

REFORMING LEGAL ASSISTANCE IN AUSTRIA: AN END TO INDEPENDENT PROVISION?

**ECRE'S CALL FOR WITHDRAWAL OF MEASURES THAT SEVERELY
RESTRICT ACCESS TO INDEPENDENT LEGAL ASSISTANCE.**

I. INTRODUCTION

Quality legal assistance and representation throughout the asylum process is at the core of fair, transparent and efficient asylum procedures. Asylum seekers are often not familiar with the national framework and face significant obstacles in navigating and understanding the complexity of asylum procedures, e.g. because of a lack of information or language barriers. Their disadvantaged position in the asylum procedure necessarily calls for adequate guidance and assistance at the earliest stage possible as it creates trust in the asylum process and benefits both asylum applicants and the asylum authorities. Yet access to free legal assistance and representation for asylum seekers remains contentious in many European countries and has been subject to various restrictions.

The latest example of this worrying trend is Austria, one of the European Union (EU) countries which recorded the largest relative decrease of first-time applicants in 2018 (-49 % representing 11,000 applicants) compared to 2017.¹ On 19 June 2019, the Austrian Parliament adopted a law establishing a Federal Agency for Supervision and Support Services (*Bundesagentur für Betreuungs- und Unterstützungsleistungen*, BBU GmbH) which will be in charge *inter alia* of (i) providing reception conditions (“basic care”), (ii) providing legal assistance to asylum seekers; (iii) providing assistance for return, (iv) providing human rights observers to monitor deportations; and (v) providing interpreters and translators during the asylum procedure.² The Federal Agency is supposed to carry out task (i) as of 1 July 2020 and all other tasks (ii to v) as of 1 January 2021.³

The stated objectives of the law are fourfold: to increase the efficiency of the assistance of the Federal Government (“*Bundesbetreuung*”); to reduce both the costs of the process and the dependency on external legal aid providers; to provide objective legal assistance; and to enforce voluntary return through quality counselling. The Federal Agency is established as a “limited liability company” (“*Gesellschaft mit beschränkter Haftung*, GmbH”),⁴ and its sole shareholder is the Federal Government.⁵ The Federal Ministry of Interior, which is responsible *inter alia* for the Federal Office for Immigration and Asylum (*Bundesamt für Fremdenwesen und Asyl*, BFA),⁶ is granted significant influence over the functioning and the role of the new Federal Agency.

In this legal note, the European Council on Refugees and Exiles (ECRE) provides its analysis of the main changes introduced by the law and their impact on the provision of legal assistance to asylum applicants both at first and second instance. In addition to the overall restrictive approach to free legal assistance and representation pursued by the new law, the exclusion of welfare organisations and external service providers in the provision of legal assistance is of particular concern to the ECRE.

II. ANALYSIS

1. THE ROLE OF THE FEDERAL AGENCY IN THE PROVISION OF LEGAL ASSISTANCE

Pursuant to the recast Asylum Procedures Directive (APD), legal and procedural information may be provided by non-governmental organisations, or by professionals from government authorities or from specialised services of the State.⁷ The recast APD further obliges Member States to ensure access to free legal assistance and representation at second instance,⁸ while they remain free to provide free legal assistance

1. Eurostat, Asylum statistics, available at: <https://bit.ly/2Pfh448>. Similarly, Eurostat statistics indicate that the number of positive first instance decisions on asylum applicants gradually decreased since 2016: while a protection status was granted to 30,370 asylum seekers in 2016, there were only 25,200 in 2017 and 15,020 in 2018. During that same period, the number of rejections increased from 12,045 in 2016 to 19,960 in 2017 and remained stable at around 19,500 in 2018.
2. Bundesgesetz, mit dem ein Bundesgesetz über die Errichtung der Bundesagentur für Betreuungs- und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung erlassen (BBU-Errichtungsgesetz – BBU-G) und das BFA-Verfahrensgesetz, das Asylgesetz 2005 und das Grundversorgungsgesetz – Bund 2005 geändert werden, available in German at: <https://bit.ly/2xaGNCE>.
3. Article 2(3) BBU-G.
4. Article 1(1) BBU-G.
5. Article 1(5) BBU-G.
6. Pursuant to Article 2(f) of the recast Asylum Procedures Directive (Directive 2013/32/EU) the BFA acts as a “determining authority”, i.e. it is responsible for examining applications for international protection and is competent to take decisions at first instance in such cases.
7. Article 21 Asylum Procedures Directive (Directive 2013/32/EU).
8. Article 20(1) Asylum Procedures Directive (Directive 2013/32/EU).

