the Ministry of the Interior.

<sup>29</sup> [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4a217b5c9439b901c125711500571f80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4a217b5c9439b901c125711500571f80?Opendocument), p 3, at D.15.

<sup>30</sup> Asylkoordination, Report on changes in the federal care system, December 2005, p 37, [http://www.asyl.at/fakten\\_2/studie\\_aenderungen\\_bundesbetreuung.pdf](http://www.asyl.at/fakten_2/studie_aenderungen_bundesbetreuung.pdf)



paid to care providers by the Federation have been criticised by NGOs in the context of the call for tender for care provision at the federal care centres, stating that the low prices tendered by European Homecare must be at the expense of quality, especially in the area of social care, and especially concerning special care measures for specially vulnerable persons, which are two areas involving higher personnel expenditure.<sup>31</sup> NGOs also stress that care facilities run by them are generally co-financed by other resources, since the financial contribution as laid down in the Basic Welfare Support Agreement is not sufficient to guarantee an adequate standard of living.

## **5. PROCEDURAL ASPECTS**

**Q.13. A. Does the national legislation specifically provide that a request for international protection is presumed to be under the Geneva Convention unless explicitly requested otherwise? (see article 2, b which is a mandatory provision)**

The Austrian Asylum Act 2005 provides only for one application for international protection in its § 2 (1) No 13. It is defined as any “a request howsoever made by an alien in Austria to be accorded the protection of Austria”<sup>32</sup>. This application is presumed to be aimed at being granted asylum status (§ 3 Asylum Act 2005), or, if this status is denied, the application is presumed to be aimed at being granted subsidiary protection (§ 8 Asylum Act 2005).

B. Explain if the scope of application of reception conditions is extended to other asylum seekers than refugees in the sense of the Geneva Convention, in particular to persons asking for subsidiary protection or to other forms of protection like humanitarian statuses (see article 3, § 4 which is an optional provision)? If not, explain briefly which the differences between these special regimes and the directive are.

Yes, the scope is extended, see A above. Since there is only one application for international protection, in the course of the procedure, it has to be decided first on granting asylum status, and if this is denied it has to be decided on granting subsidiary protection. Other forms of protection cannot be claimed separately in Austria. In any procedure, the question whether or not the deportation of an asylum seeker is permissible must also be answered.

The scope of application of the Basic Welfare Support Agreement is furthermore extended to other “aliens in need of help and protection”. The groups of aliens that are entitled to welfare support are listed in Art 2 paragraph 1 of the Agreement and contain among others aliens who have been granted humanitarian status, who can for legal or factual reasons not be deported, or aliens who have been granted asylum, for a certain period of time.

These groups are entitled to the same conditions.

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<sup>31</sup> see eg the criticism of the Red Cross, which was part of a bidding consortium at the tender, at: [http://religion.orf.at/projekt02/news/0302/ne030227\\_asyl.htm#SA](http://religion.orf.at/projekt02/news/0302/ne030227_asyl.htm#SA); see also Asylkoordination, Report on changes in the federal care system, December 2005, p 34f, [http://www.asyl.at/fakten\\_2/studie\\_aenderungen\\_bundesbetreuung.pdf](http://www.asyl.at/fakten_2/studie_aenderungen_bundesbetreuung.pdf).

<sup>32</sup> UNHCR unofficial translation, English version of the Asylum Act 2005, available at: <http://unhcr.at/pdf/1723.pdf>.

- C. Are there specific provisions in national law for reception conditions in case of diplomatic or territorial asylum requests submitted through a diplomatic or consular representation (see article 3, §2 which is an optional provision)?

No. An asylum request can only be submitted to an embassy by a family member of a person who has been granted asylum or subsidiary protection in Austria (§ 35 Asylum Act 2005). As applicants are not accommodated in diplomatic representations, the law does not provide for reception conditions in such cases. According to § 1 (1) Federal Basic Welfare Support Act reception conditions are only granted to asylum seekers whose applications have been “recorded” (see below at Q.14.). According to § 35 (4) Asylum Act 2005 an application is only recorded once the asylum seeker submits it at an initial reception centre inside the country.

**Q.14. Are reception conditions available as from the moment one asylum application is introduced? How is article 13, §1 which is mandatory legally understood? Do asylum seekers have to satisfy any other condition in order to get reception conditions?**

The Austrian Asylum Act 2005 differs between applications which are “made” (*gestellt*; basically at the border before a security organ) and applications which are “recorded”<sup>33</sup> at an initial reception centre (*eingbracht*). When an asylum seeker asks for protection before a police organ, the police organ has to arrest him or her and take him or her to the initial reception centre (after having made a first interrogation and search of the asylum seeker). In exceptional cases where an asylum seeker has a right to residence inside the territory, he or she will be asked to go to the initial reception centre to have an application recorded there. Reception conditions only start when the asylum seeker appears before the initial reception centre, because this is the moment when he or she starts to be an “asylum seeker inside the admissibility procedure” granted reception conditions according to § 2 (1) Federal Basic Welfare Support Act. § 1 No 1 defines the “asylum seeker in the admissibility procedure” as “an asylum seeker whose application for asylum has been recorded...”.

At this stage of the procedure, the asylum seeker does not have to be in need of help and protection. According to the legislation of the Laender, this is a requirement at a later stage (see relevant questions below).

**Q.15. Explain when reception conditions end, for instance after refusal of the asylum request** (include in your answer the link with the right of appeal against a decision of refusal of the status, in particular the question of its suspensive effect)

As stated at Q.10. reception conditions granted by the Federation end when the Federation is no longer competent under the Basic Welfare Support Agreement. According to § 2 (1) the Federation grants reception conditions to asylum seekers, as long as there is no decision on the admissibility of the application and as long as the proceedings are not discontinued (§ 1 No 1 of the Federal Act). Proceedings may be discontinued under § 24 Asylum Act 2005, when an asylum seeker absconds from the procedure (ie when his or her place of stay is not

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<sup>33</sup> This expression is used by Mrs Baldacchini in the practitioners’ guide for what seems to be a similar problem in the UK.

known and cannot be established by the authority or when he or she leaves the country) and the relevant facts of the case cannot be established. Moreover, conditions are granted to asylum seekers if their application has been declared inadmissible or unfounded until their departure from the territory. – In cases where applications are declared unfounded in the admissibility procedure, an appeal having or being granted suspensive effect will render the application admissible by law. At this moment, the competence of the Federation ends (see above Q.10.).

Generally reception conditions end when a final decision on the application for asylum is taken. During the appeals procedure before the second instance, the Independent Federal Asylum Tribunal<sup>34</sup>, reception conditions are continuously granted, irrespective whether the appeal has suspensive effect or not. A decision is final, when there are no more ordinary legal remedies at disposal. The Senate's decision is usually final.

When an asylum seeker whose application has been turned down, brings a complaint before a High Court<sup>35</sup> (an *irregular* remedy), practice is differing in the Laender. Apparently in some Laender, asylum seekers continue to benefit from reception conditions when the High Court has accorded the complaint suspensive effect.<sup>36</sup> The draft legal act of Lower Austria explicitly states in § 4 (2) No 3 that at this stage of the procedure, these persons are not considered “asylum seekers” anymore because a final decision has been issued, and can be granted reception conditions but are not legally entitled to them. In other Laender reception conditions end with the final decision of the Independent Federal Asylum Tribunal.

There is one important gap after the end of the admissibility procedure in the practical implementation of the burden sharing system of the Federation and the Laender, which needs to be pointed out at this place:

After an application has been declared admissible, the Federation is no longer competent to grant reception conditions, therefore there is no appeal against a dismissal from a federal care facility. The Laender are obliged to take over asylum seekers assigned to them, but there is no legal remedy accorded to the asylum seeker, because this obligation for the Laender arises only from the Basic Welfare Support Agreement.<sup>37</sup> If a place cannot be found for the asylum seeker in one of the Laender, and a decision on assignment is not taken, he or she may remain in the federal care facility for two weeks (§ 6 (2) Federal Basic Welfare Support Act). NGOs state that it happens regularly that asylum seekers are dismissed from federal care after these two weeks without perspective to accommodation and other conditions, because the Laender refuse to take asylum seekers into their care which have not been assigned to them. As for possible legal remedies in these cases see below Q.22.A.

Most of the Laender Acts stipulate that reception conditions also end when the asylum seeker leaves the territory of the Land.

Moreover, reception conditions end when they are withdrawn (see below Q.21.).

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<sup>34</sup> However, when an appeal does not have suspensive effect and during the time frame until suspensive effect is granted by the Tribunal, the asylum seeker may be detained.

<sup>35</sup> A complaint can be made before the High Administrative Court by an asylum seeker claiming a breach of law by the asylum decision, and before the Constitutional Court, if the asylum seeker claims a violation of his or her constitutional rights or the application of an unconstitutional legal norm.

<sup>36</sup> Information given by the UNHCR Office in Austria.

<sup>37</sup> The only remedy against a breach of an agreement under Art 15a of the Constitution is a complaint which can be brought before the Constitutional Court according to Art 138a of the Constitution by the Federal Government or one of the Laender Governments. The Constitutional Court is competent to decide whether a breach of the Agreement has occurred.

Reception conditions are suspended during the time an asylum seeker is in detention (see below Q.33.).

On the contrary, some Laender are also granting benefits after a final decision has been taken in that they are applying the provisions on reception conditions to persons who have been granted subsidiary status or who are in the territory on the basis of a regulation enacted in a case of mass influx of aliens, people having a right to residence for humanitarian reasons and persons who cannot be deported (Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol) as well as persons who have been granted asylum for a period of four months from the decision granting asylum (Carinthia, Burgenland, Salzburg) or even for 12 months from the positive decision (Styria); and finally to aliens who are or were victims of trafficking in human beings, even when they have entered Austrian territory illegally (Burgenland).

Q.16 Are there special rules or practices regarding reception conditions in case of successive applications for asylum introduced by the same person?

Yes. Asylum seekers who have lodged a successive asylum application within six months after the first application has been decided finally, may be excluded from reception conditions according to § 3 (1) No 3 Federal Basic Welfare Support Act. The same provision has been included in the respective Acts in Burgenland (§ 5(3) No 4), Styria (§ 5 (1) No 2), Tyrol (§ 6 (1) lit b), Upper Austria (§ 3 (2) No 4) and finally Lower Austria, where reception conditions can also be denied if an application has been made later than six months from the final decision, if it can be assumed that the aim of the application was to prevent deportation or to acquire financial benefits from the Land or other advantages (§ 8 (2) No 2 and 4).

Q.17<sup>38</sup>. Information of asylum seekers about their rights and obligations in terms of reception conditions, in particular about established benefits (see article 5 which is too large extend a mandatory provision; do not confuse this question with the information to be provided to asylum seekers about the asylum procedure):

**A. Are asylum seekers informed, and if yes about what precisely?**

Federation: The Federal Basic Welfare Support Act does not contain any obligation to provide information on rights and benefits of asylum seekers under the Act. § 29 (1) **Asylum Act** 2005 states that immediately after lodging an application the asylum seeker must receive general information (*Orientierungsinformation*). There are information sheets informing about rights and duties of asylum seekers (Ref No 1/12; provided for by § 17 (9) Asylum Act 2005), which are also relevant to the withdrawal of reception conditions. The paper informs in particular about the duty of the asylum seeker to be at the authorities' disposal to carry out the procedure and about the legal consequences of a violation.<sup>39</sup> The information sheet provides little information on material reception conditions, and particularly no information on benefits asylum seekers are entitled to.

In the Laender, legislation provides that asylum seekers must be informed about their duty to give all the necessary information to determine whether they are in need of help, and about the legal consequences of providing false information in Burgenland (§ 5(2)), Carinthia (§ 3 (7)) and Styria (§ 5(6)). In Lower Austria § 1 (9) provides that asylum seekers must be informed about their rights and duties under the Basic Welfare Support Act within 15 days, in

<sup>38</sup> To be answered with the help of UNHCR local office competent for your Member State or to be completed on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>39</sup> Information given by Ministry of the Interior.

writing and possibly in a language the asylum seeker can understand, or, if appropriate, orally. In Vorarlberg the authorities are obliged by § 35 (2 and 4) to inform asylum seekers on rights and duties, legal consequences of failure to furnish information to determine if the asylum seeker is in need of help, as well as information on the place of residence, health care, organisations which can provide legal counselling or other forms of care, possibly in writing and in a language the asylum seeker can understand.

In fact, the provision of information is depending on the organisation: As far as information could be gathered<sup>40</sup>, usually social counsellors (of the Government or of NGOs) are available at accommodation centres, and they visit private care facilities regularly. Newly arrived beneficiaries are informed about their rights and duties, available health care (eg a list of doctors in the region, possibilities of special care if available, leisure activities etc). Legal orientation should also be provided by counsellors, but may not always be guaranteed<sup>41</sup>. NGOs in the Laender claim that the information provided to asylum seekers in the initial reception centres is rather insufficient and when they arrive in the Laender, they are usually poorly informed. The Basic Welfare Support Agreement provides that costs for information, counselling and social care (not including costs for interpreting services) are being paid for one social counsellor per 170 asylum seekers (Art 9 No 9). The Federation and the Laender have transferred this provision into their legislation.

**B. Is the information provided in writing or, when appropriate, orally?**

At the beginning of the asylum procedure, the information sheet is handed out to asylum seekers. There is additional information furnished in the federal reception centres by means of placards and there is an information desk in the initial reception centres. In the Laender there is often no written information on rights and duties in general, most of the information needed is given orally by the social counsellors.

**B. Is that information in general provided in a language understood by asylum seekers? Specify the list of languages in which it is available**

Federation: According to § 17 (9) Asylum Act 2005 the information sheet must be held available in the languages the asylum seekers may reasonably be supposed to understand. There are translations in 34 languages; additional translations can be made when necessary.<sup>42</sup>

In the Laender, often information sheets only contain addresses of doctors, legal advisors, special care facilities, therefore a translation is not considered necessary. If there are translations, they are usually in the most common languages (eg French, English, and Russian).<sup>43</sup> The social counsellors working for NGOs provide most of the common languages of the asylum seekers.<sup>44</sup>

**C. Is the deadline of maximum 15 days respected?**

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<sup>40</sup> Information given by NGOs.

<sup>41</sup> Legal orientation should also be provided by counsellors, but may not always be guaranteed due to time and language constraints.

<sup>42</sup> Information given by Ministry of the Interior.

<sup>43</sup> Information given by NGOs.

<sup>44</sup> Information given by NGOs.

The information sheet is handed over to an asylum seeker immediately when his or her application is being recorded at the initial reception centre.<sup>45</sup>

As a rule the deadline is respected also when oral information is given by social or government counsellors. However, it seems that asylum seekers must show an interest in gathering information and ask for counselling; otherwise they might not get information.<sup>46</sup>

Q.18<sup>47</sup>. Information of asylum seekers about the existence of organisations or groups promoting their interest and defending their rights (see article 5 which is to a large extent a mandatory provision):

A. **Is there a list of organisations dressed by the authorities and if yes is it comprehensive? Is this in particular the case about the possibilities to get legal assistance and health care?**

The information sheet handed out in the initial reception centres states that independent legal and refugee advisors (see below at Q.22) are available (it also says that a list is attached<sup>48</sup>) and the information is given that private advisors may also be employed, but no names or addresses are given. Asylum seekers are also informed that they may turn to NGOs, and several names are given, but this list is not comprehensive. Moreover the information sheet on the asylum procedure informs that they may turn to UNHCR, providing the address. A list of doctors or medical care facilities is not given, but medical assistance is provided in the reception centres.

In the Laender there are not always lists of NGOs, especially where only one NGO is responsible (eg Voralberg, Salzburg). As a rule there is a list available in the housing facilities for asylum seekers mentioning the responsible counselling centre for them. At the counselling centre all the other information (e.g. about health care) is available. But this also depends on the particular system in the federal state.<sup>49</sup> Asylum seekers in detention are not always informed about all organisations promoting their interests. This accounts particularly for Laender where the authority has entered into a contract with one organisation to provide social and/or legal counselling. In such cases, it happens that representatives of other organisations do not have access to places of detention, unless they can argue they want to see a specific person of whom they know he or she is in detention (which is hardly possible lacking information on the names of these persons), or unless an asylum seeker asks for a specific contact. Here, it is often not possible to establish contacts between detainees and NGOs.

**B. Is the information provided to the asylum seekers, and if yes, in writing or, when appropriate, orally?**

In federal care facilities there is an information desk and information material at disposal. In the Laender this depends on the counselling centre. Sometimes written information is given by information sheets, lists of addresses (eg of legal counsellors or of doctors), or on notice boards in care facilities.

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<sup>45</sup> Information given by Ministry of the Interior.

<sup>46</sup> Information given by NGOs.

<sup>47</sup> To be answered with the help of UNHCR local office competent for your Member State or to be completed on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>48</sup> According to the knowledge of the UNHCR Office in Austria lists are generally not available, but it is assumed that advisors can be traced anyhow in the respective authority buildings.

<sup>49</sup> Information given by NGOs.

- C. **Is that information in general provided in a language understood by asylum seekers? Specify if possible the list of languages in which it is available.**

Since written information consists mainly of lists of addresses, these lists are usually in German.

If information is provided by NGOs when they are in charge of legal and social counselling, they usually have trained staff skilled in the necessary languages.

- D. **How many organisations are active in that field in your Member State?**

There are about 15 different NGOs and other organisations active in that field (most of them only in one or a few federal states). There is no umbrella organisation.<sup>50</sup> Among the most important ones are Caritas, Diakonie, Volkshilfe, SOS Menschenrechte; specialised organisations or projects for traumatised persons, eg Omega, Zebra; Netzwerk Asylanwalt (a legal counselling project of UNHCR, Caritas, Red Cross and other partners), Asylkoordination (a cooperation of a large number of NGOs in the field), and plenty of others, sometimes very small ones. Networks of these NGOs often promote the provision of care for vulnerable persons (eg separated children and traumatised persons).

**Q.19. Documentation of asylum seekers (see article 6):**

- A. **What kind of document is delivered to the asylum seeker? Explain the legal value of this document (just a certification of the status as asylum seeker or also prove of identity?) (see §1 of article 6 which is a mandatory provision)**

When an asylum seeker's application has been recorded at an initial reception centre, a Procedure Card is issued (§ 50 Asylum Act 2005 (Ref No 1/5): *Verfahrenskarte*), which is a title to stay in the initial reception centre and to enjoy reception conditions.

Following a positive admissibility decision asylum seekers are issued a Residence Entitlement Card (§ 51 Asylum Act 2005: *Aufenthaltsberechtigungskarte*) which is a proof of identity and a proof that the asylum seeker is legally residing in the territory.

- B. **Are there situations or specific cases in which another equivalent document or even no document is issued? (in particular is there an exception for “procedures to decide on the right of the applicant legally to enter the territory” as made possible by §2 of article 6)?**

There is no exception for airport procedures, but in practice, in airport procedures<sup>51</sup> and when an asylum seeker is in detention, a Procedure Card is usually not delivered – this accounts mainly for procedures where the Dublin II Regulation is applied.

- C. **For how long is this document in principle valid and is it necessary to renew it after a certain period?**

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<sup>50</sup> Information given by NGOs.

<sup>51</sup> ICF II Report, p 12.

On the first document delivered to the asylum seeker (*Verfahrenskarte*), the date of invalidation is inserted by the authority. There are no rules on the period of validity, but the state of the procedure will also be shown on the document, so that this might be relevant for the period of validity. When an application is admissible, the identity document (*Aufenthaltsberechtigungskarte*, § 51 Asylum Act 2005) must be issued, which is valid until the asylum seeker is obliged to leave the country because an enforceable decision has been taken or the procedure is discontinued (eg because the asylum seeker absconded from the care facility). Then he or she must return it to the competent police authority (§ 51 (2) Asylum Act 2005)

**D. What is the deadline for the delivery of that document? Is the mandatory deadline of 3 days set by article 6, §1 respected<sup>52</sup>?**

The deadline for delivery of the *Verfahrenskarte* is three days (§ 17 (6) Asylum Act 2005). However, the deadline only starts when an application for asylum has been recorded at an initial reception centre (for the procedure see above paragraph 2 of Q.11.). NGOs confirm that this deadline is generally respected, with the exception of cases when asylum seekers are in detention.

**E. Is it possible for an asylum seeker to get a travel document for serious humanitarian reasons (see §5 of article 6 which is an optional provision)?**

There is no such possibility.

**F. Is there a central system of registration of asylum seekers and is it or not separate from the registration of aliens? If yes, describe it briefly (content) and indicate in particular if it is an electronic database.**

There is an electronic database called “Care Information System” (*Betreuungsinformationssystem* – BIS), which contains information about the name, date of birth, distinguishing marks, country of origin, data of his or her documents, profession, religion, ethnic group and state of health (§ 8 (1) Federal Basic Welfare Support Act). It is run by the Ministry of the Interior, and is separate from the registration system for aliens, but authorities may use data from the aliens registration system.

There is also a “Central Procedure Database” which comprises information on applications, decisions and legal remedies of asylum seekers and authorises asylum authorities to share information acquired by them on this database (§ 56 Asylum Act 2005).

Moreover, there is an electronic database called “Asylum Seekers Information System” (*Asylwerberinformationssystem*, AIS), which is a part of a larger information system of the Ministry of the Interior (“electronic criminal police information system”, *elektronisches kriminalpolizeiliches Informationssystem*) which comprises also the aliens information system and Schengen information system (EKIS/FIS/SIS). AIS contains information eg on procedural stages, registered place of residence, police measures (arrest, detention) etc.

**Q.20. Residence of asylum seekers<sup>53</sup>:**

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<sup>52</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>53</sup> Nota bene: the case of detention is covered by other questions and should be ignored under this question.



**A. Is in principle an asylum seeker free to move on the entire territory of your Member State or only to a limited part of it and in case, which part? (see article 7, §1 which is a mandatory provision)**

Until the decision on admissibility, but for 20 days at the longest, the asylum seeker's residence is only tolerated within the administrative district he or she is living in. His or her stay is tolerated on the whole territory if this is necessary to fulfil legal duties, if he or her has been summoned by a court or an administrative authority or if it is necessary for medical care or treatment (§ 12 (2) Asylum Act 2005).

At a later stage, the asylum seeker's freedom to move can be limited to a certain area, which must be at least the area of an administrative district, if the right to residence is withdrawn ("prohibition of return", *Rückkehrverbot*, § 62 Aliens Police Act), because the asylum seeker represents a risk to public order and security or other reasons cited under Art 8 paragraph 2 ECHR. In this case he or she may not be deported.

Restriction to a district may also be a more lenient measure when detention would be legitimate.

According to NGOs there are no reports that this measure would often be invoked in practice.

**B. About the place of residence (see §2 of article 7): explain to which extend the person is free to choose her residence and if this depends of the stage of the asylum procedure (for instance before and after admissibility); if there are constraints limiting the choice, explain which ones and their reasons (for instance processing of application, attribution of reception conditions,...).**

There is no choice for needy asylum seekers to choose their place of residence, but they are assigned to a certain place by the authorities. In the admissibility procedure, they have to stay in a federal care facility, and after that decisions on the distribution of asylum seekers to the Laender are taken by the coordination office of the Federal Asylum Office with the consent of the Laender according to their quota and depending on availability.

The procedure to be applied by the coordination office is not laid down by law, and no more information on a possible different legal basis or on the practical functioning of the office could be gathered. Of course, the coordination office is also bound by the Austrian constitution and therefore has to take decisions individually and objectively (under the constitutional equality principle). When assigning asylum seekers to a specific place of residence it also has to find an agreement with the Land concerned which also has an interest that asylum seekers fit within the social structure already existing.

Generally the Laender grant benefits only to asylum seekers whose place of residence is in the territory of the Land<sup>54</sup>. If an asylum seeker moves to a certain Land individually, he or she is theoretically entitled to reception conditions under most of the respective Laender Acts. Lower Austria (§ 8 (1) No 4 and 5), Salzburg (§ 5 (1) No 2 and 3) and Upper Austria (§ 3 (2) No 1 and 2) declare this to be a reason for exclusion from benefits. Carinthia requires that an asylum seeker has been assigned to the Land by the coordination office, but provides for an individual decision to take also other asylum seekers into care (§ 1 (2) Carinthia Basic Welfare Support Act). In other Laender, however, the asylum seeker may also be excluded from reception conditions in this case being regarded as not needy since he or she could get

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<sup>54</sup> § 3 (2) Burgenland, § 3 Lower Austria, § 2 (1) Carinthia, § 3 (3) Styria, § 4 lit c and § 2 (3) Tyrol, § 1 (1) Upper Austria, § 2 (1) Vienna and § 7a (1) Vorarlberg.

support from other resources.<sup>55</sup> Only Vienna does not grant an entitlement to reception conditions and has issued a regulation that no asylum seekers will be taken into care who have not been residing in Vienna before 1<sup>st</sup> May 2004 (see above Q.10.).

In the legislation of some of the Laender, the right to a specific form of accommodation is explicitly excluded (Lower Austria § 7 (3); Salzburg, § 2 (3), Upper Austria § 1 (2), Burgenland concerning the right to a specific place of residence § 5 (4)).

- C. **About the place of reception (meaning where the asylum seeker has to stay to benefit from reception conditions) (see § 4 of article 7): explain which are the general rules about the determination of this place (to which extend are the decisions determining the place taken individually and do they take into account the personal situation of the asylum seeker?) and to which extend the person is free to choose it and if it depends of the stage of the asylum procedure (for instance before and after admissibility); if there are constraints limiting the choice, explain which ones and their reasons (for instance attribution of reception conditions, processing of the application,...).**

There is hardly any choice for needy asylum seekers<sup>56</sup>. Upon making an application, asylum seekers are arrested and are taken to one of the initial reception centres by the authorities. Asylum seekers who are residing on Austrian territory legally might choose one of them to have their applications recorded, but this is a fairly infrequent case.

Under Art 3 paragraph 2 Basic Welfare Support Agreement the Federation is obliged to install a coordination office whose task it is to distribute asylum seekers to the Laender. After an application has been declared admissible, the coordination office will assign the asylum seeker to a certain place of reception in one of the Laender with the consent of the Land in question. There is no formal decision and therefore no right to file a remedy against this decision. However, the authority is of course bound by constitutional requirements to decide individually and objectively.

Rules for the distribution are laid down in the Federal Welfare Support Act and the respective Laender Acts:

Under the Federal Welfare Support Act (§ 2 (2)), the decision on the place of residence of the asylum seeker has to take into account family relations, the special needs of single women and minors, and ethnic particularities.

The Basic Welfare Support Agreement obliges the federal entities to take into account family unity when providing accommodation to asylum seekers (Art 6 paragraph 1 No 1) and to grant special conditions to unaccompanied minor refugees (Art 7 paragraphs 1 and 2). These provisions have been taken over by the Laender Acts (see above Q.12.).

An asylum seeker may apply for the right to move to another care facility, then the government has to give its consent – if the asylum seeker wants to move to another Land, the government there must give its consent, too. If an asylum seeker leaves the assigned place of reception, reception conditions may usually be withdrawn because the asylum seeker is not considered to be in need of help anymore.

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<sup>55</sup> Information given by the UNHCR Office in Austria.

<sup>56</sup> Persons who address themselves to an Initial Reception Centre will usually be accepted there.

The asylum seeker may also apply for permission to move from an accommodation centre to individual accommodation, though there is no such procedure foreseen by the Laender Acts, and some Acts stipulate explicitly that there is no right to a specific form of reception conditions (§ 7 (2) Lower Austria and § 1 (2) Upper Austria). Such permission is seldom given. Apparently some Laender only accept such a change in accommodation after a certain waiting period which is not laid down by law.<sup>57</sup>

**D. If all asylum seekers are not placed in accommodation centres because of capacity limits, explain how the persons are distributed between accommodation centres and other accommodation facilities (which authority takes the decisions, on the basis of which elements, can that decision be appealed by the asylum seeker,...)<sup>58</sup>**

Before the entry into force of the new legislation, the Austrian Red Cross and several NGOs created emergency facilities (*Notquartiere*), asylum seekers who were denied access to other care facilities because of capacity limits could turn there. Under the new legislation the Federation is obliged to provide for the initial reception of asylum seekers and may outsource this task (Art 3 paragraphs 1 and 5 Basic Welfare Support Agreement). The Federation is also responsible for creating contingency capacities with a view to meeting accommodation shortages in the Laender (Art 3 paragraph 4). At the moment the number of places seems enough. There are no rules on a formal procedure for the distribution of places yet.

**E. How can an asylum seeker ask to leave temporarily the place of residence or of reception or an assigned area? How is the individual AND impartial character of the decision ensured? (see §5 of article 7 which is a mandatory provision)**

An asylum seeker who is restricted to the area of the administrative district during the first 20 days of the admissibility procedure does not need a permission to leave the assigned area, if this is necessary to fulfil legal duties, when he or she is summoned to a judicial or administrative authority or when it is necessary for the provision of medical care and treatment (§ 12 (2) Asylum Act 2005). There is no provision allowing other exceptions. If the asylum seeker leaves the assigned area, he or she is no longer tolerated on the territory and may thus be arrested and taken back to the district of his or her residence, and a fine may be imposed on him or her under the Aliens Police Act (§ 120).

The decision restricting the place of residence of an asylum seeker to an assigned area under § 62 Aliens Police Act has to be done by an individual formal decision (*Bescheid*) which can be appealed. There is no possibility to apply for a permission to leave the assigned area, but a stay outside the assigned area is not considered an infringement, if it was necessary, especially for the purpose of medical treatment or the fulfilment of other legal obligations (§ 121 Aliens Police Act).

For both categories, this means that if an asylum seeker leaves the assigned area without such reasons foreseen by law, this constitutes an administrative offence. It will be determined during the administrative criminal procedure whether or not his stay outside the assigned area was necessary and therefore justified.

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<sup>57</sup> ICF II-Report, p 24.

<sup>58</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

An asylum seeker may not leave his assigned place of accommodation for more than 24 hours according to the rules of the house for the federal care facilities, without giving reasons for his or her absence, otherwise he or she might be expelled from the care facility. The decision on withdrawal of federal care must be taken according to the procedure explained in Q.21.

**Q.21. A. Do rules on reduction or withdrawal of reception conditions exist in internal legislation and if yes in which cases (mention in particular if there are cases not foreseen by article 16, § 1 and 2 which are optional provisions)? Distinguish in your answer between cases of reduction and withdrawal and explain which conditions can be reduced and if access to emergency health care is always ensured as requested by article 16, §4, last sentence.**

Rules of reduction and withdrawal exist in the Federal and in the Laender legislation. Some cases mentioned there are not foreseen in the Directive. Hardly any of them make a distinction between cases in which reception conditions can be withdrawn or restricted, nor do they state explicitly which forms of restrictions can be imposed. Since all the benefits foreseen in the Basic Welfare Support Agreement must be considered necessary to satisfy basic needs, the only thinkable restriction of benefits can be the restriction or withdrawal of pocket money.

In all of the Acts, access to **emergency health care** is guaranteed.<sup>59</sup>

Under the Federal Welfare Support Act and several of the Laender Acts reception conditions can be withdrawn, restricted, or legal restraints can be imposed, when:

- an asylum seeker represents **a risk** to the order of the care facility (with or without a reference to a continuous severe violation of the rules of the house of a care facility) (§ 2 (4) No 1 Federal Welfare Support Act; Burgenland § 5 (3) No 1; Carinthia § 3 (3); Salzburg, § 9 (1) No 3; Styria § 4 (3) No 1; Tyrol § 5 (3) lit a; Upper Austria § 3 (2) No 6; Vienna § 3 (3); Vorarlberg § 7a (5) lit b)
- an asylum seeker has been evicted from the care facility by a police organ under § 38a Security Police Act (Sicherheitspolizeigesetz, [Ref No 1/14](#)). Under this provision, a police organ may evict a person from a place of accommodation and its neighbourhood if there has been an **aggressive attack** before and an attack against life, health or freedom of another person is to be expected. (§ 2 (4) No 2 Federal Welfare Support Act; Burgenland § 5 (3) No 1; Carinthia § 3 (3); Styria § 4 (3) No 2; Salzburg § 9 (1) No 2; Tyrol § 5 (3) lit c; Vienna § 3 (3, second indent); Vorarlberg § 7a (5) lit b, second indent)
- an asylum seeker has been convicted of an **exceptionally serious crime** and therefore represents a risk to the community (§ 2 (5) Federal Welfare Support Act; Carinthia § 5 (3) lit d; Salzburg, § 9 (1) No 1; Upper Austria § 3 (2) No 9, all in connection with § 6 Asylum Act 2005)

Other Acts stipulate the condition that a reason for exclusion from asylum under § 13 of the Asylum Act 1997 is given, which refers to exclusion grounds under Art 1 F of the Geneva Convention (§ 13 (1)) and allows for exclusion from asylum when an alien for cogent reasons constitutes a danger to the security of the Republic or when he or she has been convicted of a particularly serious crime and, by reason of such punishable act,

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<sup>59</sup> Federation § 2 (4); Burgenland § 5 (5), Carinthia § 3 (4), Lower Austria § 10, Salzburg § 9 (2), Styria § 4 (5), Tyrol § 5 (3), Upper Austria § 3 (4), Vienna § 3 (4) and Vorarlberg § 7a (5).

represents a danger to the community (§ 13 (2); Carinthia § 3 (3)<sup>60</sup>; Styria § 4 (3) No 3; Vienna § 1 (5); Vorarlberg § 7a (5) lit c, with a reference to Art 2 paragraph 4 Basic Welfare Support Agreement)

- an asylum seeker resorts to **severe violence**. (Tyrol § 5 (3) lit b)
- an asylum seeker displays **unacceptable behaviour** vis-à-vis other residents or the management of the care facility. (Upper Austria § 3 (2) No 6, second indent)

Moreover, asylum seekers may be excluded from reception conditions if they:

- are nationals of an EU member state or of Switzerland, Norway, Iceland or Liechtenstein § 3 (1) No 1
- do not comply with requests to provide **information on their identity and their need for support**, or refuse to cooperate in the asylum procedure (§ 3 (1) No 2; Burgenland § 5 (3) No 3; Salzburg § 9 (1) No 8; Upper Austria § 3 (2) No 3 and No 7; Vorarlberg § 7a (5) lit a);
- lodge an application for international protection within six months after a final decision of an **earlier application** (successive applications) § 3 (1) No 3; Burgenland § 5 (3) No 4; Salzburg § 9 (1) No 5; Upper Austria § 3 (2) No 4;
- **do not cooperate** in the establishment of the facts necessary to carry out the asylum procedure § 3 (1) No 4;
- **have abandoned** the assigned place of accommodation for more than three days or do not reside there regularly (Burgenland § 5 (3) No 5, Salzburg § 9 (1) No 4)

In Lower Austria (§ 9 (3) No 5), Salzburg (§9 (1) No 7) and Upper Austria (§ 3 (2) No 10) reception conditions may be withdrawn or reduced if an asylum seeker unjustifiably **refuses to take up an employment**.

In Lower Austria (§ 8 (1) No 2) reception conditions may not be granted if benefits of welfare support or comparable benefits are being granted or must be granted by other persons or institutions or offices. In Upper Austria (§ 3 (2) No 11) reception conditions may be withdrawn or refused if a third party is obliged by law or contract to provide similar benefits. In other Laender persons who are entitled to benefits from other sources would most probably not be considered needy.

The provision that reception conditions shall not be granted when a **third party is granting benefits** has come in for criticism in Upper Austria, because it excludes reception conditions especially when eg an NGO is in fact providing reception conditions, and therefore apparently has been deleted in the Government Bill.

In Salzburg (§9 (1) No 6) reception conditions may be withdrawn or refused if an asylum seeker continuously uses the money paid in cash for purposes other than originally intended.

In Lower Austria (§ 10) and Upper Austria (§ 3 (3)), decisions must be taken individually under consideration of the **proportionality** principle taking into account the specific situation and the question whether the asylum seeker is a specially vulnerable person. The Vienna Basic Welfare Support Act refers to Art 1 paragraph 2 Basic Welfare Support Agreement in case of withdrawal, refusal or restriction of benefits, the Carinthian Act refers to its § 1 (3), both provisions referring to the provisions of the Directive.

The provisions on **Lower Austria** are so elaborated that they would take one page to be displayed here. Since the person responsible for drafting the law expects that the Government

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<sup>60</sup> The provision also mentions § 6 (1) No 4 which also refers to a serious crime as mentioned in the other provisions.

Bill will possibly be changed on that point and that reasons for refusal or withdrawal of reception conditions may be deleted because of their incompatibility with the Directive<sup>61</sup>, it does not seem reasonable to give the details here. Lower Austria distinguishes cases in which reception conditions must be refused (eg when the legal requirements for granting benefits are not fulfilled, when the system of assignment by the cooperation office is not respected, but also in Dublin II-cases) and cases in which reception conditions may be refused (eg in case of repeat applications, but also when there are reasons to believe that the asylum seeker will represent a risk to life, health or property in the care facility). In addition, it distinguishes cases in which reception conditions must be withdrawn (in some of the above mentioned cases or when it comes up that the asylum seeker has financial means), and in which they can be withdrawn or restricted (eg for reasons which would allow refusal; for failure to cooperate in the procedure, unacceptable behaviour vis-à-vis other residents, if a person who has a dangerous disease refuses to undergo a medical screening).

**B. Has article 16, §2 dealing with refusal of reception conditions for unreasonably late applications for asylum been transposed by your Member State (or was this case already applicable before transposition)? Are there cases in practice<sup>62</sup>?**

It has been transposed only by Lower Austria (§ 8 (2) No 1) and Upper Austria (§ 3 (2) No 5): In case of late applications there is no legal entitlement to benefits anymore in these Laender, but a margin of appreciation is left to the Laender Government. In other Laender it can be assumed that in such cases asylum seekers would be considered not needy because they had been able to support themselves on other means before filing an application. There is no information whether there are cases in practice.