and representation in the procedures at first instance.⁹ It refers to national legislation, however, as regards the persons who should be entrusted with the responsibility of providing free legal assistance. Thus, the establishment of a Federal Agency responsible for providing free legal assistance does not *per se* contradict the recast APD. However, it should be noted that the APD sets relatively low procedural standards in that regard and that the higher requirements under human rights law should be taken into consideration. In any case, the establishment of the Federal Agency raises concerns about independence as the role was previously carried out by external service providers, as will be explained below.

2. FREE LEGAL ASSISTANCE AT FIRST INSTANCE

As demonstrated in the ECRE/ELENA Legal note on access to legal aid, European countries have developed diverging practices with regard to the provision of legal assistance at first instance. In some countries, it is simply not available (CY, DE, EL, HU, IT, MT, PL, RS), or limited to legal advice (FR, HR, IE, PT, RO, BG, England and Wales). Others, however, provide legal assistance at first instance, including legal representation during the interview (BE, ES, IS, NL, NO, SE and SL).¹⁰ In 2019, a positive development was noted in Switzerland, as the new asylum procedure introduced a right to receive free advice and legal representation in first instance procedures as a safeguard given the acceleration of the process.¹¹

Currently, in Austria free legal assistance at first instance is mainly provided by Caritas and Verein Menschenrechte Österreich (VMO) but remains limited to the existing resources and availability of staff. Legal assistance is provided at their offices or at the branch offices of the BFA. In 2016, information from the Federal Ministry of Interior revealed that a majority of consultations had been provided at the offices of the external providers rather than at the branch offices of the BFA.¹² However, legal assistance will be even further restricted with the entry into force of the new law, which amends the BFA Procedures Act (BFA-VG) setting the rules for procedures at the BFA.¹³ While access to legal assistance at first instance was the general rule under the previous Article 49(1) BFA-VG, it becomes the exception under the new law. Legal assistance at first instance shall now only be provided according to the “available possibilities”, and does not constitute a right, except in specific cases listed in the Asylum Act.¹⁴ In other words, access to free legal assistance at first instance is only granted when existing resources are available (e.g. staff and funding), and is not a right for all.

Article 29 of the Austrian Asylum Act, one of the provisions that is being referred to as a case in which free legal assistance should be provided at first instance, merits particular attention. The previous Article 29(4) of the Asylum Act provided that when an asylum seeker receives a notification of the intention to reject his or her application for international protection (“*Mitteilung*”),¹⁵ he or she has the right to be heard (“*Einvernahme zur Wahrung des Parteihör*”). The asylum applicant is therefore referred to a legal adviser and provided with free legal assistance with the aim of making the best use of his or her right to be heard. The asylum applicant and the legal adviser both receive a transcript of the case files (“*Akteninhalt*”) and, for the purpose of preparation, the asylum applicant cannot be heard within the first 24 hours. This was however already a short minimum period to prepare a proper response to the BFA’s intention to reject the asylum application.