**C. How is it ensured that decisions of reduction or withdrawal are taken individually, objectively AND in particular impartially (for instance through and independent arbitrator) (see article 16, §4 which is a mandatory provision)?**

In the Federation and the Laender, decisions on reduction or withdrawal have to be taken individually by the administrative authorities (the administrative district authorities or more often the government itself, depending on the Land). According to most of the Laender Acts<sup>63</sup>, a formal written decision (*Bescheid*) has to be issued only when the asylum seeker asks for it. The procedure is determined by the Austrian Administrative Procedures Act (Allgemeines Verwaltungsverfahrensgesetz; AVG, [Ref No 1/13](#)) which grants basic procedural guarantees. § 7 lays down the impartiality principle and § 58 (2) states that decisions which do not fully acknowledge claims must always be reasoned. Several Laender Acts provide for additional requirements for the procedure.<sup>64</sup> The Federal Basic Welfare Support Act – which is applicable in the admissibility stage of the procedure – also asks for a previous interrogation of the asylum seeker if possible (§ 2 (6)).

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<sup>61</sup> Telephone interview with is the person responsible for drafting the Act in the Lower Austrian Government.

<sup>62</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>63</sup> Carinthia § 9 (3), Lower Austria § 17 (3) (as far as accommodation, food, pocket money, clothing and health insurance are concerned), Salzburg § 15 (1) (as far as accommodation, food, clothing and emergency healthcare are concerned), Styria § 14 (4), Tyrol § 21 (2), Upper Austria § 4 (1). In Vorarlberg, decisions on denial, withdrawal or restriction of reception conditions always have to be taken by formal decision (§ 7a (6)).

<sup>64</sup> A decision can only be taken after a hearing of the asylum seeker in Burgenland (§ 5 (3)), Tyrol (§ 21 (1)) and Carinthia (§ 9 (4)).

In Vienna, decisions on withdrawal are not taken formally under the Administrative Procedures Act because the institution responsible for granting and withdrawing benefits, the Fond Soziales Wien, does not have competences as a public authority. Decisions are subject to the substantive requirements laid down by the Basic Welfare Support Act. Of course the authority, when fulfilling official duties, is also bound by the Austrian constitution and especially the equality principle, asking for an objective and impartial decision. The Government is responsible for the supervision of the staff of the fund but has no decision-making authority.

- D. Is statement 14/03 adopted by the Council at the same moment as the Directive respected (see the documentation pack you received at our meeting in Brussels in April)?

Since the ECHR has the status of Constitutional Law in Austria, it must be respected in all administrative decisions, decisions on withdrawal can be challenged before the Constitutional Court, if the asylum seeker alleges a breach of Art 3 or Art 8 ECHR. If reception conditions are withdrawn, emergency healthcare must be granted (Federal and all Laender Acts).

In cases where there is no legal basis at present or where decisions are not taken under the Administrative Procedures Act, the Supreme Court may also become involved, because it is competent to rule on claims for compensation for violations of Community Law (see the case brought before the civil court as described at Q.21.E.). The Supreme Court also has to take into account constitutional law in its decision-making, even if it has no competence to rule on constitutional matters.

In some Laender (eg Vorarlberg<sup>65</sup>) asylum seekers will receive social aid, when material benefits have been withdrawn; in some Laender (eg Upper Austria, where asylum seekers are not entitled to social aid, § 6 (3) Social Aid Act) benefits are usually entirely withdrawn, so that the asylum seeker is deprived of any financial substance to live on.

- E. Are there already administrative appeal decisions or judgements on cases of reduction, withdrawal or refusal which have been taken, and if yes, what has been the outcome<sup>66</sup>?

One decision on the merits is accessible on the website of the Independent Administrative Tribunal for Upper Austria (<http://www1.land-oberoesterreich.gv.at/uvs/> (search page)).

The Independent Administrative Tribunal – acting as second instance in application of the Federal Basic Welfare Support Act, because the initial reception centre East (Thalham) is situated in Upper Austria – repealed a decision on withdrawal of reception conditions following an appeal. The appellant claimed that an aggressive attack he was said to have committed had never occurred, a fact that was confirmed by the alleged victim. (The victim was allegedly thrown out of the first floor of the care facility into a snow hump while he said he had jumped himself for fun). The Tribunal held that the authorities had failed to carry out an investigation procedure, but only took over the very short official note remitted by the police officer who had investigated the incident, although the evidence was unclear. Moreover, it had failed to adequately reason its decision as to why the appellant had severely violated the rules of the house and why there was imminent danger emanating from him so

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<sup>65</sup> Information given by the competent administrative authority (Bezirkshauptmannschaft) for Bregenz.

<sup>66</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

that his further stay in the premises was considered unacceptable. The authority had also not explained why in the interest of public welfare for reasons of imminent danger the exclusion of the suspensive effect of the appeal was deemed necessary.

In September 2005 the Constitutional Court had denied its competence to rule on claims for benefits based upon the fact that the Directive had not been transposed and referred claimants to the ordinary civil courts to claim compensation from the Laender or the Federation, depending on the benefit they intended to claim (with the Supreme Court (Oberster Gerichtshof) as last instance court). The civil courts are competent to decide on cases of state liability for failure to transpose Community law, if damage has been caused by an act of an administrative authority or a court. If damage has been caused because of a decision of an administrative authority on an application for a work permit, the Federation is accountable (because under the Constitution employment is a federal competence). The Land (in the present case: Tyrol) is accountable for decisions taken by the authorities on the amount of social aid (a constitutional competence of the Land), irrespective of whether the asylum seeker is entitled to benefits or not (see above at Q.9., VfGH 26.9.2005, A 10/05).

A case has been brought before a civil court in Linz/Upper Austria in April 2006 by an Austrian lawyer who claims benefits for a client from the Land Upper Austria (where at current there is no legal basis for reception conditions). The claimant, who had been living in a care facility in Linz, had been evicted from care for reasons he is contesting in the action brought before the court. At current, he is living with a relative. No other benefits are being granted to him, and apparently he is not insured in the health insurance system anymore. He argues that the Directive is directly applicable and that he therefore has a right to be taken up in the care system again, claiming material benefits for the future and compensation for the time he has been without welfare support.<sup>67</sup>

**Q.22. A. Appeal against a negative decision relating to the granting of benefits or based on article 7 (see article 21 which is a mandatory provision): indicate against which decision an appeal can be introduced, describe the system of appeal in general and include in particular in your answer the information given to asylum seekers about possibilities of appealing, deadline for appealing, if the appeal has or not a suspensive effect, if there are different steps (for instance first an administrative appeal and in particular if the guarantee of an appeal before a judicial body in the last instance is respected)?**

Under Austrian legislation, as has been indicated above at Q.3. and Q.15., there are two possibilities for the public authorities to act: legislation can either foresee that they must act under administrative law, then they have to follow the rules of the General Administrative Procedures Act, leading to an appeals procedure before administrative appeals authorities or tribunals and allowing for complaints to the High Administrative and Constitutional Courts. But – especially when it is about granting benefits to which an applicant shall not be entitled – legislation might also authorise them to act under private law. In such cases there is generally no legal remedy. However, under the recent jurisdiction of the Supreme Court in the case of benefits granted on a private law basis (see above at Q.3.), it seems to be accepted that the equality principle requires that benefits be granted equally to all applicants fulfilling the criteria set by law. Therefore, in case of withdrawal or refusal of reception conditions, an

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<sup>67</sup> Information given by the claimant's legal representative.



asylum seeker may file an application for (re)admission to the care facility before the civil court, against whose decision an appeal is possible. In such procedures, interim measures may also be applied for.

The civil courts are also competent to decide claims for compensation for failure to transpose the Directive in those Laender where currently a legal basis does not exist (see above at Q.21.E.)

This Austrian administrative specific renders the situation relatively complicated. However, the appeals procedures and problems arising in the field of reception conditions should be pointed out in the following.

Appeals against all formal decisions by administrative authorities are brought before Independent Administrative Tribunals (according to the Federal and Laender Basic Welfare Support legislation<sup>68</sup>) These are situated in the Laender and meet the requirements of Art 6 ECHR. They decide in the last instance, against their decision, which is considered final, a complaint before the High Administrative Court is possible.

Only Vienna does not provide for an appeal, because decisions of the Fonds Soziales Wien are not taken formally under the Administrative Procedures Act. Here, an application for readmission before a civil court can be possible in cases of withdrawal of reception conditions<sup>69</sup>, but it must be remembered for cases of refusal that Vienna requires that an asylum seeker should have been resident in the territory before 1<sup>st</sup> May 2004.

The decision on assignment of an asylum seeker to a certain place in a Land cannot be appealed by him or her, since it is only communicated to him informally (§ 6 (1) Federal Basic Welfare Support Act).

In cases where after a positive decision on admissibility a decision on assignment of an asylum seeker to a certain Land is not taken (as described above at Q. 15), NGOs state that it happens regularly that asylum seekers are dismissed from federal care after two weeks. In this case, a legal remedy against the Federation would be vain, lacking federal competence under the Constitution.

But also the Laender refuse to grant reception conditions in such cases to asylum seekers who have not been assigned to them by the coordination office. Where the decision comes under private law, an application for admission before a civil court is possible. If the Land issues a negative formal administrative decision, an appeal is possible. However, in some Laender<sup>70</sup>, the assignment decision is a prerequisite for granting welfare support (see above at Q.20.B.), there a legal remedy against a negative decision would not have any effect. In other Laender, the assignment is no legal requirement. However, according to NGOs also those sometimes refuse asylum seekers without taking a formal decision, although they might be obliged to do so under their respective Welfare Support Acts. In such cases, the only remedy against inaction of the authority is laid down in § 73 of the Act (Devolutionsantrag), but can only be filed after a period of six months.

It seems unclear whether the asylum seeker has a possibility to oblige the coordination office to take a assignment decision, since this requires the consent of the Laender.

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<sup>68</sup> Federation § 9 (2), Burgenland § 11 (5), Carinthia § 9 (5), Lower Austria § 19 (1), Salzburg § 16 (3), Styria § 14 (2), Tyrol § 20 (2), Upper Austria § 4 (2), Vorarlberg § 15 (8) iVm UVS-G.

<sup>69</sup> § 1 Act on the Jurisdiction of the Civil Courts (Jurisdiktionsnorm).

<sup>70</sup> Carinthia (§ 1 (2) lit a); Lower Austria (§ 8 (1) No 4 and 5); Salzburg (§ 5 (1) No 2 and 3); Upper Austria (§ 3 (1) No 2).

According to the Administrative Procedures Act a formal decision always has to contain the information on possibilities of appeal (§ 61). An appeal against a formal administrative decision (*Bescheid*) has to be submitted within two weeks from the date of delivery of the first instance decision (§ 63 (5)).

According to the Administrative Procedures Act an appeal usually has suspensive effect. Suspensive effect of an appeal can be excluded by the authority adopting the decision if early enforcement is in the interest of a party or for the common good because of imminent danger. (§ 64 Administrative Procedures Act).

Under the Federal Basic Welfare Support Act (§ 9 (3)), in Burgenland (§ 11 (5)) and Upper Austria (§ 4 (3)), suspensive effect can be granted in this case by the Independent Administrative Tribunal. Suspensive effect is excluded explicitly in Lower Austria (§ 19 (1) draft proposal for a Basic Welfare Support Act).

**B. Explain which are the possibilities for asylum seekers to benefit from legal assistance when they introduce such an appeal (see article 21, §2 which is a mandatory provision but leaves space to Member States)?**

During the admissibility procedure, asylum seekers have the right to assistance provided by a legal advisor in the initial reception centre (§ 64 Asylum Act 2005; *Rechtsberater*), their obligation, however, is to assist asylum seekers in the admissibility procedure, but they can also provide information in such cases. During the procedure on eligibility at the Offices of the Federal Asylum Office asylum seekers can seek the assistance of a “refugee advisor” (§ 66 Asylum Act 2005, *Flüchtlingsberater*) – the latter, however, only have limited resources<sup>71</sup>. No legal assistance (*Verfahrenshilfe*) is foreseen for persons who do not have the means to pay for a legal advisor in the second instance procedure. Only when a case is brought before the High Administrative Court, legal aid can be granted by the Court upon application (§ 61 High Administrative Court Act), and a lawyer will be provided by the Bar Association. Legal aid can be granted by the Independent Administrative Tribunals only in administrative criminal procedures.

If a case is brought before a civil court (eg in Vienna), legal assistance (*Verfahrenshilfe*) can be granted according to § 63 ff of the Rules on Civil Procedures (*Zivilprozessordnung*).

**C. Are there already administrative appeal decisions or judgements which have been taken and if yes, which are the main important ones<sup>72</sup>?**

There are no decisions under the new legislation. Apparently several Independent Administrative Tribunals intend to challenge their competence as second instance before the Constitutional Court, arguing that the competent authority under the constitution would be the Independent Federal Asylum Tribunal. They have done so under the old legislation, but the Constitutional Court did not rule on the question.

**D. Is a mechanism of complain for asylum seekers about quality of receptions conditions in general (even if they are not personally concerned) organised? If yes, before which authority? Is it linked to the**

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<sup>71</sup> Information given by the UNHCR Office in Austria.

<sup>72</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

system of guidance, control and monitoring of reception conditions (see below question n° 39)?

The possibilities of complaint depend on the system of care. In federal care facilities, there is no formal mechanism of complaint. Complaints can be made anytime before employees, NGOs or legal advisors<sup>73</sup>.

In the Laender the situation depends on the organisation of the care system. Usually there are regular controls of the care system effected by social counsellors and/or government officials. In Salzburg there are regular controls of the care facilities effected by officials. Complaints will often be made before the social counsellor who will forward the information on the circumstances of the case to the Government. In Vorarlberg, Caritas has introduced an internal management system for complaints, reaching from individual counsellors to heads of department and then to the Government. In Lower Austria, asylum seekers can complain at the counselling centres or directly at a specific office at the Government of Lower Austria, in Vienna there is a complaint procedure before the responsible institution, the Fonds Soziales Wien.

Apparently the way in which the different offices deal with these complaints is very different.<sup>74</sup>

## **6. RIGHTS AND OBLIGATIONS OF ASYLUM SEEKERS**

**Q.23.      Family unity of asylum seekers: define how a family is defined in relation with article 2, (d) which is a mandatory provision and explain how housing is provided to a family (see articles 8 which is a mandatory provision but leaves space to member States and 14, §2, (a) which is a mandatory provision).**

Most of the Basic Welfare Support Acts do not define the term “family”. In the Asylum Act 2005 and the Aliens Police Act the definitions cover only spouses and minor children. Lower Austria also provides a similar definition (§ 2 (1) No 5). In Upper Austria the definition is the same as in the Directive, covering stable relationships outside marriage (§ 2 (1)). The Austrian aliens legislation also does not treat unmarried partners like married couples.

Practice shows that the authorities are more generous, and housing is provided also to more distant relatives in one place, as far as possible. The only case where families are often separated is in procedures in which the Dublin II Regulation is applied. Often, adult male family members are detained while women and children are not.<sup>75</sup>

All Basic Welfare Support Acts have taken over the provision of Art 6 paragraph 1 No 1 Basic Welfare Support Agreement which stipulates that housing must be granted with respect to family unity<sup>76</sup>.

**Q.24.      A.      How is housing of asylum seekers organised: describe the system in general and indicate in particular what is the most frequently system used**

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<sup>73</sup> Information given by Ministry of the Interior.

<sup>74</sup> Information given by NGOs.

<sup>75</sup> ICF II-Report, p 14.

<sup>76</sup> By general reference to the Basic Welfare Support Agreement in § 2 (1) and § 1 No 3 Federal Basic Welfare Support Act; § 1 (1) draft proposal for Upper Austria and § 7a (1) Vorarlberg Social Aid Act; and explicitly in § 4 (1) No 1 Burgenland Care Act; § 3 (1) No 1 Carinthia Basic Welfare Support Act; § 1 (2) draft proposal for Lower Austria, § 2 (1) No 2 draft proposal for Salzburg; § 4 (1) No 1 Styria Care Provision Act; § 5 (1) lit a Tyrol Basic Welfare Support Act; § 3 (1) No 1 Vienna Basic Welfare Support Act.

**(see article 14, §1 which is a mandatory provision but leaves space for Member States; distinguish between accommodation centres, private houses and apartments, hotels places or other premises).**

There are four federal care facilities, among which two big initial reception centres and two smaller facilities.

In the Laender a combination of different premises exists. The usual differentiation made in Austria is between organised accommodation centres and organised private facilities. Accommodation centres exist only in some of the Laender and are generally rather small; most asylum seekers live in organised private hotels and guesthouses or flats that have been adapted for the accommodation of asylum seekers.

The statistics only differ between organised accommodation and individual accommodation in private flats organised by the asylum seekers themselves. Individual accommodation is scarce in the Laender, frequent only in Lower Austria and Vienna<sup>77</sup> (see Q.10.).

- B. What is the total number of available places for asylum seekers?<sup>78</sup> Distinguish in your answer between accommodation centres, private houses and apartments, hotels or other premises.

Federation: 1423 (initial reception centres and federal care facilities)

Laender: 29.200 (16.000 in accommodation centres and 13.200 in organised private premises)<sup>79</sup>

- C. Is this number of places for asylum seekers sufficient in general or frequently insufficient?<sup>80</sup>

The total number seems to be sufficient<sup>81</sup>, especially since the amount of applications for international protection has decreased. However, the quotas set by the Basic Welfare Support Agreement internally are not met, which leads to political difficulties within the federal system.

- D. Are there special measures foreseen in urgent cases of a high number of news arrivals of asylum seekers (outside the case of application of the directive on temporary protection)?

see Q. 32 B und C

Art 3 paragraph 4 Basic Welfare Support Agreement obliges the Federation to create contingency capacities in the Laender for cases of accommodation shortages. According to § 11 Federal Basic Welfare Support Act, the Ministry of the Interior must create these capacities to cope with unpredictable and inevitable shortages of places in the Laender. It may

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<sup>77</sup> Information given by NGOs.

<sup>78</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>79</sup> Information given by Ministry of the Interior.

<sup>80</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>81</sup> Information given by NGOs and the Ministry of the Interior.

therefore declare military camps a care facility by regulation. No other specific measures are foreseen.

Q.25. Accommodation centres (**important note: all the following questions are about open and not closed centres where asylum seekers are detained which are covered by another question**)

A Are there different categories of accommodation centres, for instance depending of the stage of the procedure (admissibility and eligibility)?

To a certain extent there are different categories depending on the stage of the procedure. Asylum seekers are, unless detained, accommodated in two big accommodation centres attached to the initial reception centres<sup>82</sup> during the beginning of the admissibility procedure. If their applications are not admitted they may be transferred to one of the two other, smaller federal care facilities (especially in procedures where the Dublin II Regulation is applied, which often take longer).

Upon admission, they are transferred to smaller facilities in the Laender to undergo the eligibility procedure. Facilities in the Laender can be accommodation “centres”, which are by nature generally relatively small, or private guesthouses. These categories are however not linked to the stage of the procedure but come as the management systems of reception conditions and the infrastructure are different in the Laender.

For more detailed information on the repartition of duties between the Federation and the Laender see above at Q.10. and 11.

B. Is there a legal time limit for accommodation in a centre after which the asylum seekers have access to private houses or apartments or is this limit linked to a stage of the asylum procedure?

Asylum seekers remain in the federal care facilities for a maximum of 20 days (and probably longer up to 14 days, until a place in one of the Laender is found). In the Laender there are no time limits, but in practice it seems that the permission to move to private premises is seldom given and according to NGOs the authorities in the Laender have a general idea that asylum seekers should stay in accommodation centres for about half a year (or sometimes even a year) before moving to individual accommodation.<sup>83</sup>

B. Is there a general regulation about the internal functioning of those centres and the rights and duties of the asylum seekers? If yes, is this general regulation applicable to public and private centres? If not, are the centres supposed to adopt an internal regulation and does a central authority have or not a kind of control about its content?

In all the premises there are rules of the house, provided for by the management of the care facility. There is no general rule applicable for all facilities. The Federation has issued rules of the house which are attached as **Ref No 1/4**, but no information could be gathered if these are still up to date or if they have been replaced by new ones with the new Basic Welfare Support Act. In addition, a regulation prohibiting entry to federal care facilities for unauthorised persons has been issued by the Ministry of the Interior. If the Governments of the Laender are responsible for organising reception conditions, they might decide on the rules of the house themselves (eg § 7 (3) Styria Care Act). Since they are also responsible for concluding

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<sup>82</sup> EAST in Traiskirchen and Thalham.

<sup>83</sup> Information given by NGOs, see also ICF II-Report, p 24.

contracts with NGOs and other service providers they do have at least an indirect influence on these rules. Above all, it is them who decide on withdrawal of benefits for the breach of such rules. Apparently the rules in the different premises are quite similar.<sup>84</sup>

- C. Do the regulations foresee the possibility of sanctions against asylum seekers in case of breach of the rules? (see article 16, §3) If yes, which sanctions for which rules? Which is the competent authority to decide? How is it ensured that decisions are taken individually, objectively and in particular *impartially* (for instance through an independent arbitrator) as requested by §4 of article 21 which is mandatory provision? Which are the possibilities of appealing against those decisions if the system is different from the general one under question n°22? Are there already administrative appeal decisions or judgements which have been taken and if yes, which are the main important ones?**<sup>85</sup>

The Basic Welfare Support Agreement authorises the federal entities to foresee sanctions in case an asylum seeker poses a threat to the order inside the care facility. The Federal Basic Welfare Support Act (§ 2 (4) No 1) and the rules of the house for the federal care facilities provide that in case of breach of the rules, reception conditions may be limited or withdrawn. A thinkable limitation can only be the withdrawal of pocket money, but no further information on a relation between breaches of rules and sanctions could be gathered. Sanctions are also foreseen in other rules of the house but these are in general not made public, so that there is equally not much information. Apparently in Styria, where the rules of the house are issued by the government, sanctions can be imposed by the (public) management of the facility and start at eg 5 Euro for minor violations.<sup>86</sup>

In case of violent behaviour, asylum seekers are usually expelled from the place of accommodation. If there are other difficulties between the management of the care facility and the asylum seeker, he or she is often transferred to another care facility.<sup>87</sup>

The formal decisions of the authorities fall under the same rules as in Q.21. C and 22.

- D. Are asylum seekers involved in the management of these centres? If yes, how (advisory board, appointment or election of representatives)? (see article 14, §6 which is an option provision)**

Asylum seekers are not officially involved. In individual guesthouses, asylum seekers may take over organisational duties (eg taking care of the keys of the premises etc), but there is no general custom. There is no organised form of representation of asylum seekers in the places of accommodation.

- E. Do specific rules exist on work of asylum seekers inside the accommodation centres different from the general ones about**

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<sup>84</sup> Information given by NGOs.

<sup>85</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>86</sup> Information given by NGOs.

<sup>87</sup> Information given by NGOs.

employment (see below)? If yes, which ones? Can working inside accommodation centres be considered as a (mandatory) contribution of the asylum seekers to the management of the centres, is it or not paid and considered as implying access to the labour market and subject to the same rules?

In the Federation and in most of the Laender asylum seekers can work on a voluntary basis inside the accommodation centres and are allowed to fulfil tasks which are directly linked to their accommodation and care (eg cleaning, kitchen, transport etc).<sup>88</sup> These works are generally remunerated, the amount depending on the management of the centre (€3 to 5 per hour, according to a federal regulation<sup>89</sup>). If there are eg cleaning plans and cleaning is limited to the asylum seekers' own rooms and the ordinary cleaning of the premises they are living in (especially in smaller facilities) it is usually not paid.

In Burgenland this form of work is considered mandatory.<sup>90</sup>

In addition, the Federation the Laender or the local authorities can draw on asylum seekers for non-profit services. These are usually also remunerated and can be rendered on a voluntary basis.<sup>91</sup>

According to § 7 (4) draft proposal for a Lower Austria Basic Welfare Support Act, asylum seekers are obliged to work as appropriate, and make the effort to look for adequate occupation. This also accounts for non-profit services. Their personal situation, age and health situation have to be taken into account.

All these possibilities for asylum seekers to work fall outside the legislation on aliens' employment and

**Q.26. A. How can asylum seekers communicate with legal advisers, representatives of UNHCR and NGOs? (see article 14, §2, (b) which is a mandatory provision).**

Since accommodation centres are not closed asylum seekers can always enter into contact with legal advisors, representatives of UNHCR and NGOs, though the costs of travel for this purpose are not foreseen by the benefits listed in the Federal and the Laender Acts. Moreover, it has to be remembered that during the admissibility procedure an asylum seeker's stay is only tolerated within the district of his or her residence. Social counselling is provided in all care facilities. Access to UNHCR is guaranteed under § 63 Asylum Act 2005. Moreover, these people cannot be excluded from permission to enter care facilities (see below at B.).

**B. What are the rules about access of legal advisers, UNHCR and NGOs regarding access to accommodation centres and other housing facilities (see article 14, §7 which is a mandatory provision)**

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<sup>88</sup> Eg § 7 (3) No 1 Federal Basic Welfare Support Act, Carinthia § 3 (8), Lower Austria § 1 (8), Styria § 4 (6) No 1; Vienna § 3 (5).

<sup>89</sup> ICF II-Report, p 16.

<sup>90</sup> § 6 (1) No 1 Burgenland Care Act.

<sup>91</sup> Burgenland § 6 (1) No 2, Carinthia § 3 (8), Styria § 4 (6) No 2.

The Federal Care Facility Entry Regulation (Ref No 1/3), issued by the Ministry of the Interior, provides that unauthorised entry to federal care facilities is prohibited, unless the person has a legitimate interest in such entry or stay. UNHCR personnel is always authorised to enter federal care facilities (§ 1 (2)). Moreover, legal advisors and representatives of NGOs are considered to have a legitimate interest in entering the care facility (§ 1 (3)). According to § 1 (3) No 2, organs or representatives of organisations in charge of providing care have a legitimate interest when they need to enter a care facility in order to provide these tasks. While the legal requirement appears to be that they must have been commissioned by the asylum seeker, NGOs do not seem to encounter big difficulties and even non-official confidants are usually granted access.<sup>92</sup> They need an entry permit which is issued by the management of the house between 8 am and 5.30 pm according to the federal rules of the house.

In most of the Laender access to accommodation centres is not limited. The only Land where there is a legal authorisation to issue a regulation on prohibition of entry is Styria (see § 7 (1)). Such a regulation has not (yet) been issued.

**C. Can the access of legal advisers, UNHCR and NGOs be limited for security reasons or any other reason (see article 14, §7, last sentence)?**

The access of persons with a legitimate interest as explained above cannot be limited. No information could be gathered on the Styrian regulation on prohibition of entry to care facilities. Apparently under the regulation access can be limited for NGOs.

**Q.27. A. Is a medical screening organised by the receiving State, is it mandatory or voluntary? Does it include HIV tests? (see article 9 which is an optional provision)**

There is a mandatory medical screening taking place in both initial reception centres. It includes an x-ray of the lungs and a test for tuberculin for children and pregnant women. It does not include a HIV test.

In addition, the voluntary visit of a doctor must be admitted in the initial reception centre.<sup>93</sup>

**B. Do the legal provisions on reception conditions ensure that asylum seekers receive at least emergency care and essential treatment of illness as requested by article 15 §1 which is a mandatory provision? Do they have a further access to health care?**

Every asylum seeker undergoing an asylum procedure in Austria and included in the system of reception conditions enjoys health insurance<sup>94</sup>. Health insurance covers all direct treatment costs. Additional costs for necessary treatment like psychotherapeutical care and other benefits not covered by the insurance can also be covered by reception conditions upon an

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<sup>92</sup> ICF II-Report, p 13.

<sup>93</sup> Information given by NGOs and Ministry of the Interior.

<sup>94</sup> Federation § 1 No 3, Burgenland § 4 (1) No 5, Carinthia § 3 (1) lit e, Lower Austria § 5 No 5, Salzburg § 6 (1) No 4 (the preliminary draft is speaking of necessary health care, in fact asylum seekers are in the insurance system), Styria § 4 (1) No 4, Tyrol § 5 (1) lit d, Upper Austria § 1 (1), Vienna § 3 (1) No 5, Vorarlberg § 7a (1) – reference to the Basic Welfare Support Agreement in the Federal Act, Upper Austria and Vorarlberg.



individual decision<sup>95</sup>. If reception conditions are withdrawn or restricted, access to emergency healthcare is guaranteed in the Federal and all Laender Acts.<sup>96</sup>

- C. What is the practice regarding access of asylum seekers to health care and how is it organised? In particular, what is the situation in accommodation centres (are doctors coming to the centres or do asylum seekers go to doctors outside)?<sup>97</sup>

The initial reception centre in Traiskirchen hosts four general practitioners, three doctors trained in psychology and two specialists (x-ray and lungs). Reception conditions cover also psychological care and other benefits not paid for by the health insurance system.<sup>98</sup>

In most other reception centres asylum seekers go out to see practitioners who would make referrals to specialist doctors as appropriate.

There are no doctors coming to the centres in a periodical way (only when they are called because of emergency cases). Frequently travelling costs to doctors and hospitals are to be paid by the asylum seekers themselves. The language barrier is also an important obstacle to adequate health care.<sup>99</sup>

**Q.28. A. What is the length of the period determined by the concerned Member State during which asylum seekers have no access to the labour market? (see article 11 which is a mandatory provision)**

Asylum seekers do not have access to the labour market during the first three months after an application has been registered, § 4 (3) No 7 Aliens Employment Act (Ausländer-Beschäftigungsgesetz, AuslBG, [Ref No 1/8](#)).

During this period, asylum seekers are also not allowed to work on the basis of self-employment (which is not covered by the Aliens Employment Act) according to § 7 (2) Federal Basis Welfare Supply Act.

- B. After that period, are asylum seekers or not obliged to obtain a work permit? In case is there a limit for the administration to deliver the permits and how quick are they delivered? What is their length?**

Yes, asylum seekers need a work permit (*Beschäftigungsbewilligung*) under the Aliens Employment Act, which has to be applied for by a possible future employer (§ 3 (1)). The authorities have to decide on first applications for regular work permits within six weeks (§ 20a).

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<sup>95</sup> Federation § 1 No 3, Burgenland § 4 (1) No 6, Carinthia § 3 (1) lit f, Lower Austria § 5 No 6, Styria § 4 (1) No 5, Tyrol § 5 (1) lit e, Upper Austria § 1 (1), Vienna § 3 (1) No 6, Vorarlberg § 7a (1) – reference to the Basic Welfare Support Agreement in the Federal Act, Upper Austria and Vorarlberg.

<sup>96</sup> All Acts speak of “emergency healthcare”, only Vorarlberg grants access to “emergency healthcare and the essential treatment of illnesses”. In practise, this differentiation in wording will not make a difference. Provisions are to be found in: Federation § 2 (4); Burgenland § 5 (5), Carinthia § 3 (4), Lower Austria § 10, Salzburg § 9 (2), Styria § 4 (5), Tyrol § 5 (3), Upper Austria § 3 (4), Vienna § 3 (4) and Vorarlberg § 7a (5).

<sup>97</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>98</sup> Art 6 § 1 No 6 Basic Welfare Support Agreement, taken over by the respective Federal and Laender legislation (see above at Q.12.A).

<sup>99</sup> Information given by NGOs.

Ordinary work permits can be granted for one year, work permits for professions which are usually limited to a specific time of the year (seasonal work) can be limited to the time necessary (§ 7 (1, 2)), but to a maximum period of six months. In this case, a second work permit cannot be issued immediately after an earlier work permit has expired

According to an administrative instruction issued by the Ministry of Economic Affairs and Employment, asylum seekers shall only be granted work permits for seasonal work. If a person has been working for 52 weeks within the last 24 months, he or she will be able to achieve an “ordinary” work permit under the above mentioned provision. This is the necessary period of work until an employee is entitled to unemployment benefits and is considered to be available on the labour market.<sup>100</sup> Given that this possibility can therefore only become relevant after two years, it should be reminded that access to the labour market is only open to asylum seekers as long as a final decision has not been taken (unless they have a residence permit on a different legal basis).

Other forms of work permits are not accessible to asylum seekers.

**C. After that period, what are the conditions for access of the asylum seekers to the labour market? (in particular, are there rules concerning the maximum allowed of working hours or days per week, month or year, limits in terms of type of work or of professions authorised?)**

Taking into account the limitation of asylum seekers to seasonal work, the priority for EEA and Turkish nationals (below at D.) and the fact that the work permit has to be applied for by the future employer, NGOs criticise that the present rules are so strict that in practice they exclude asylum seekers from the labour market.<sup>101</sup>

The general conditions for the granting of work permits are laid down in §§ 4 ff Aliens Employment Act (Ref No 1/8). According to § 4, a work permit has to be issued if the status and development of the labour market allow it and if no important public or economic reasons stand against it. According to § 4b (1) the labour market allows an employment of an alien if, for the vacation in question, no national and no other alien admitted to the labour market is available. In addition, a maximum number of aliens to be granted work permits per year are supposed to be set by the Federation and cumulatively by the Laender for enterprises on their territory. Among other conditions it has to be expected that the employer will employ the asylum seeker in his business and that rules on wages and working conditions will be respected.

There are no other rules on specific conditions of work.

**D. What are the rules in terms of priorities between asylum seekers on the one hand and nationals, EU or EEE citizens and legally third-country nationals on the other?**

In addition to the above mentioned conditions, there is priority for EEA citizens and Turkish nationals falling under the association agreement, as well as other third country nationals under certain conditions (eg when they are entitled to unemployment allowances or already have a work permit; § 4b (1)).

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<sup>100</sup> Information given by a member of the Upper Austrian Chamber of Labour (Arbeiterkammer Oberösterreich).

<sup>101</sup> ICF II-Report, p 16.

**E. Do asylum seekers have access to vocational training, does this or not depend of their right to access to the labour market, and in case at which conditions? (see article 12 which is optional regarding §1 and mandatory regarding § 2)**

There are no rules excluding asylum seekers or other aliens from vocational training. However, access to vocational training is linked to the availability of a person on the labour market. The “Labour Market Service” (Arbeitsmarktservice, AMS) is an institution installed by law which fulfils public duties on the one hand (eg payment of unemployment benefits) and provides other services. According to § 32 of the Act on the Labour Market Service (Arbeitsmarktservicegesetz, AMSG), the institution has to provide its services with a view to placing unemployed persons in vacancies, securing employment and securing the subsistence of unemployed persons. The target of the AMS must be to aim at combining the markets of demand and supply of the workforce and thus to secure the employment of all persons who are available on the Austrian labour market (§ 29 AMSG). The competent offices of the AMS only afford access to courses to asylum seekers who are within the system of unemployment benefits, thus who have been working at least 52 weeks during the last 24 months. Moreover, a right to legal residence on the territory is necessary for being considered available on the labour market, it is not sufficient if an asylum seeker is only being *tolerated*. Since asylum seekers are not integrated into the system of the employment service, they do not have access to vocational training.<sup>102</sup>

Apparently there are a lot of asylum seekers who are still under the old asylum legislation, who are therefore in the work process and have access to unemployment benefits and vocational training. The competent offices generously offer German courses, and sometimes training in nursery schools. Other courses are scarcely offered to asylum seekers, but this is subject to the individual official in charge.<sup>103</sup> Under the new Asylum Act 2005 it will depend on the progress of the asylum procedure, because asylum seekers can be considered “available” on the labour market if they have a right to residence. This is granted during the first and second instance procedure (unless where an application has been declared inadmissible in the asylum procedure, and when in such cases suspensive effect is not granted by the Independent Federal Asylum Tribunal). If suspensive effect is being granted by the High Administrative Court, the asylum seeker still has a right to residence then.

If an asylum seeker meets the requirements for his or her admission to a university, he or she does not have to pay a tuition fee only if he or she comes from a country listed in annex 1 or 2 of the regulation on the tuition fee (§ 3 (1) Studienbeitragsverordnung 2004). In addition to that, some (small) scholarships are available.

**F. Are the rules regarding access to the labour market adopted to transpose the directive more or less generous than the ones applicable previously?**

The rules have changed with the whole revision of the aliens law regime. Unlike before, access to a more favourable follow-up work permit (issued after an employment of 12 months) now depends upon lawful *establishment* on the territory (*Niederlassungsbewilligung*), a requirement which cannot be met by asylum seekers. This work permit is attributed to aliens themselves (and not to the employer), and is valid on the territory of a Land, for a maximum period of two years. Due to the shorter duration of asylum procedures envisaged under the new asylum legislation and the fact that asylum seekers often will not have a right to

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<sup>102</sup> ICF II-Report, p 16.

<sup>103</sup> Information given by a member of the Upper Austrian Chamber of Labour.

residence on the territory but will only be tolerated, they will frequently not be considered “available” on the labour market and therefore not have access to work permits exceeding seasonal work or vocational training.

Q.29. Are reception conditions subject to the fact that asylum seekers do not have sufficient resources? Are asylum seekers requested to contribute to reception conditions when they have personal resources (for instance if they work) or to refund the authorities if it appears that they have resources? (see article 13 §§ 3 and 4 which are optional provisions)

Under the federal legislation, reception conditions are being granted without this requirement<sup>104</sup>. However, if the asylum seeker has an income or other means, he or she will have to refund the costs incurred according to § 3 (2) of the Federal Welfare Support Act. In the Laender, reception conditions are subject to the fact that the asylum seeker is in need of help and protection (*hilfs- und schutzbedürftig*). Persons who do not have the necessary means of subsistence are considered to be in need of help<sup>105</sup>. If it appears that asylum seekers have an income or other resources, they can be asked to refund. The income of relatives of the asylum seeker, who are obliged to maintain the asylum seeker by law (eg parents, children), can equally be deducted from benefits granted, and these relatives can be asked to refund.