Nevertheless, the reform introduces a new threshold which grants the asylum applicant the right to free legal assistance by the Agency only if an appointment - during which the applicant exercises his or her right to be heard - is scheduled within 72 hours (3 days) after having been notified by the BFA of the intention to reject the asylum application. This means that, if the BFA grants the asylum applicant the right to be heard at a later stage (e.g. in 4 or 5 days), free legal assistance by the Agency will only be available if resources so allow. The discretion of the BFA as regards the timing of the appointment thus has an influence on whether legal assistance will be provided at first instance because the Federal Agency is legally obliged to *do* so, or whether it will be provided if the Agency’s available resources *allow* so. In addition, the provision specifies that, if the asylum seeker did not make use of the right to be heard, this does not affect the outcome of the decision on his or her application for international protection.

9. Article 21(2) Asylum Procedures Directive (Directive 2013/32/EU).

10. ECRE/ELENA, Legal note on access to legal aid in Europe, November 2017, 5, available at: <https://bit.ly/2zIzeAU>.

11. AIDA, Country report Switzerland, 2018 Update, March 2019, 26, available at: <https://bit.ly/2Ksrle0>.

12. AIDA, Country report Austria, 2018 Update, March 2019, 28-29, available at: <https://bit.ly/2ID5uzH>.

13. Federal Act on the general rules for procedures at the federal office for immigration and asylum for the granting of international protection, the issuing of residence permits for extenuating circumstances reasons, deportation, tolerated stay and issuing of stay terminating measures, furthermore the issuing of documents for aliens, available in German at: <http://bit.ly/1Jdmw0F>.

14. Article 49(1) BFA-VG.

15. A notification on the intention to reject an asylum application is not the actual decision of the determining authority. Several Member States, such as the Netherlands, have established a practice of notifying asylum applicants on the intention to reject their asylum application.

What follows from the above is the risk of arbitrary access to free legal assistance at first instance which will largely depend on the BFA's goodwill allowing the asylum applicant to be heard in due time. ECRE has consistently highlighted the importance of early legal assistance for the efficiency and fairness of asylum procedures.¹⁶ Complex asylum procedures and unfamiliarity with the system may prevent asylum seekers from effectively enjoying their rights. Legal assistance is therefore a key component of fair and efficient asylum procedures and helps asylum applicants to fully understand their rights and obligations at the earliest stage of the procedure, which subsequently increases the confidence of both parties in the asylum process.

3. FREE LEGAL ASSISTANCE AT SECOND INSTANCE

As already mentioned, under EU law, applicants are entitled to free legal assistance and representation upon request in the case of a negative decision by the determining authorities, in order to lodge an appeal and be represented at the appeal hearing.¹⁷ This ensures that they understand the reason(s) for rejection and are provided information on the best way to appeal.

In Austria, free legal aid at second instance was first introduced by amendment of the Asylum Act in 2011,¹⁸ and complemented by jurisprudence. In 2016, the Administrative High Court (*Verwaltungsgerichtshof*, VwGH) confirmed that asylum applicants should be allowed to make effective use of their right to legal assistance.¹⁹ Similarly, the Constitutional Court (*Verfassungsgerichtshof*, VfGH) stated that, if asylum applicants so request, legal advisers should represent them before the Court.²⁰ Accordingly, Article 52(2) BFA-VG provides that asylum applicants should, at their request, be represented at the appeal hearing.

In practice, two organisations, namely ARGE Rechtsberatung (implemented by Diakonie and Volkshilfe) and VMÖ, are contracted by the Federal Ministry of Justice to provide legal assistance in appeal proceedings. Although asylum applicants have no choice as to which of these organisations will be responsible for providing them legal assistance,²¹ they can decide to be represented by other welfare organisations (i.e. by finding other organisations providing free legal assistance)²² or to contract a private lawyer. However, the fact that legal assistance is being provided by external providers does not necessarily guarantee quality and independence. The organisation VMÖ for example has been criticised for its ties with the Federal Government and its lack of independence.²³ In addition, in 2016, a report evaluating the assistance of legal advisers at the appeal hearing revealed that VMÖ represented asylum applicants at the appeal hearing in only 4 cases, whereas ARGE Rechtsberatung represented 139 cases. Improvements to the assistance of VMÖ were, however, noted in 2017, especially regarding the quality of the advice provided.²⁴