Reception conditions can also be granted in part, if the asylum seeker’s needs are adequately satisfied.<sup>106</sup> When asylum seekers have an income this is deducted from any financial benefits they can get (e.g. pocket money).<sup>107</sup>

According to NGOs, asylum seekers who leave the care facility for more than three days can be dismissed from a care facility, applications for re-entry into the care system are often rejected because the asylum seeker is not considered in need of help anymore<sup>108</sup> (see eg § 5 (3) No 5 Burgenland Welfare Support Act; see also No 9 of the Rules of the House for the federal care facilities (Ref No 1/4), which provides that reception conditions may be withdrawn if the asylum seekers leaves the care facility for more than 24 hours without reason).

## **7. SPECIAL NEEDS OF PARTICULAR CATEGORIES OF ASYLUM SEEKERS**

Q.30. **A. Which of the different categories of persons with special needs considered in the directive are taken into account in the national legislation (see article 17, §1 which is a mandatory provision): disabled people, elderly people, pregnant women, single parents with minor children, persons who have been tortured, raped or victims of serious physical or psychological violence? Include in your answer all other categories envisaged in national law.**

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<sup>104</sup> Martin Diehsbacher, Bundesbetreuungrecht, 2005, p 18.

<sup>105</sup> Burgenland § 2 (1); Carinthia § 2 (2); Lower Austria § 4 (1); Salzburg § 5 (2); Styria § 3 (1); Tyrol § 4 and § 1 lit f; Upper Austria § 2 (1); Vienna § 1 (2); Vorarlberg § 3 (4) and § 1 (3).

<sup>106</sup> Information given by Ministry of the Interior.

<sup>107</sup> Information given by NGOs.

<sup>108</sup> ICF II-Report, p 22.

The Basic Welfare Support Agreement provides for special measures for unaccompanied minor applicants in its Art 7. Other than that, no special provisions for specific groups are provided.

The Federal Basic Welfare Support Act provides that the special needs of single women and minors are to be taken into account in the process of assignment of asylum seekers to a place of reception. § 30 Asylum Act 2005 considers persons with mental health problems due to torture or an equally severe incidence a specially vulnerable group. Lower Austria (§ 10) and Upper Austria (§ 3 (4)) refer to the needs of specially vulnerable person to be taken into account in procedures on withdrawal of benefits. In § 7a (3) Vorarlberg stipulates that ethnic particularities, individual needs of the beneficiary and special needs of particularly vulnerable persons are to be taken into account when granting welfare support benefits, especially concerning medical support. Single women and minors, elderly people, disabled people or persons who have been subject to torture, rape or other forms of psychological, physical or sexual violence are considered particularly vulnerable persons.

§ 4 No 5 of the draft proposal for Salzburg specially vulnerable persons are to be considered: minors, disabled persons, elderly persons, pregnant women, single women or men with minor children, as well as persons who have suffered from torture, rape or other serious forms of psychological, physical or sexual violence. There is, however, no further specific reference to this group of persons in the Act.

In all other legislation, there is no reference to persons with special needs, such groups can only be identified from the context of benefits granted, which include measures for persons in need of particular care (*Pflegebedürftige*)<sup>109</sup>, health insurance and benefits not covered by insurance on the basis of an individual decision, and information, counselling and social care (Art 6 Basic Welfare Support Agreement).

**B. How is their specific situation taken into account (see articles 13, §2, second indent, 16 §4 second sentence and 17 which are mandatory provisions)?**

According to § 30 Asylum Act 2005 asylum seekers who are suffering from a mental health problem because of torture or an equally severe incidence are a specially vulnerable group. If the problem amounts to a disease, a negative decision on the merits cannot be taken in the admissibility procedure and his or her special needs shall be taken into account in the further course of the procedure. Benefits granted under reception conditions include “other necessary benefits not covered by health insurance upon individual decision” (for references see Q.12.). This means that the additional costs of psychotherapy or other necessary medical treatment are covered when granting reception conditions. However, according to the information provided by a physician working in the field, “these facilities are scarce and places there are insufficient.”<sup>110</sup> For persons who have been tortured, raped or victims of serious physical or psychological violence several NGOs provide psychotherapy. Access to psychotherapy for the latter group is often difficult since all NGOs are based in the provincial capitals and travel costs are usually not covered. Also these NGOs have long waiting lists. Other assistance for them than psychotherapy is scarce.”<sup>111</sup> Another limit for access to psychotherapy is the language barrier, since the costs of translation services are equally not covered.

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<sup>109</sup> Art 6 (1) No 7 Basic Welfare Support Agreement. 2480 Euro per month are to be paid for accommodation in special institutions if necessary according to Art 9 No 6.

<sup>110</sup> Art 9 No 6 Basic Welfare Support Agreement.

<sup>111</sup> Information given by NGOs.

Disabled persons can apply for nursing allowance and fund their necessary support. Measures for persons in need of special care (Pflegebedürftige) are covered up to an amount of €2480,- per person per month

In the initial reception centre in Traiskirchen, there are special premises for single women and for unaccompanied minors. There, women are provided with an information pack on rights of women in Austria<sup>112</sup>. There are no special care structures for them in Thalham.<sup>113</sup> For pregnant women with families no special procedures are foreseen and there is no similar procedure for single fathers<sup>114</sup>. Unaccompanied minors shall be placed in special forms of accommodation and be granted benefits which go beyond ordinary welfare support and which are listed in Art 7 of the Basic Welfare Support Agreement. At the moment, there seems to be a sufficient number of places available for separated children in the Laender.

**C. How and when are the special needs of the concerned persons supposed to be legally identified (see article 17 § 2 which is a mandatory provision and clarify how it has been interpreted by transposition)?**

There is no procedure laid down in legislation for the identification of such groups. The Federal and Laender Acts only add to the list of benefits to be granted, “other necessary benefits not covered by health insurance upon individual decision”. In the Austrian administrative system, a formal negative decision will have to be taken if an asylum seeker claims specific benefits under this provision. If a question can only be answered by an expert (eg whether a person is a minor or whether a person is traumatised) an expert opinion will have to be obtained under the ordinary administrative procedure.

The persons concerned shall be identified possibly by the police organs or asylum authorities during the first interview. Their specific need can be taken into account at any stage of the procedure. According to § 20 Asylum Act victims of violations of sexual self-determination shall be interviewed by organs of the same gender. The procedure before the Independent Federal Asylum Tribunal, which is in general public, can be carried out in camera.<sup>115</sup>

According to the information gathered by NGOs, persons who have visible special needs should be identified upon arrival at the reception centre. Others with invisible needs will either contact NGOs dealing with persons who have been tortured, raped or victims of serious physical or psychological violence themselves. Most of them get this information through fellow countrymen or they are identified by local doctors, reception centre staff, and above all during social counselling. But as the counselling only takes place on a voluntary basis, not every asylum seeker makes demand of these offers. But since even NGOs often do not have expert personnel who could for example identify traumatised persons, social counsellors can only be attentive to situations, experience and emotions asylum seekers describe during an interview which could provide an indication of special needs.<sup>116</sup>

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<sup>112</sup> Information given by Ministry of the Interior.

<sup>113</sup> Information given by the UNHCR Office in Austria.

<sup>114</sup> Single fathers with minor children are defined as specially vulnerable persons in § 4 No 5 of the draft proposal for Salzburg.

<sup>115</sup> Information given by the Ministry of the Interior.

<sup>116</sup> Information given by NGOs.

**D. Is the necessary medical and other assistance provided to persons with special needs as requested by article 15, §2 which is a mandatory provision and in particular to victims of torture and violence as requested by article 20 which is a mandatory provision?**

Generally, medical assistance is provided under the ordinary health care system by doctors who have a contract with the social insurance institution, or by a series of projects providing special intercultural counselling and psychotherapy. Medical care is generally adequate also for persons with special needs (elderly, minors, pregnant women etc).

In the federal care facility in Traiskirchen, three specialists are providing psychological care. However, as far as psychotherapy and other treatment of traumatised persons and victims of torture is concerned, in both systems (health insurance and special projects) resources are scarce and there are long waiting lists. In addition, interpretation and travel costs, which are not covered by health insurance, are huge obstacles in the access to necessary assistance.<sup>117</sup>

The most important NGOs in the field (Ankyra, Innsbruck/Tyrol, ASPIS, Klagenfurt/Carinthia, Hemayat, Vienna, Oasis, Upper Austria, Onderos, Salzburg and Omega and Zebra, Graz) have created a network under the title “Intercultural psychotherapy for extremely traumatised persons” (*Interkulturelle Psychotherapie nach Extremtraumatisierung*) which is coordinated by the Asylkoordination in Vienna.<sup>118</sup>

Apparently a study is being done at the moment at Aspis, which is a project of the University of Klagenfurt/Carinthia by Klaus Ottomeyer and Walter Renner on the identification of traumatised persons during the asylum procedure, criticising that reports of asylum seekers on traumatising experience are not adequately being registered by the expert opinions. The authors criticise that often experts do not discern symptoms described by their patients as signals for post-traumatic stress disorders or did not draw the necessary conclusions. In other cases the expert opinions given are reported to be so short that the findings of the expert could not be reconstructed from his or her report on the examination of the patient. This study is supposed to be published in autumn this year.<sup>119</sup>

**Q.31. About minors:**

**A. Till which age are asylum seekers considered to be minor?**

18 years (§ 21 (2) of the Civil Code).

**B. How is access of minor asylum seekers to the education system ensured? Is it at school or in case inside accommodation centres and can it be considered as similar to the conditions for nationals as requested by article 10, §1?**

Up to the age of 15 years, minor asylum seekers are subject to compulsory education under § 1 (1) of the Compulsory Education Act (Ref No 1/12), and are subject to the same rules as nationals. Unless special education projects of NGOs are being offered (which target mainly older asylum seekers), lessons are given at school within the ordinary school system.

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<sup>117</sup> Information given by NGOs.

<sup>118</sup> Aspis yearly report 2005, p 13.

<sup>119</sup> Klaus Ottomeyer, Gutachtenverwahrlosung in österreichischen Asylverfahren, in: Klaus Ottomeyer/Walter Renner (eds), *Interkulturelle Traumdiagnostik* (not yet published). See also *Der Standard* (Austrian newspaper), 7 June 2006.

For minors over 15 years, there is no legal title to be admitted to a specific school, but admission is subject to fulfilment of legal requirements (eg language skills, a certain standard of tuition – usually the requirement is the positive conclusion of tuition at a lower school, sometimes also certain minimum grades, or places available) which are laid down in § 4 (2) Act on the Organisation of Schools. Also here, the provisions applying for asylum seekers are the same as for nationals.

Access can also be granted to minor refugees older than 15 years, but it lies within the competence of the school to decide whom it admits for tuition. Of course, the school management is also bound by legislation, but has discretion as to the fulfilment of legal requirements.

Education is generally provided for unaccompanied minors, who are in special forms of accommodation and care (eg projects run by NGOs). For accompanied minors, living with their family in “ordinary” care facilities, access to education is not always provided, depending on the place where the minor lives.<sup>120</sup> This is also due to the fact that transport costs are not always provided to minors who are not covered by compulsory education.<sup>121</sup> Art 7 paragraph 3 No 5 of the Basic Welfare Support Agreement stipulates that for unaccompanied minors an integration plan shall be elaborated and measures taken to make use of existing schooling, education and vocational activities with a view to self-preservation. Decisions on the future of accompanied minors are to be taken in the interest of the welfare of the child by their guardians. The Ministry of the Interior deems that there is no reason to restrict the guardians’ rights in this respect.<sup>122</sup>

**C. Is access to education ensured not later than 3 months as requested by article 10, §2 (or after maximum one year if specific education for asylum seekers is provided) and till an expulsion decision is really enforced?**

Usually minors who are subject to compulsory education are not integrated into the schooling system during the admissibility procedure, because they are supposed to stay there only for 20 days. If this time limit is exceeded, they are enrolled in the public schools. The time limit of three months is usually not exceeded. However, NGOs and UNHCR state that this provision has been violated in several cases of minor asylum seekers who were in a procedure under the Dublin II-Regulation.<sup>123</sup>

If minor refugees cannot attend ordinary classes due to a lack of language skills, they can be accepted at public schools as extraordinary pupils for 12 months at the maximum. This time limit may be extended for another 12 months if the minor failed to acquire the language skills necessary to attend classes and if he or she cannot be held responsible for this failure.

**D. Is specific education (like language classes) available for asylum seekers, in particular to facilitate their effective access to the education system of the reception Member State (see article 10, §2 which is an optional provision)?**

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<sup>120</sup> Information provided by NGOs.

<sup>121</sup> ICF II-Report, p 15.

<sup>122</sup> Information provided by the Ministry of the Interior.

<sup>123</sup> UNHCR, The Dublin II Regulation. A UNHCR Discussion Paper, p 51; <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=4445fe344>.



At some schools, specific language classes for students with insufficient knowledge of German are available. These classes are being offered in addition to or as a preparation for ordinary tuition. In the larger care facilities and accommodation centres run by NGOs there are language classes available, in most guesthouses in small villages on the countryside there are no possibilities to attend language classes.

**E. Are minors in general accommodated with their parents or with the person responsible of them? (see article 14, § 3)**

They are. Minors are generally accommodated with their parents, the person responsible for them, or if possible with other relatives, even when they are less close.

**F. Do minors with special needs enumerated by article 18, §2 which is a mandatory provision, have access to appropriate mental health care and qualified counselling?**

In general, minors have the same access to health care, especially to psychotherapy and other necessary medical treatment as adults (see Q.30.D). Art 7 Basic Welfare Support Agreement obliges the federal entities to grant benefits to *unaccompanied* minors which go beyond benefits granted to adults and must comprise social and psychological support when needed. Moreover, “such persons shall be assisted by initial clarification and stabilization measures whose purpose should be to strengthen their emotional state and create a basis of trust”. This provision has been taken up by the Federation and nearly all the Laender in their legislation<sup>124</sup> (see Q.12.A). Only Vienna has not issued a provision concerning special benefits for minor asylum seekers with special needs.

In practice, for unaccompanied minors in special forms of accommodation the necessary care and counselling is granted there. For all other minors, the situation depends on the place they are living in. Special support is subject to a lack of supply in some areas, which complicates access, lack of places in general, waiting lists for psychological support and lack of interpreting services.<sup>125</sup> Moreover, since there are no screening procedures the special needs of accompanied minors or of minors who are not living in a special form of accommodation granting specific social counselling are often not being identified.

**G. How and when is organised the representation of unaccompanied minors (guardianship, special organisation) and regularly assessed? (see article 19, §1 which is a mandatory provision)**

According to § 2 (7) Federal Basic Welfare Support Act § 16 (5) Asylum Act 2005 is also applicable in questions of capacity to act and representation of minors in the procedure under this Act. Thus, during the admissibility procedure unaccompanied minors are represented in federal care matters by the legal advisor of the initial reception centre. After admission of an application and assignment of the minor to a place of reception in one of the Laender, the

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<sup>124</sup> § 2 (1) and § 1 No 3 Federal Basic Welfare Support Act; § 7 Burgenland Care Act; § 4 Carinthia Basic Welfare Support Act; § 6 draft proposal for Lower Austria; § 6 (2) No 2 draft proposal for Salzburg; § 8 Styria Care Provision Act; § 7 Tyrol Basic Welfare Support Act; § 1 (1) draft proposal for Upper Austria; § 7a (1) Vorarlberg Social Aid Act.

<sup>125</sup> Information given by NGOs and ICF II-Report, p 23f.

youth welfare office of the respective Land is responsible (see also the jurisdiction of the Constitutional Court, B 1290/04, above at Q.9.).

Youth welfare is a constitutional competence of the Laender, therefore all Laender have their own Youth Welfare Acts which are generally applicable to minor asylum seekers as well. These Acts grant assistance to all minors whose interests cannot be represented by their parents or other persons. Several Basic Welfare Support Acts of the Laender explicitly refer to their Youth Welfare Acts, declaring them applicable as far as care is concerned<sup>126</sup> or granting at least access to the data of the care information system (database) to the youth welfare offices.<sup>127</sup> The youth welfare office may also take the minor under guardianship in a formal procedure. During the admissibility procedure, this is often not done because it can be expected that the minor will leave the reception centre soon and move to another Land or country. In the Laender, it depends on the particular youth welfare office, which policy it takes on unaccompanied minors. In some Laender youth welfare offices do not take steps to take unaccompanied minors under guardianship.<sup>128</sup> In a recent decision, the High court ruled that an unaccompanied minor has a right to be taken under guardianship in the interest of his or her welfare (see above at Q.9., OGH 7 Ob 209/05v).

**H. How is placement of unaccompanied minors organised (with adult relatives, a foster family, in special accommodation centres or other suitable accommodation)? (see article 19, §2 which is mandatory provision)**

According to Art 7 paragraph 1 Basic Welfare Support Agreement unaccompanied minors must be accommodated in special shared accommodation groups (for minors with special needs), special accommodation centres (for minors unable to care for themselves) or other suitable accommodation, or in individual accommodation.<sup>129</sup>

In practice, unaccompanied minors are rarely accommodated with foster families during the asylum procedure. This is a solution which is only being used exceptionally in case of minors below 14 years or asylum-seeking children with relatives in Austria<sup>130</sup>. NGOs complained that the number of places available for unaccompanied minors in special accommodation facilities was insufficient and were concerned about inadequate placement of minors.<sup>131</sup> Apparently, this situation has changed so that right at the moment the number of places seems to be sufficient.<sup>132</sup>

**I. How is the tracing of the family members of the unaccompanied minors organised? Are measures taken to protect confidentiality of**

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<sup>126</sup> § 8 (1) Styria, § 7 (1) Tyrol, § 1 (4) Vorarlberg.

<sup>127</sup> § 10 (3) Burgenland, § 8 (2) Carinthia, § 25 (3) No 1 Lower Austria, [Salzburg], § 12 (3) No 6 Styria, § 18 (3) lit a Tyrol, § 8 (3) Upper Austria, § 4 (1) Vienna.

<sup>128</sup> ICF-II Report, p 23.

<sup>129</sup> Reference to housing for unaccompanied minors of to Art 7 Basic Welfare Support Agreement in: § 2 (1) and § 1 No 3 Federal Basic Welfare Support Act; § 7 (1 and 2) Burgenland Care Act; § 4 (1 and 2) Carinthia Basic Welfare Support Act; § 6 (1 and 2) draft proposal for Lower Austria; § 6 (2) No 1 draft proposal for Salzburg; § 8 (1 and 2) Styria Care Provision Act; § 7 (1 and 2) Tyrol Basic Welfare Support Act; § 1 (1) draft proposal for Upper Austria; § 7a (1) Vorarlberg Social Aid Act.

<sup>130</sup> ICF II-Report, p 25 and information given by the UNHCR Office in Austria.

<sup>131</sup> ICF II-Report, p 23.

<sup>132</sup> Information given by NGOs.

**information when necessary? (see article 19, §3 which is a mandatory provision)**

Tracing of family members is done within the regular asylum procedure. If relatives of the minor are in Austria, they can be found via the aliens information system. If relatives are within the Eurodac-system, they can be traced there.

All information gathered during this procedure is subject to the general confidentiality provisions of the Austrian Constitution, the Data Protection Act and the regulations on duties of public servants. Moreover, § 54 of the Asylum Act 2005 provides that asylum authorities may only use personal data for the fulfilment of the tasks assigned to them and § 57 rules which authorities may receive data collected in the Asylum seeker information system, the procedure database or the aliens information system.

Art 7 paragraph 1 No 2 and 4 Basic Welfare Support Agreement provide that special care for unaccompanied minors covers tracing their family members and in case making family reunification possible. This provision has been taken over by the Federation, Upper Austria and Vorarlberg (by general reference to Art 7), Burgenland (§ 7 (3) No 2 and 4), Carinthia (§ 4 (3) lit b and d), Styria (§ 8 (3) No 2 and 4) and Tyrol (§ 7 (3) No 2 and 4). Tracing of family members, but not family reunification is foreseen in Lower Austria (§ 6 (3) No 2) and Salzburg (§ 6 (2)). No reference to the tracing of family members is made in the Basic Welfare Support Act for Vienna.

Since according to the legal provisions, tracing is part of special care for minors, those responsible under the respective care systems will have to take adequate measures. Unaccompanied minors are generally accommodated in special forms of accommodation, run by specialized organisations which in practice are well informed about and make use of the Red Cross Tracking Service.<sup>133</sup>

## **8. EXCEPTIONAL MODALITIES OF RECEPTION CONDITIONS**

**Q.32.** **Apart from detention covered by the next question, are there exceptional modalities for reception conditions in the following cases and if yes, which ones and for how long are they applicable, knowing that they should be “as short as possible” (see article 14, §8)?**

**A. Persons with specific or special needs, regarding in particular the period of assessment of those needs?**

There are no exceptional modalities. Until specific needs of asylum seekers (eg psychotherapy, other medical care or accommodation in nursing homes) are identified, they receive the usual reception conditions.

**B. Non availability of reception conditions in certain areas**

There are no exceptional modalities. In practice, when places in accommodation centres are rare, asylum seekers may be given the permission to live individually in private apartments

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<sup>133</sup> Information provided by the Red Cross Headquarters Vienna.

and reception conditions will be granted in money. When a Land refuses to take over asylum seekers assigned to them by the coordination office for lack of free places in accommodation centres, the coordination office will have to find another place of residence.

### C. Temporarily exhaustion of normal housing capacities

Under Art 3 paragraph 4 Basic Welfare Support Agreement and § 11 Federal Basic Welfare Support Act, the Federation is obliged to provide contingency housing capacities as a precaution for capacity limits in the Laender with a view to meeting unpredictable and inevitable accommodation shortages in the Laender. In consultation with the Ministry of Defence, military camps can be declared accommodation centres by regulation.

### D. The asylum seeker is confined to a border post

Asylum seekers who arrive at **Vienna International Airport** are subjected to the special procedural rules under §§ 31ff Asylum Act 2005. The existing legislative norms do not provide any special provisions for reception conditions for asylum seekers who are confined to the special transit zone at the airport. **Moreover, it is not considered to fall under the Federal Basic Welfare Support Act, so that no reception conditions are being granted there on a legal basis.** The care facility existing there (*Sondertransitheim*) is run by the NGO Caritas<sup>134</sup>, which provides social and legal counselling, food and accommodation for 35 persons. However, there is **no legal responsibility** of the Government to guarantee the maintenance of the place of reception, nor are formal decisions on reception conditions taken and judicial remedies granted. Above all, asylum seekers are not entitled to a place in the care facility of the special transit zone and might be forced to remain outside in case of exhaustion of places. In addition, there is a particular zone “to secure the refusal of entry to the territory” in the transit area (*Zurückweisungszone*) to which social counsellors do not have access.

Under the wording of the Federal Basic Support Act, the care facility at the airport is not necessarily excluded from the scope of application of the Act (§ 1 No 5, according to which a care facility is any “accommodation outside an initial reception centre, where the satisfaction of basic needs of an asylum seeker is being factually granted”). Moreover, the Care Facility Entry Regulation 2005 (Ref No 1/3) explicitly defines in its § 1 (1) No 3 the accommodation at Vienna International Airport (Building 800) as a “care facility”.

In fact, the care facility at the airport seems to be simply ignored by legislation, and no contribution to the discussion could be found in the documents preparing the different amendments to the basic welfare support act in the past.

As for the period of time an asylum seeker might stay in the transit zone, see the information on the special airport procedure at Q. 11.A. Deadlines for authorities to act are rather short. According to § 32 (4) Asylum Act 2005 the maximum period of time for an asylum seeker to stay there is six weeks.

On other borders asylum seekers are not confined to border posts.

### E. All other cases not mentioned in the directive (for instance urgent situation in case of a sudden high number of applicants outside a case of application of the directive on temporary protection).

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<sup>134</sup> See [http://www.caritas-wien.at/flughafen\\_1605.htm](http://www.caritas-wien.at/flughafen_1605.htm).

See above at C.

**Q.33. Detention of asylum seekers (we do not cover the situation of rejected asylum seekers detained for the purpose of their return) (see articles 6 §2, 7 §3, 13, §2 2<sup>nd</sup> indent and 14 §8 which implies that the directive is in principle applicable in case of detention):**

**A. In which cases or circumstances and for which reasons<sup>135</sup> (identity verification in particular if the persons have no or false documents, protection of public order or national security, refugee status determination, way of entry into the territory, etc) can an asylum seeker be detained during the asylum procedure till his request has been finally rejected. Quote precisely in English in your answer the legal basis for detention of asylum seekers in national law.**

According to § 47 (1) **Asylum Act 2005 (Ref No 1/5)**, an asylum seeker shall be arrested in order to be taken to the initial reception centre under § 43 (2) Asylum Act 2005 or when it has been ordered by the Federal Asylum Office under § 26 Asylum Act 2005.

1) According to § 43 (2) of the Act, an asylum seeker must be arrested and taken to the initial reception centre, when he or she does not have a right to residence in the territory and has applied for international protection before a police organ. The same accounts for asylum seekers who have a right to residence but do not present themselves at the initial reception centre within 14 days, when his right to residence has expired in the meantime.

2) An asylum seeker can be arrested by a request of the Federal Asylum Office according to § 26 Asylum Act 2005 if an asylum seeker has left the initial reception centre without justification or has “eluded” from the procedure (see § 24 (1): when the Office cannot determine the asylum seeker’s place of residence or when he or she leaves the country (in certain circumstances)). If the asylum seeker is arrested, the Federal Asylum Office has to inform the persons holding the asylum seeker in custody, when and to which initial reception centre he or she is to be taken. After the necessary procedural steps the asylum seeker must be set free.

3) According to § 76 (2) **Aliens Police Act (Ref No 1/6)**; *Schubhaft*) the aliens police authority can issue an detention order to secure the expulsion procedure or to secure deportation, if:

a) an expulsion order (§ 10 Asylum Act 2005) has been issued which can be effected by deportation, even when it is not yet final (No 1).

An expulsion order has to be issued under § 10 Asylum Act 2005 in case of any negative decision, be it for inadmissibility (under the Dublin II Regulation or for the existence of a safe third country) or for ineligibility (when neither an asylum status nor a status of subsidiary protection is granted).

An expulsion order may not be issued if the asylum seeker has a right to residence upon a different legal basis, or if this would constitute a violation of Art 8 of the European Convention on Human Rights.

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<sup>135</sup> Please specify it article 18 §1 of the Directive on asylum procedures of 1 December 2005 which specifies that “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum” is or not respected (even if has not yet to be transposed).

If a deportation would constitute a violation of Art 3, and if this situation is not durable, the authority has to declare that deportation be suspended for the time being.

b) an expulsion procedure has been opened on him or her under the Asylum Act 2005 (No 2).

According to § 27 an expulsion procedure is considered opened if

- the authority informs the asylum seeker in the admissibility procedure that it envisages to reject the application for inadmissibility or dismiss it for ineligibility (such procedural steps have to be taken according to § 29 (3) No 4 and 5 respectively Asylum Act 2005 before a formal decision is taken<sup>136</sup>)
- if the Independent Federal Asylum Tribunal discontinued the procedure (which it can do according to § 24 (2) Asylum Act 2005 if the asylum seeker has absconded from the procedure and a decision cannot be taken without a further interview) in a case in which the first instance had issued an expulsion order.
- An expulsion procedure must also be opened if the investigation done may justify the assumption that the application will be rejected or dismissed and there is a particular interest in an accelerated procedure. This is the case when an asylum seeker has been convicted, indicted by the public prosecutor or caught in the very act of certain serious crimes (§ 27 (2 and 3) Asylum Act 2005). If the asylum authority opens an expulsion procedure, it has to notify the aliens authorities.

c) an expulsion order or a decision on prohibition of residence had been issued before an application for international protection was made, when these decisions can be effected by deportation (No 3; eg when an appeal does not have suspensive effect).

According to § 76 (6), an alien may be kept in detention after having made an application for international protection, if he or she has been in detention for the purpose of his return before. The change of the legal basis for detention has to be annotated in the asylum seeker's records.

d) it can be assumed by reason of the results of an interrogation, a personal search and a check of the police records that the alien's application for international protection will be declared inadmissible lacking Austrian responsibility to assess the application. This provision aims at asylum seekers who will be subject to a procedure under the Dublin II-Regulation.

These provisions equally concern asylum seekers and persons whose application has been finally decided.

**B. Has your member State adopted measures to transpose §3 of article 7 which is an optional provision? If yes, how has this provision been legally understood (is it a case of detention or an obligation to stay in and not leave a certain place?) and for which reasons can an asylum seeker be “confined” in such a place?**

There is no explicit reference to Art 7 paragraph 3 of the Directive and there are no cases of confinement to a place, which are not covered by the legislation on detention. Confinement to a certain place, meaning a decision on a place of residence and the obligation to report to

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<sup>136</sup> The asylum seeker will then be referred to a legal advisor and will be granted a preparation time of at least 24 hours to prepare for the interview, in which the legal advisor will also be present.

police authorities regularly, is a general alternative to detention as a more lenient measure (see below at C.).

**C. Are there legally alternatives to detention, like obligation to report to the authorities, obligation to stay in a place, provision of a guarantor or of a financial guarantee?**

According to § 77 Aliens Police Act the aliens authority has to renounce detention, if the purpose of detention may be reached by more lenient measures. It is obliged to resort to more lenient measures vis-à-vis minors, unless there is reason to believe that the purpose of detention cannot be reached. § 77 (3) takes as examples for more lenient measures the obligation to take residence in a certain place designed by the authority or to report at regular intervals at a certain police station.

In cases of families whose applications have been turned down for inadmissibility under the Dublin II Regulation, often men are taken in detention, while women and children are subjected to more lenient measures (usually the above mentioned alternatives to stay in a certain care facility and report regularly to the police station).<sup>137</sup>

**D. Which is the competent authority to order the detention of an asylum seeker? Explain if different authorities are involved to first take and later confirm the decision.**

1) If an asylum seeker is arrested by a police organ in order to be taken to the initial reception centre, no detention order is issued.

2) If an asylum seeker's residence is unknown, the competent authority to request his or her arrest is the Federal Asylum Office.

3) The competent authority to order detention for the purpose of return is the aliens police authority. In some bigger cities this is the Federal Police Directorate (*Bundespolizeidirektion*), where no such directorates exist, it is the district administrative authorities (*Bezirksverwaltungsbehörden*).

**E. For how long and till which stage of the asylum procedure can an asylum seeker be detained?**

1) The asylum seeker can be held in custody for a maximum time limit of 48 hours (§ 47 (2) Asylum Act 2005).

2) The asylum seeker can be held in custody for a maximum of 72 hours (§ 26 Asylum Act 2005)

3) According to § 80 (1) Aliens Police Act, the authorities have to make sure that the length of detention is as short as possible. Asylum seekers detained under § 76 (2) can be detained until the fourth week after a final decision has been taken, has passed. If an asylum seeker cannot be deported for certain reasons listed in § 80 (4) No 1 to 3 the overall maximum duration of detention is six months. If an appeal filed by an asylum seeker against a negative decision, in which his or her application has been declared inadmissible, has been granted suspensive

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<sup>137</sup> Information given by NGOs.

effect by the Independent Federal Asylum Tribunal, the asylum seeker may be detained until a final decision is taken. After that, detention may be held up if the Tribunal has issued a negative decision.

If the asylum seeker shall be kept in detention for more than six months, the Independent Administrative Senate shall verify on the first day after that period, and then every four weeks, if the reasons for detention are still existing and whether it is proportional to hold up detention (§ 80 (6)).

Altogether, the maximum duration of detention must not exceed ten months within a period of two years.

The same rules account for asylum seekers detained because they are in a procedure under the Dublin II-Regulation. It has to be reminded that if consultations under the Dublin II-Regulation are being initiated, the deadline of 20 days for the authority to decide on the admissibility of an application is not applicable. Therefore, asylum seekers who are being detained because there is reason to believe that the alien's application for international protection will be declared inadmissible lacking Austrian responsibility to assess the application will often be detained for a relatively long time, even *before* a decision has been taken in the first instance.

**F. In which places (can we call them “closed centres”?) are asylum seekers detained (places in a special closed centres reserved only to asylum seekers, together with returnees like illegal aliens or even in a normal prison, in case within separated areas or with the other detainees)? Indicate if a difference has to be made following the location of the “closed centres” at the border or on the territory? Which is the authority managing those places and is it the same as the one in charge of reception conditions?**

If asylum seekers are arrested in order to be taken to an initial reception centre or an asylum authority that has summoned him or her, they usually stay for a short period of time at the police station of the district where they were arrested. If they cannot be taken to their place of destination, they can be transferred to a police detention centre to wait for further transport there. Asylum seekers detained pending deportation are being detained in prison-like police detention centres (*Polizeianhaltezentren*). These are designed for the ordinary detention scheme for administrative infractions, among which infractions of aliens police legislation, and are usually located in major police stations. Asylum seekers are detained there together with other aliens detained pending deportation, and also other persons, detained for administrative infractions.<sup>138</sup> However according to § 4 (3) of the Detention Regulation (Anhalteordnung, [Ref No 1/7](#)), these two groups of people are to be detained in separate departments, if possible. Due to efforts of NGOs, today there are several departments in police detention centres for aliens pending deportation where the doors of cells are open during the day as long as there are no disciplinary problems (*Offener Vollzug*).

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<sup>138</sup> In Austria, administrative authorities (district administrative authorities, police authorities, mayors) can impose prison sentences of up to two weeks, and six weeks if necessary for particularly aggravating reasons (§ 12 Administrative Penal Act).



If the police authorities are not able to detain an asylum seeker in a police detention centre, they have to ask the head of the local jailhouse (which is usually attached to a criminal court) to take the asylum seeker in detention (§ 78 (1) Aliens Police Act).

**At the border, the only place which could be considered a “closed centre” is the special transit zone at the airport. It is not considered to be a place of detention, because asylum seekers are free to leave when they decide to leave the country and are thus considered to stay in the transit zone voluntarily.** The Human Rights Advisory Board is of the opinion that the obligation to stay in the special part of the transit zone which is separated as a zone “to secure the refusal of entry to the territory” (*Zurückweisungszone*), where social counsellors do not have access, must be considered a deprivation of personal liberty under the Federal Constitutional Law of 29 November 1988 on the Protection of Personal Liberty. However, there are voices in literature which do not share this view.<sup>139</sup>

#### **G. Does UNHCR and NGOs have access to the places of detention and under which conditions?**

UNHCR generally and NGOs if they wish to see detainees known to them have access to asylum seekers who are in detention. According to § 21 (3) of the Detention Regulation (Anhalteordnung, [Ref No 1/7](#)), legal advisors and representatives of “institutions which have been installed by International Agreements for the Protection of Human Rights” and other persons have access if it is demonstrated that their visits are of importance for an asylum seeker’s personal affairs. In addition, some NGOs have contracts with the Ministry of the Interior to provide social care for aliens in detention pending deportation.

#### **H. What appeal(s) can asylum seekers introduce against the fact he is detained? Is article 18 of the directive on asylum procedures of 1 December 2005 following which “Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review” respected (even if it has not yet to be transposed)?**

1) and 2) If an arrest under the Asylum Act 2005 can be considered an act of “immediate administrative instruction and compulsion”, a complaint can be filed before the Independent Administrative Tribunals, according to Art 129a of the Constitution. The request of the asylum authority to detain an asylum seeker who has absconded from a care facility or whose residence is unknown (§ 26 Asylum Act 2005; *Festnahmeauftrag*), is not taken by formal decision, therefore no remedy is granted.

An asylum seeker can file a complaint against an order imposing detention pending deportation before the Independent Administrative Tribunal which is competent for the territory of the district administrative authority where the asylum seeker has been arrested. (§ 82f Aliens Police Act). The complaint can be submitted to the authority which has arrested him or her or to the authority which has ordered the arrest, the respective authority having to submit the complaint to the Independent Administrative Tribunal within two days. If the detention has ended earlier, the authority has to notify the Tribunal of a complaint without undue delay. The Independent Administrative Tribunal has to decide on the continuation of

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<sup>139</sup> Nicolas Raschauer/Wolfgang Wessely, Anhaltung von Fremden im Transitbereich, *migraLex* 2005, p 88.

detention within one week (§ 83 (2) Aliens Police Act). The deadline is prolonged if the Tribunal rejects the complaint to the complainant for the purpose of its amendment in case relevant information is missing (§ 83 (3) Aliens Police Act).

**I. Is the directive on reception conditions considered to be in principle applicable to the places where asylum seekers are detained? In particular which information do they receive about their rights, which access do they have to legal advice and health care?**

The Directive is in principle applicable to cases of detention. During detention no benefits of welfare support are granted according to the Federal and Laender Acts<sup>140</sup>, but they are suspended. Only the Government Bill for Upper Austria does not foresee this exception. When detention ends, the asylum seeker is again entitled to benefits under these Acts. In Lower Austria, he or she has to appear before the competent authority (ie the Government) in order to be granted reception conditions again.

Since during detention, the Federation is responsible for the well-being of detainees, reception conditions are being based on a federal legal basis. The applicable norm is the Detention Regulation (a legislative regulation issued by the Ministry of the Interior; *Anhalteordnung*). According to § 1 (2) the text of this regulation must be held available in the place of detention in the official languages of the UN, in the languages of the countries surrounding Austria<sup>141</sup> and in Croatian, Romanian, Serbian and Turkish languages. The detainee may ask for a language version upon his choice. In the rooms where people are detained, a list of their rights and duties under the regulation must be available in a shortened version.

According to § 10 (1), necessary health care shall be effected by a public health officer (*Amtsarzt*), or it has to be assured that a medical treatment by a physician is guaranteed without undue delay if necessary. According to § 7 (3) all detainees have to undergo a medical screening before the public health officer without undue delay, but within 24 hours at the latest. If the state of health of an asylum seeker requires, the asylum seeker can also be kept in detention in a suitable hospital according to § 78 (7) Aliens Police Act.