Upon entry into force of the new law, free legal assistance at second instance will be provided by the Federal Agency, as explicitly stated in Article 2.²⁵ Following a negative decision on the asylum application by the BFA, asylum seekers shall be informed in writing that they have access to a legal adviser free of charge. Accordingly, while the previous Article 59 of the BVA-VG foresaw that the “appointed legal adviser by the Federal Office (BFA) or the entrusted legal person” shall be informed as well, the new provision deletes the reference to the “entrusted legal person” and replaces it with a reference to the Federal Agency.

Commentators fear that the law could also be interpreted as introducing restrictions with regard to legal assistance to persons who have a low chance of recognition.²⁶ Although the law only stipulates that “legal advisers must provide legal assistance objectively and to their best knowledge and must inform the consulted person on the prospects of success of the appeal”,²⁷ the Government's impact assessment of the law clearly

16. ECRE/ELENA, Legal note on access to legal aid in Europe, November 2017, available at: <https://bit.ly/2zIzeAU>; ECRE, Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, November 2016, 9, available at: <https://bit.ly/2ui3Rw1>.

17. Article 20 of the Asylum Procedures Directive (Directive 2013/32/EU).

18. BGBl I Nr. 38/2011.

19. VwGH, Decision Ra 2016/18/0001, 3 May 2016.

20. VfGH, Decision G 447-449/2015-13, 9 March 2016.

21. AIDA, Country report Austria, Update 2018, March 2019, 30, available at: <https://bit.ly/2ID5uzH>.

22. See for example the website of Caritas which provides a list of offices throughout Austria where free legal assistance can be provided, available in German at: <https://bit.ly/31V2nsZ>.

23. AIDA, Country report Austria, 2018 Update, March 2019, 28-29, available at: <https://bit.ly/2ID5uzH>.

24. Ibid., 31.

25. Article 2(1)2 BBU-G.

26. Diakonie Austria, Position statement on the Federal law amending the BFA Procedures Act (BFA-VG), the Asylum Act and the Basic care act, 5, available in German at: <https://bit.ly/2W4cAAb>.

27. Article 52(2) BBU-G, and similarly see Article 13(1) BBU-G.

implies such restrictions. It states that, while providing legal assistance, the Federal Agency should meet the “necessary public service requirements of reinstating short procedures in accordance with the rule of law” and, more explicitly, “appeals with a low prospect of success could be halted”.²⁸ The law as such does not contradict EU law as it only includes an obligation to inform applicants of the prospects of success of their appeal without stipulating any consequences. Member States are allowed under the recast APD to not grant free legal assistance and representation where the applicants’ appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success (“merits test”).²⁹

However, the approach suggested by the impact assessment, if applied in practice by the Federal Agency, is extremely problematic. Whereas the recast APD does not specify which other authorities could be considered competent to apply a merits test, entrusting the Federal Agency with that task would create an obvious conflict of interest. Moreover, where another authority than a court or tribunal carries out a merits test, the applicant must have the right to an effective remedy before a court or tribunal against that decision, according to Article 20(3) recast APD. If in practice the Federal Agency were to refuse free legal assistance and representation on that basis without the applicant having an effective opportunity to challenge that decision before a court or tribunal, there would be a clear breach of the recast APD.

In any case, ECRE is firmly opposed to the application of the so-called “merits test” as it may result in hindering asylum applicants from accessing an essential procedural guarantee and increases the risk of violations of the principle of *non refoulement* as a result of the wrongful denial of international protection.³⁰ It constitutes an exercise in trying to predict the outcome of an application for international protection based on a preliminary and incomplete pre-assessment of the merits of the case.³¹ As a rule, free legal assistance should always be provided objectively and regardless of the chances of success of the asylum application concerned.

The Court of Justice of the European Union (CJEU) has ruled that access to legal aid is an important component of the general principle of effective judicial protection in EU law.³² The CJEU has further provided some guidance on the nexus between access to legal aid and the right to an effective remedy as enshrined in Article 47 of the Charter of Fundamental Rights (CFR).³³ Accordingly, when assessing whether the grant of legal aid is necessary or not, national courts must ensure compliance with the principle of effective judicial protection and take several criteria into account.³⁴ Thus, effective access to legal aid is deemed necessary to comply with the rights under the Charter, including Articles 18, 19 and 47.³⁵ The European Court of Human Rights (ECtHR) has also highlighted that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 of the European Convention on Human Rights (ECHR) to the point that it becomes inaccessible.³⁶

The establishment of the Federal Agency thus raises concerns with regard to the right to an effective remedy because one of its key components - namely the access to free legal assistance – could be affected by the potential conflict between the appointed legal advisers’ and asylum seekers’ interests. Furthermore, it should be noted that the recast Reception Conditions Directive explicitly states that “free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant”.³⁷ The sole

28. Impact assessment, 127/ME XXVI. GP, 5, available in German at: <https://bit.ly/2Zwo9kW>.

29. Article 20(3) recast Asylum Procedures Directive (Directive 2013/32/EU).

30. ECRE, Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, November 2016, 20, available at: <https://bit.ly/2ui3Rw1>.

31. Ibid.

32. Explanations Relating to the Charter of Fundamental Rights, Title VI – Justice, Explanation on Article 47, Official Journal of the European Union C 303/17 - 14.12.2007, available at: <http://bit.ly/2tTOdGI> ; and, by analogy, CJEU, Case C-63/01, Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers’ Bureau, judgment of 4 December 2003, para 77; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, judgment of 22 December 2010, para 42.

33. ECRE and the Dutch Council for Refugees, The Application of the EU Charter of Fundamental Rights to asylum procedural law, Chapter V, 63-64, available at: <https://bit.ly/2uQ3dK7>.

34. This includes “the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively”; See, CJEU, Case C-279/09, DEB Deutsche Energiehandels und Beratungsgesellschaft GmbH v. Bundesrepublik Deutschland, judgement of 22 December 2010, para 61.

35. ECRE/ELENA, Legal note on access to legal aid in Europe, November 2017, 4, available at: <https://bit.ly/2zIzeAU>; see also : Elspeth Guid, The Asylum Seeker’s Right to Free Legal Assistance and/or Representation in EU Law, 20-23, available at: <http://bit.ly/2upPjNO>.

36. In the case of M.S.S. v. Belgium and Greece, for instance, the Court found a violation of Article 13 in conjunction with Article 3 ECHR *inter alia* because the applicant has no practical means of paying a lawyer and received no information on organisations offering legal assistance, which was considered essential in securing access to the asylum procedure in Greece; See, ECtHR, M.S.S. v. Belgium and Greece, Application No. 30696/09, judgment of 21 January 2011, para 319.

37. Article 9(6) and Article 26(2) of the Reception Conditions Directive (Directive 2013/33/EU).

eventuality of a conflict of interest is thus raised as a potential risk of violation of EU law.

The absence of non-state actors in the provision of legal assistance at second instance may, similarly to legal assistance at first instance, considerably affect the asylum seekers' trust in the system. Overall, ECRE has consistently highlighted the role and the importance of specialised NGOs providing legal assistance at all stages of the asylum procedure as they contribute to fair and transparent asylum procedures.

4. INDEPENDENCE OF THE FEDERAL AGENCY

One of the key challenges of the establishment of the Federal Agency falling under the responsibility of the Ministry of Interior is therefore to guarantee the independence of its employees who will be acting as legal advisers and as the main actors in the implementation of the new system. The influence of the Federal Ministry of Interior on the governance of the Federal Agency raises serious concerns in this regard.