According to § 21 (3) the legal advisor of an asylum seeker has access to the place of detention. However, this requires that the advisor has already been commissioned by the asylum seeker for his or her representation. NGOs are allowed to provide only social counselling under their contracts with the Ministry.<sup>142</sup> In Tyrol, Upper Austria and Vienna, the contract for social counselling in police detention centres has been concluded with the NGO Verein Menschenrechte Österreich, an organisation which has come in for a lot of criticism on the part of other NGOs working in the field and was accused of partiality because it also provides legal counselling on voluntary return in detention centres.<sup>143</sup> It should be added that according to Austrian procedural rules the authority which is carrying out a procedure (eg upon a complaint against detention before the Independent Administrative

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<sup>140</sup> §2 (3) Federal Basic Welfare Support Act, § 2 (2) Burgenland, § 3 (4) Carinthia, § 9 (4) Lower Austria, § 3 (2) Styria, § 10 Salzburg, § 2 (8) Tyrol, § 1 (4) Vienna, § 7a (1) Vorarlberg.

<sup>141</sup> Italian, Slovenian, Hungarian, Slovak and Czech languages.

<sup>142</sup> ICF II-Report, p 20.

<sup>143</sup> See for example [http://www.asyl.at/fakten\\_2/betr\\_2006\\_01.htm](http://www.asyl.at/fakten_2/betr_2006_01.htm), [http://no-racism.net/old/staatsrassismus/schubhaftbetreuung\\_ausschaltung\\_010303.htm](http://no-racism.net/old/staatsrassismus/schubhaftbetreuung_ausschaltung_010303.htm), recently Der Standard, 30 May 2006.

Tribunal) has the duty to inform about procedural rights and duties and “lead” parties through the procedure (Manuduktionspflicht).

- J. Apart from freedom of movement, what are the main differences between normal reception conditions and exceptional modalities for reception conditions in case of detention, knowing that they should be “as short as possible” (see article 14, §8)? If it is about closed centres, are the regulations of those places in line with the requirements of the directive (is article 13, §2, second indent of the directive following which “*Member States shall ensure that standards of living is met (...) in relation to the situation of persons who are in detention*” respected?).**

The conditions of detention are laid down in the Detention Regulation which contains (in some cases very detailed) provisions on the detainees’ rights to places of detention adequate for the protection of their dignity and health, hygiene of places of detention, clothing if necessary, adequate food etc. Benefits under the respective Welfare Support Acts are explicitly suspended for the duration of detention. Therefore asylum seekers do not receive pocket money. Asylum seekers in detention are accommodated together with other detainees<sup>144</sup> in ordinary prison-like detention centres. There is no effective access to legal counselling and to health care that goes beyond screenings effected by the public health officer. According to a member of the Human Rights Advisory Board, detention of asylum seekers is sometimes unnecessarily prolonged because the two different databases used – the aliens information system and the asylum seekers information system – are not compatible, therefore information is not adequately shared between the authorities.

- K. Are measures taken to avoid detention of asylum seekers with special needs (if yes, which ones?) or are special measures taken because of their needs?**

According to § 7 (3) Detention Regulation all detainees will have to undergo a medical screening within 24 hours at the latest. If they are considered unfit for detention in the detention centre, detention has to be continued in a hospital (§ 78 (7) Aliens Police Act).

As for regulations concerning minors see below at L.

- L. Can minor asylum seekers be detained together with relatives? Can unaccompanied minor asylum seekers be detained? If yes, are there special measures which take into account that children are concerned?**

According to § 79 (3) Aliens Police Act and § 4 (4) Detention Regulation minors shall be detained together with their parent/s unless the welfare of the minor requires otherwise.

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<sup>144</sup> They are accommodated together with persons arrested by police organs, persons convicted of administrative infractions or detained upon a formal decision for other reasons under aliens or security legislation.

According to § 77 Aliens Police Act more lenient measures have to be applied to minors, unless there is reason to believe that the aims of detention cannot be reached. Minors under 16 years old may only be detained if accommodation and care adequate to his or her age and adolescence can be guaranteed (§ 79 (2) Aliens Police Act). The Ministry of the Interior has issued an administrative instruction<sup>145</sup> according to which detention must be the last resort vis-à-vis minors and minors under 14 years must not be detained. If necessary, more lenient measures can be imposed.<sup>146</sup> Moreover, it stipulates that in cases where the authority cannot exactly determine the age of an alien who claims to be a minor, the authorities have to start from the assumption that he or she is a minor. Minors in detention must not be detained together with adults (apart from their parents or family members) according to § 4 (3) Detention Regulation.

In practice, these requirements do not seem to be met. The independent Human Rights Advisory Board installed at the Ministry of the Interior has issued a report in 2000, criticising that conditions of detention were not adequate to the needs of minors. In the meantime, the Ministry of the Interior has taken up several proposals, issuing among others the above mentioned instruction. However, it seems that the practical situation, especially for unaccompanied minors in detention, has not much improved. Minors are often taken in detention, because their declaration as to their age is not found credible. Sometimes, minors are taken in detention as minors, but then fall within the ordinary detention regime in practice. This situation is also due to the fact that police detention centres are not adequately equipped with staff, and since the police reform in 2005 they have been assigned more tasks without being accorded more personnel.<sup>147</sup> Sometimes, the age of the minor is determined by expert opinions estimating the age of the asylum seeker, the reliability of which is questioned by NGOs. However, sometimes persons are also deemed to be adults but in detention treated as minors.<sup>148</sup>

**M. In particular is article 10 regarding access to education of minors respected in those places?**

Minors who are in detention do not have access to education.<sup>149</sup>

**N. How many asylum seekers are for the moment detained in your Member State? Which proportion does this represent in comparison of the total number of asylum seekers at the same moment?**

The Ministry of the Interior informed, that in April 2006 a total number of 215 asylum seekers were registered in detention pending deportation under § 76 (2) Aliens Police Act. This number contains asylum seekers as well as persons whose applications have been finally rejected. It further informed that in the reference date of 30 April 2006, 13.233 procedures were being carried out in the first instance, 28.624 in the second instance.

NGOs give a number of 900 detainees at the moment, which is a proportion of 1:31, compared to asylum seekers under reception conditions. Compared to the number of asylum

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<sup>145</sup> Of 10 April 2000, No 31.340/17-III/16/00.

<sup>146</sup> [http://www.sosmitmensch.at/static/www/files/schubaftminors\\_3456\\_ab\\_3545\\_j\\_xxii.pdf](http://www.sosmitmensch.at/static/www/files/schubaftminors_3456_ab_3545_j_xxii.pdf).

<sup>147</sup> Information given by a member of the Austrian Human Rights Advisory Board.

<sup>148</sup> Information given by the UNHCR Office in Austria.

<sup>149</sup> Information given by NGOs.

procedures actually pending before the first and second instance<sup>150</sup> – 40.521 – this would be a ratio of 2,2% of asylum seekers in detention.

The latest statistic of the first half-year 2006 shows the following numbers of detention orders (!) issued:

detention with a view to return § 76 FPG (not only asylum seekers)		5902
among which detention under § 76 (2) FPG	§ 76 (2) No 1 FPG (expulsion order under § 10 Asylum Act 2005)	188
	§ 76 (2) No 2 FPG (expulsion procedure opened under Asylum Act 2005)	572
	§ 76 (2) No 3 FPG (expulsion order or prohibition of residence before application was made)	186
	76 (2) No 4 FPG (rejection for inadmissibility to be expected)	954
		1900
More lenient measures - § 77 FPG		618

Source: Ministry of the Interior,  
[http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen\\_statistik/2006/09/fremdenwesenstatistik\\_0906.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen_statistik/2006/09/fremdenwesenstatistik_0906.pdf)

The latest statistic on numbers of minors in detention is the following:

(1 <sup>st</sup> Jan-31 <sup>st</sup> Dec)	2002	2003	2004	2005
- 16 years	58	69	25	11
16–18 (19) years	293	307	250	130

Source: [http://www.sosmitmensch.at/static/www/files/schubftminors\\_3456\\_ab\\_3545\\_j\\_xxii.pdf](http://www.sosmitmensch.at/static/www/files/schubftminors_3456_ab_3545_j_xxii.pdf)

According to the Ministry of the Interior, 171 minors were in detention pending deportation in 2005, among which 14 persons aged between 14 and 16 years, 157 between 16 and 18 years. In the period between 1<sup>st</sup> January 2006 and 31<sup>st</sup> March 2006 there were 52 minors in detention pending deportation, among whom 2 persons aged between 14 and 16 years, 50 between 16 and 18 years.<sup>151</sup>

## **9. ORGANISATION OF THE SYSTEM OF RECEPTION CONDITIONS**

Q.34. Explain if the system of providing reception conditions is centralised or decentralised (which levels of government do provide practically reception conditions?) (do not confuse this question with question number 3 about the competence to make rules about reception conditions).

<sup>150</sup> Figures of September 2006, see statistic at:

[http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen\\_statistik/2006/08/asylstatistik\\_0806.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen_statistik/2006/08/asylstatistik_0806.pdf).

<sup>151</sup> Answer of the Minister of the Interior to a parliamentary inquiry, available at [http://www.parlinkom.gv.at/pls/portal/docs/page/PG/DE/XXII/AB/AB\\_04012/FNANAMEORIG\\_063953.HTM](http://www.parlinkom.gv.at/pls/portal/docs/page/PG/DE/XXII/AB/AB_04012/FNANAMEORIG_063953.HTM) L (answer to questions 62 and 63).

See Q.10.

Q.35. In case, are accommodation centres public or/and private (managed by NGOs? If yes, are the NGOs financially supported by the State?)<sup>152</sup>

See Q.10.

All federal care facilities are public.

In most Laender there are few small public accommodation centres. Only in Styria and Tyrol accommodation is managed to a large extent by the Government. More frequently care facilities are private (mainly hotels, private pensions, flats), and are managed either by private innkeepers or by NGOs. Such premises are often made available for welfare support because they are situated in remote areas and cannot be used for the purpose of tourism.<sup>153</sup> These premises fall under the category of “organised facilities” in Austria – to be distinguished from private places of asylum seekers who receive reception conditions in money.

Organised facilities are financially supported by the state. They receive a maximum amount of 17,- Euro per day per asylum seeker for providing accommodation and food, as laid down in Art 19 No 1 Basic Welfare Support Agreement – the actual amounts paid are laid down in the contracts with the care providers. For the high standard usually granted in facilities run by NGOs, this amount is not adequate and NGOs will have to finance parts of these accommodation centres themselves.

Additional equipment like playgrounds and leisure activities is often financed on donations.

Q.36. In case, how many accommodation centres are there in your Member State (distinguish in your answer between public and private centres)?<sup>154</sup>

There are four federal care facilities, among which two initial reception centres (*Thalham* and *Traiskirchen*). In the Laender there are approximately 600 care facilities.<sup>155</sup>

Statistics do not differentiate between public and private (organised) facilities. The following chart only shows the number of places in organised facilities in comparison with individual private accommodation.

Lower Austria	56 accommodation centres	2100 asylum seekers
Lower Austria	Private apartments	1600 asylum seekers
Burgenland	15 accommodation centres	533 asylum seekers
Vienna	31 accommodation centres	2663 asylum seekers
Vienna	Private apartments	5900 asylum seekers
Carinthia	28 accommodation centres	1200 asylum seekers
Salzburg	19 accommodation centres	720 asylum seekers
Salzburg	Private apartments	200 asylum seekers
Tyrol	22 accommodation centres	1100 asylum seekers
Tyrol	Private apartments	460 asylum seekers
Vorarlberg	40 accommodation centres	750 asylum seekers

<sup>152</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>153</sup> ICF II-Report, p 18.

<sup>154</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>155</sup> Information given by Ministry of the Interior.

**Source: ICF II- Report, p 17**

Note: This is no complete list, but serves as an example for how much the situation differs between the Laender. Special premises for unaccompanied minor refugees are not included.

Other available numbers specify that in Vorarlberg there are 5 accommodation centres (for more than 40 people) and 220 private facilities (care facilities run by privates and individual accommodation).<sup>156</sup> In Salzburg there are 2 accommodation centres and 17 private facilities.<sup>157</sup> In Tyrol there are 15 public accommodation centres and 6 private guesthouses.<sup>158</sup>

Q.37. Is there in the legislation a plan or are there rules in order to spread the asylum seekers all over the territory of your Member State to avoid their concentration in some areas like big cities or to share the costs of their reception between central, regional and local authorities?

After a positive decision on admissibility, asylum seekers are to be spread among the Laender according to a quota which shall be set in relation to the population of the Laender (currently according to the census of 2001). Other criteria like individual needs of the beneficiary, ethnic particularities, country of origin and family unification are also to be taken into account. This helps to avoid a concentration of asylum seekers in certain areas.<sup>159</sup>

Costs are shared according to the Basic Welfare Support Agreement between the Federation and the Laender at a ratio of 60:40.

**The figures which could be gathered on the distribution of asylum seekers between the Laender are the following:**

Land	Actual rate	Quota %	Target rate	Compliance with quota %	Deviation from quota
Burgenland	730	3,4554	977	74,70	-247
Carinthia	1.177	6,9639	1.970	59,76	-793
Lower Austria	6.023	19,2434	5.442	110,67	581
Upper Austria	4.718	17,1394	4.847	97,33	-129
Salzburg	1.365	6,4152	1.814	75,23	-449
Styria	3.594	14,73066	4.166	86,27	-572
Tyrol	1.474	8,3843	2.371	62,16	-897
Vorarlberg	914	4,3707	1.236	73,94	-322
Vienna	8.287	19,2971	5.458	151,84	2.829
<b>Total</b>	<b>28.282</b>		<b>28.281</b>		

Source: Report on the refugee system in Tyrol, issued by the Tyrol Court of Audit, p 16

<sup>156</sup> Information given by NGOs.

<sup>157</sup> Information given by NGOs.

<sup>158</sup> Report of the Tyrol Court of Audit on the refugee situation in Tyrol, January 2006, p 22 and 38.

<sup>159</sup> Information given by Ministry of the Interior.

Q.38. Does a central body representing all the actors (like NGOs) involved in reception conditions exist? Does it play a consultative role for the State authorities, a role for the actors or any other role?<sup>160</sup>

There is no body representing all actors, particularly not NGOs. Asylkoordination plays an important role, because it comprises some of the most important organisations and is a platform of exchange of information and ideas of these organisations and a basis for joint projects. In the Laender, NGOs or private care providers may be involved on an informal basis, depending on the government officials in charge.<sup>161</sup> There is an office responsible for distributing asylum seekers to the Laender (see above at Q.10.), and a Coordination Council, see below Q.39.

Q.39. **A. Which is the body in charge of guidance, monitoring and controlling the system of reception conditions as requested by article 23 which is mandatory provision? Include in your answer which is the competent ministry (Interior, Social affairs, etc) for reception conditions?**

For the system of federal care, the Ministry of the Interior is responsible (department for basic welfare support for refugees). All the governments of the Laender have one refugee coordinator or refugee commissioner. These organs are responsible for the administration as well as the monitoring of the reception system in the Laender. In some Laender where reception conditions are organised by the governments directly, they have an immediate control function, in other Laender, where tasks have been outsourced to other institutions like NGOs or to the Fonds Soziales Wien in Vienna, the monitoring function is in fact often also to a large extent taken over by the organisations, according to their contracts with the governments. In most of the Laender, the refugee coordinators are installed in the departments of social affairs. Only in Carinthia and Vorarlberg they belong to the department for internal affairs.

In addition, a Coordination Council for the Federation and the Laender (*Bund-Länder-Koordinationsrat*; Art 5 Basic Welfare Support Agreement) has been created, which is composed of the Federal Ministry of the Interior and the Refugee Coordinators in the Laender and whose task it is to resolve problems arising from sudden challenges, the interpretation of the Agreement, the allocation of costs and audit, or other extraordinary incidents.

B. Has your Member State (like the Czech Republic did recently) approved quality standards (not necessary legally binding) for housing services (for instance about the number of persons per bedroom on the basis of its size, number of accessible toilets, bathrooms, showers and washing machines per number of persons, existence of common rooms with radio, television, newspapers, books, computers, accessibility of telephone, existence of recreative rooms for children,...) to be respected in particular in accommodation centres?<sup>162</sup>

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<sup>160</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>161</sup> Information given by NGOs.

<sup>162</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.



In practice this depends on the Land. There is eg no catalogue of standards in Vorarlberg, where asylum seekers live mainly in private accommodation and standards are generally high.<sup>163</sup> There is a catalogue of standards in Salzburg, which has been issued by the Government and published on the internet (Ref No 5/2). Other Laender applied (different) standard requirements when they tendered accommodation facilities after entry into force of the Basic Welfare Support Agreement. They applied rationing schemes attributing points for certain conditions (eg for qualified staff, running water in the rooms, warm meals, the distance to a public school, the existence of television etc).<sup>164</sup>

**The Ministry of the Interior** reminded that under Art 6 paragraph 1 of the Basic Welfare Support Agreement accommodation has to be effected in appropriate accommodation facilities, taking into account the respect of human dignity and family unity, and **provided the following list of minimum standards for federal care facilities:**

- Persons belonging to different families should be accommodated separately. This requirement may be departed from temporarily in times of a high number of asylum seekers. In any case, nationality, ethnic group and different religious denominations must be taken into account.
- The Laender have different norms of minimum standards for accommodation facilities. In any case standard equipment must include a bed, mattress, a pillow, a blanket, sheets, a towel, a cupboard, chair and table in proper condition. The landlord is responsible for the cleaning of sheets every 14 days. Sanitary facilities must be made accessible at any time. The cleaning and heating of rooms has to be done as appropriate. In the federal care facilities, cleaning is mostly done by asylum seekers, cleaning implements are being provided.
- There are provisions concerning food, social care, clothing supply etc.
- The company „European Home Care” which was charged with care, meals and social care within the federal care facilities has an internal system of quality management and quality control. There are detailed and comprehensive organisational schedules and flow charts for administration, accommodation, care and meals. Of course monitoring is done by the head of the care facility and initial reception centre.
- The forms of care provision have to be adapted to particular groups of persons with special needs (eg pregnant women, minors, mentally disabled persons, physically disabled persons, traumatised persons and victims of violence).
- Private accommodation facilities are being controlled regularly and controls are supposed to be further expanded.

### **C. How is this system of guidance, control and monitoring of reception conditions organised?**<sup>165</sup>

The Refugee Coordinators of the Laender are responsible for organising the whole care system, unless they have contracts with NGOs which provide care. They take individual decisions on granting and withdrawal of benefits and have the right to issue instructions vis à vis the management of public accommodation centres or private guesthouses or NGOs providing other benefits on the basis of a contract.

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<sup>163</sup> Information given by NGOs.

<sup>164</sup> Asylkoordination, Report on changes in the federal care system, December 2005, p 13 ff; [http://www.asyl.at/fakten\\_2/studie\\_aenderungen\\_bundesbetreuung.pdf](http://www.asyl.at/fakten_2/studie_aenderungen_bundesbetreuung.pdf)

<sup>165</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

- D. Does the body in charge of guidance, control and monitoring produce reports about the level of reception conditions? If yes, how frequently and are they public?<sup>166</sup>

There is no information as to whether such reports exist.

The Coordination Council shall issue regular reports concerning the transposition of the Basic Welfare Support Agreement, the first report was supposed to be made on 1<sup>st</sup> May 2005. The frequency of the issuing of such reports is to be set by the Coordination Council. These reports are apparently not public, since none could be found gathered and was not made available upon request by the Ministry of the Interior.

- Q.40. A. What is the total number of asylum seekers covered by reception conditions for the last year for which figures are available (see article 22 obliging Member States to calculate those statistics about which we also asked the Commission to require them from Member States for mid June)?

The number given by the Ministry of the Interior for 19 May 2006 is 28.364 persons.

- B. What is the total budget of reception conditions in euro for the last year for which figures are available?<sup>167</sup>

A total budget cannot be given, because the Laender calculate independently and often benefits granted (like psychological care, schooling for asylum seekers etc) are not cited under the title of care for asylum seekers. The most reliable figure is probably the amount given in the explanatory notes of the Government Bill for the Basic Welfare Support Agreement: the estimated costs of reception conditions amounted to Euro **125.675.660,00**, based on the assumption that 16 000 asylum seekers are in the care system (based on figures of 2002). – In view of the above mentioned number of asylum seekers enjoying reception conditions of course this figure is no longer up to date.

- C. What is the average cost of reception conditions in euro per asylum seeker for the last year for which figures are available?<sup>168</sup>

The Government Bills for a Basic Welfare Support Act for Burgenland and Upper Austria calculated €7.300,- per person and year.

- D. Are the costs of reception conditions of asylum seekers supported by the central/federal or federated government or are they shared with regional and/or local authorities?

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<sup>166</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>167</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>168</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

The costs covered by the federal and local governments are laid down in the Basic Welfare Support Agreement (Ref No 1/2) – these are the amounts that are taken as basis when the costs of reception are shared between the Federation and the Laender after an analysis done by the Coordination Council (Koordinationsrat) on numbers of asylum seekers covered by reception conditions at a certain date. The costs incurred during the first year after an application has been made are shared between the Federation and the Laender at a ration of 60:40. If a final decision on the application has not been taken after one year, the Federation has to cover the costs incurred after that time (the reasons for this rule being that the Federation is responsible for the carrying out of the asylum procedure, and is therefore responsible if an application has not been decided within that time). The costs falling at the expense of the Laender are shared between them in proportion to their population.

However, the amounts laid down in the Basic Welfare Support Agreement are also the maximum amounts paid to NGOs in case they are the ones organising reception conditions (eg Caritas in Vorarlberg, Salzburg, Upper Austria; Diakonie doing legal counselling in Vienna and Lower Austria). Bearing in mind the amount paid (eg 16 Euro per day for legal counselling, 17 Euro per day for accommodation of asylum seekers per person) it is to be assumed that these NGOs cannot operate without co-financing reception conditions.

**E. Is article 24 § 2 of the directive following which “*Member States shall allocate the necessary resources in connection with the national provisions enacted to implement this directive*”<sup>169</sup> respected?**

According to the information given by the Ministry of the Interior, the personal and financial resources necessary to provide reception conditions to asylum seekers have been allocated. The costs of all measures are shared between the Federation and the Laender according to the Basic Welfare Support Agreement. The maximum amounts paid to NGOs which provide accommodation, care or counselling are also calculated upon these provisions, but finally accorded with them by means of contracts under private law. The competitive situation on the market thus created for NGOs granting reception conditions urges NGOs to conclude contracts on the basis of terms, under which they could not keep the high standard currently achieved. Counselling is eg provided for by the Agreement at a ration of one counsellor per 170 asylum seekers (Art 9 No 9 Basic Welfare Support Agreement). The amount paid to organisations providing organised accommodation and food may amount to a maximum of 17,- Euro per person per day (§ 9 No 1). Apparently European Homecare tendered 12,90 Euro per day per person when it won the contract to provide accommodation, food, care and counselling in the federal care facilities.<sup>170</sup> It should be added that higher amount are being paid to organisations if they are providing special forms of accommodation creating higher expenses, eg for unaccompanied minors. Care measures granted by NGOs are co-financed by them and joint projects; see also what has been said regarding psychotherapy for persons with special needs, special conditions for minors and other specially vulnerable groups (above at Q.30.B).

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<sup>169</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>170</sup> see the article “Österreich: Versorgung und Unterbringung von Asylsuchenden” of September 2003 in the German journal „Migration und Bevölkerung“, at: [http://www.migration-info.de/migration\\_und\\_bevoelkerung/artikel/030703.htm](http://www.migration-info.de/migration_und_bevoelkerung/artikel/030703.htm).

Q.41. A. What is the total number of persons working for reception conditions?  
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A total number cannot be given because different forms of reception conditions not only shared by the Federation and the Laender, but are often provided by NGOs on the basis of contracts with the federal entities or on their own initiative.

For the Federation, about 114 persons are working in four federal care facilities and two initial reception centres. This number does not include the personnel of European Homecare.

B. **How is the training of persons working in accommodation centres organised? Does it take into account specific needs of unaccompanied minors when relevant as well as the gender dimension? (see article 14 §5, 19 § 4 and also 24 §1 which are mandatory provisions)?**<sup>172</sup>

There is no compulsory training foreseen in legislation.

The Federation obliged people in charge of social care to attend at least one seminar in the first half of 2006. It offers a series of seminars on criminal law, intercultural communication strategies, methods of de-escalation and seminars providing knowledge on specific groups of refugees (eg Chechens who are a relatively large group in Austria).<sup>173</sup> The Ministry of the Interior informs that European Homecare which is responsible for providing reception conditions in the initial reception centres, has had experience in social care for many years and extensive quality management.

Apparently persons working with minors must have a special pedagogical education.<sup>174</sup> NGOs which run care facilities or provide social care in public facilities have multi-professional trained staff of both genders. Some operators of care facilities offer training for their staff, but generally there is no training, especially for innkeepers that run private facilities and their personnel. Regional training in the Laender is not provided.<sup>175</sup>

C. Are there rules about the deontology of persons working in accommodation centres, in particular on confidentiality?<sup>176</sup>

There are no general rules of deontology, unless they are applied by NGOs on their staff. Public service employees have to keep information gathered confidential under the Constitution and the Data Protection Act 2000. Operators of care facilities working on the basis of a contract with the Federation must oblige their personnel to observe confidentiality

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<sup>171</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>172</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>173</sup> Information given by Ministry of the Interior.

<sup>174</sup> Information given by NGOs.

<sup>175</sup> Information given by NGOs and ICF II-Report, p 20.

<sup>176</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

according to § 4 (2) of the Federal Basic Welfare Support Agreement. Similar provisions exist in all of the Laender.<sup>177</sup>

## **10. IMPACT OF THE DIRECTIVE**

Legal impact of the transposition of the directive:

Q.42. Specify if there are or not big problems with the translation of the directive in the official language of your Member State and give in case a list of the worst examples of provisions which have been badly translated? (please note that this question has in particular been added to the questionnaire concerning the new Member States)

Apart from the possible differences in meaning in the expression “zuweisen”, where the English version speaks of “confinement” in Art 7 paragraph 3 of the Directive, no significant problems with the translation of the directive into German can be stated.

Q.43. Where there precise legal rules on reception conditions for asylum seekers before the adoption of the norms of transposition of the directive (if yes, specify what the nature of those rules was (legislation, regulation, administrative instructions,...))?

The Federal Care Provision Act was issued in 1991 (FLG 405/1991) and is still the basis of the Federal Welfare Support Act. The name and the content (notably the legal entitlement to benefits is new) have been changed at the occasion of the transposition of the Welfare Support Agreement concluded with the Laender.

Q.44. Did the legal rules applicable to reception conditions become more clear, precise, coherent or detailed with the adoption of the transposition norms (for instance do you now have after the transposition one basic text dealing with reception conditions instead of numerous different texts in the past?)

The legal rules did on the one hand become more clear and precise, on the other hand the system of burden sharing between the Federation and the Laender did make the situation more complicated. The system as it stands might be considered useful and adequate for the moment to guarantee reception conditions in practice, but there are still loopholes and major inequalities in the treatment of asylum seekers).

Q.45. Did the transposition of the directive imply important changes in national law or were the changes of minor importance? In case, list the most important changes that have been introduced.

There have been significant changes in national law, which were basically made before the time frame set by the Directive. Major changes were introduced already in 2004 into the

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<sup>177</sup> Burgenland § 3 (4), Carinthia § 2 (7), Lower Austria § 25 (5), Styria § 6 (2), Tyrol § 3, Upper Austria § 1 (3), Vienna § 4 (5), Vorarlberg § 17 (2).

Federal Care Provision Act (FLG I 32/2004). Under the Basic Welfare Support Agreement (Ref No 1/2) there is now a clear distribution of responsibilities between the federal entities and a list of benefits they are obliged to guarantee. All the Laender have now, if not enacted, at least foreseen legislation to guarantee these benefits.

Some provisions are included in the Asylum Act 2005 or the Aliens Police Act, which have been completely renewed in 2005 (Aliens Law Package; Fremdenrechtspaket, see FLG I 100/2005). The new legislation made the whole system of aliens law more restrictive, taking into account not only the present, but above all also other EG-directives in the field.

#### Political impact of the transposition of the directive:

Q.46. Explain briefly if there has been an important debate about the transposition of the directive (in particular in the Parliament, but possibly also in the government, between political parties, including in medias, etc; underline in case the main points which have been discussed or have created difficulties)

There has been an important debate about granting reception conditions to asylum seekers in general, which has started already before the transposition of the Directive was due. The significant rise in asylum seekers starting in the end of the 1990ies, that reached its high in 2002 (see the chart below), was not accompanied by an adequate rise in accommodation organised by the Federation and the Laender, leaving a large number of asylum seekers in homelessness and dependant on care and support from NGOs. NGOs complained every winter about high numbers of homeless asylum seekers who could not get a place in federal or Laender care.<sup>178</sup> Since according to the repartition of competences under the Austrian Constitution the Laender are basically responsible to take care of people in need of support, the Federation urged them to make more efforts to take asylum seekers into their care and issued an administrative directive in October 2002 prescribing that basic benefits be refused to asylum seekers coming from certain countries (eg Nigeria, Georgia, Armenia)<sup>179</sup>. Often asylum seekers were dismissed from care facilities because they were accused of having lodged asylum applications for reasons which would not entitle them to the asylum status (*asylfremde Motive*). In January 2003 the High Court issued a decision stating that asylum seekers had the right to be taken into federal care if they fulfilled the criteria laid down by law.<sup>180</sup> In October 2003 the Minister of the Interior issued a regulation stating that care facilities could only be created with prior consent of the mayors of the municipalities in question. Due to the strong opposition of the local authorities, the creation of new care facilities for asylum seekers was severely blocked.<sup>181</sup>

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<sup>178</sup> Eg in 2001 UNHCR Press Release of 21 November 2001, at <http://www.unhcr.at/index.php/cat/17/aid/247>; in 2002 see eg the yearly report of Caritas Vienna for the year 2002, p 27, at [http://www.caritas-wien.at/div/caritas\\_ed\\_wien\\_jahresbericht\\_2002.pdf](http://www.caritas-wien.at/div/caritas_ed_wien_jahresbericht_2002.pdf); Falter (newspaper) of 27 November 2002, under the title "Mittellos, würdelos", at [http://www.falter.at/print/F2002\\_48\\_3.php](http://www.falter.at/print/F2002_48_3.php); for the year 2003 see the letter of the NGO Asylkoordination of 22<sup>nd</sup> December 2003 addressed to the Federal Chancellor, at [http://www.asyl.at/projekte/existenzsicherung/existenzsicherung\\_16.htm](http://www.asyl.at/projekte/existenzsicherung/existenzsicherung_16.htm); Caritas Upper Austria, Press Release of 14 October 2003, at [http://www.dioezese-linz.at/redaktion/index.php?action\\_new=Lesen&Article\\_ID=2123](http://www.dioezese-linz.at/redaktion/index.php?action_new=Lesen&Article_ID=2123).

<sup>179</sup> UNHCR Press Release of 29 January 2003, see <http://www.unhcr.at/index.php/cat/17/aid/547>.

<sup>180</sup> At the time asylum seekers were not granted a right to reception conditions under the Federal Care Act, and decisions were not taken under the Administrative Procedures Act. The High Court ruled that the equality principle laid down in the Austrian Constitution was applicable coming to the said result that asylum seekers could not be excluded for other reasons than those laid down by law (see OGH 24 February 2003, 1Ob272/02k).

<sup>181</sup> Asylkoordination, Report on Changes in federal care support, p 18, available at [http://www.asyl.at/fakten\\_2/studie\\_aenderungen\\_bundesbetreuung.pdf](http://www.asyl.at/fakten_2/studie_aenderungen_bundesbetreuung.pdf)

The conclusion of the Basic Welfare Support Agreement was considered a success in the parliamentary discussion and met the approval of the three big parties in Parliament<sup>182</sup> in the ballot of 24 March 2003. The Greens had voted in favour of the Agreement in the Parliamentary Committee on Internal Affairs, but finally opposed the Government Bill in the ballot and criticised that the sums of money determined for the respective welfare support benefits could not suffice to meet an asylum seeker's basic needs.<sup>183</sup> Negotiations between the Federation and the Laender had concentrated not only on the repartition of the financial burden of reception conditions, but also on the amount of asylum seekers to be taken into the care of the Laender.

The Minister of the Interior emphasised that the number of accommodation places had significantly increased and that all asylum seekers were finally taken into federal care. He referred to the Directive underlining that Austria was one year ahead of the deadline for the implementation of the Directive and that finally a consistent care system throughout the county was created, which would allow closing the gap in accommodation mourned by NGOs.<sup>184</sup> However, the Minister did not take into account that the Federal Care Act was not designed to be the basis of welfare support for the future, but much would depend on the implementation of the Basic Welfare Support Agreement in the Laender. Since the Basic Welfare Support Agreement had been concluded on the basis of 16.000 asylum seekers to be taken into care, the places available in the Laender were insufficient in view of the numbers of asylum seekers which had been much higher than the calculated 16.000 already in 2001. Some Laender regularly stopped accepting newly arrived asylum seekers and Carinthia considered cancelling the Agreement, but finally refrained from doing so.<sup>185</sup> In October 2004 – after the Basic Welfare Support Agreement had entered into force – the situation was still precarious, particularly because the opposition in the municipality of Traiskirchen – which hosts a large initial reception centre and federal care facility – against the high numbers of asylum seekers accommodated there was rising. When numbers of asylum seekers within the care system started to go down again, the situation relaxed a little. Today – due to a rise in places of accommodation, but in particular due to falling numbers of applications for international protection – the places available in ordinary care facilities seem sufficient for the moment. However, there are no big emergency capacities available for cases of unexpected accommodation shortages. The problems in the factual implementation of reception conditions, particularly in the fields of information, social care and medical care for persons with special needs have been demonstrated in the above questions.

1990	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
22.789	5.920	6.991	6.719	13.805	20.129	18.284	30.127	39.354	32.359	24.676	22.461

Source: <http://www.unhcr.at/index.php/cat/14/aid/1760>

**Q.47. Did the transposition of the directive contribute to make the internal rules stricter or more generous? In particular, did your Member State use the occasion of the transposition to abolish more favourable provisions of**

<sup>182</sup> Austrian People's Party, Austrian Social Democrat Party, Freedom Party.

<sup>183</sup> Mag Stoitsits, 24 March 2004, Minutes of the 55<sup>th</sup> Parliamentary Session, p 102 ff, at [http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ\\_00055/SEITE\\_0102.html?P\\_PM=SEITE\\_0102](http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ_00055/SEITE_0102.html?P_PM=SEITE_0102).

<sup>184</sup> Minister of the Interior Dr Strasser, 24 March 2004, Minutes of the 55<sup>th</sup> Parliamentary Session, p 120ff, at [http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ\\_00055/SEITE\\_0120.html?P\\_PM=SEITE\\_0120](http://www.parlament.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ_00055/SEITE_0120.html?P_PM=SEITE_0120).

<sup>185</sup> Asylkoordination, Report on Changes in federal care support, p 17 f.

**national law? Does your Member State still have rules more favourable than the provisions of the directive (if yes, try to give the more important examples).**

There were no provisions more favourable in legislation concerning reception conditions. However, while asylum seekers were according to the Federal Care Provision Act legally entitled to benefits under the care system, there is no such entitlement now in Laender which have failed to provide for it in their legislation.

In addition, employment legislation has changed in a way that it now requires an alien to have a right to establishment to obtain a more favourable work permit. These changes have excluded asylum seekers from obtaining such work permits. Although even under the earlier legislation, more favourable work permits were hardly ever granted to asylum seekers, the fact that they were considered “available” on the labour market opened the possibility for them to be granted access to unemployment benefits and vocational training. Apparently there are still a lot of cases before the authorities today, where interest groups of employees are trying to make sure that such benefits be granted to their clients.<sup>186</sup> These options have now been factually excluded.

## **11. ANY OTHER INTERESTING ELEMENT**

Q.48. What are in your view the weaknesses and strengths of the system of reception conditions in your Member State?<sup>187</sup>

Weaknesses stated by NGOs lie within the fact that there are no nationwide standards for reception conditions and that the system lacks transparency. There are especially different standards in the field of training of staff of accommodation facilities, financial allowances to asylum seekers, social and legal counselling of asylum seekers and offers for vulnerable groups.<sup>188</sup>

Q.49. Mention any good practice in your Member State which could be promoted in other Member States<sup>189</sup>

The Ministry of the Interior emphasises that at least three Laender (Tyrol, Vienna and Vorarlberg) have created special accommodation facilities for single women (with or without children) or accommodate these persons in shared facilities for women or centres for women with children (which have been created not only for asylum seekers). The other Laender try for a separate accommodation of women, too. A special accommodation facility for women exists also in the initial reception centre *Ost* in Traiskirchen

As far as medical care is concerned, there is a ward in the initial reception centre as well, where four general practitioners are working. Moreover there are four specialists trained in psychiatry. Projects of NGOs provide an accommodation facility for women and one for unaccompanied minors and offer psychotherapeutic and social care there.

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<sup>186</sup> Information given by a member of the Upper Austrian Chamber of Labour.

<sup>187</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.

<sup>188</sup> Information given by NGOs.

<sup>189</sup> To be answered with the help of UNHCR local office competent for your Member State or on the basis of the answers of NGOs and accommodation centres to the practical questionnaire.



In general, it can be said that the projects run by NGOs (often co-financed also by the Federal or Laender Government and the European Refugee Fund) provide an indispensable care at a very high standard. This accounts for social counselling in accommodation facilities and to aliens in detention as well as to psychiatric treatment for victims of torture and other traumatised persons. Several of these projects have also been mentioned as models of good practice in the Final Report of the European Open Forum on Reception and Health Care of Asylum Seekers in Vienna, in January this year.

Q.50. Please add here any other interesting element about reception conditions in your Member State which you did not had the occasion to mention in your previous answers.

It seems that Länder did not consider to transpose the Directive, but focussed on the transposition of the Basic Welfare Support Agreement, and have tried to adapt it to their ideas of policy vis-à-vis asylum seekers eg in the areas of withdrawal of benefits. The Laender which have always had contracts with NGOs and obviously envisaged to do so further on have not put much emphasis on the integration of basic requirements in legislation, but have decided to set standards in their contracts with care-providers.

Sources of Information:

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