According to the law, the Ministry of Interior is entitled to appoint the executive board ("*Geschäftsführung*"),³⁸ as well as half of the twelve members of the supervisory board ("*Aufsichtsrat*"), including the chairperson and the deputy chairperson.³⁹ The Federal Ministry of Finance and the Federal Ministry of Justice are further both entitled to appoint one member of the supervisory board respectively.⁴⁰ As regards the remaining four members, the law only provides that they represent the Agency's employees.⁴¹ While it is unclear whether and to what extent the latter four members will be under the supervision of the Ministry of Interior, it goes without saying that its power to appoint the majority of the leaders of the Federal Agency will have an impact both on its functioning and its priorities.

There are several other provisions which illustrate the control of the Ministry of Interior's control over the Federal Agency's work plan and decision-making process. The director of the Agency has to follow instructions given by the Federal Minister of Interior,⁴² and "in case of a tie of votes in the supervisory board, the vote of the chairperson – or in his or her absence, the vote of the deputy chairperson – decides"⁴³ Similarly, the law allows the Ministry of Interior to set the policies, strategies and objectives of the Federal Agency. More precisely, it is entitled to define binding basic rules for the policy and the management of the Agency, which the executive board is obliged to execute.⁴⁴ When the policies concern the provision of legal assistance at appeal stage, the Ministry of Justice has to be consulted.⁴⁵ The law further sets the conditions in which the Federal Agency has to report to the Ministry of Interior to demonstrate that the guidelines and strategies have been successfully followed,⁴⁶ as well as the procedure to be applied if the Ministry of Interior changes its objectives, to which the executive board is bound.⁴⁷

This influence inevitably impacts the working conditions of the officials who will provide legal assistance to asylum applicants. Legal advisers are required to meet certain criteria to be able to work for the Agency (e.g. with regard to their academic and professional background),⁴⁸ and the law provides that they should be independent and free from instructions while providing legal assistance.⁴⁹ The law therefore guarantees that, in carrying out their tasks, and especially in providing legal assistance, the officials of the Agency act independently. However, the problem lies in the overall supervision and recruitment of the legal advisers as employees of the Federal Agency and in particular in the fact that they are bound by the general guidelines of the executive board. As opposed to a system where asylum applicants are provided with a list of external and independent lawyers who provide free legal assistance (e.g. in *GR, NL, SI, SE*), the provision of assistance by officials of a Federal Agency – and *a fortiori* by civil servants who might have ties with the Ministry of Interior –⁵⁰ inevitably raises questions as to their independence and potential conflicts of interest.

38. Article 9(2) BBU-G.

39. Article 10(1) BBU-G.

40. *Ibid.*

41. *Ibid.*

42. Article 16(1) BBU-G.

43. Article 10(2) BBU-G.

44. Article 12(1) BBU-G.

45. Article 12(2) BBU-G.

46. Article 12(3) BBU-G.

47. Article 12(4) BBU-G.

48. Article 13 BBU-G.

49. Article 13(1) BBU-G.

50. See in particular Article 16, 17 and 18 BBU-G, which regulate the modalities in which civil servants who previously worked for the Ministry of Interior become officials of the Agency.

Three observations can be made from the above. First, the Ministry of Interior has a clear influence on the composition of the Federal Agency and more importantly on the employees who will work as legal advisers. Second, the Ministry is allowed to define the Agency's "business plan", designs its basic policy and management principles and influences its decision-making process. Third, there are no provisions whatsoever that allow or indicate the contribution of non-governmental actors, external service providers or welfare organisations which could supplement, monitor or intervene in the role and the powers of the Agency. The Austrian Government therefore creates what has been described by both UNHCR and Diakonie Austria as a "black box", which is steered mainly by the Ministry of Interior.⁵¹ All external actors are prevented from intervening to potentially correct mistakes or erroneous decisions, subsequently creating an Agency that is fully self-sufficient and non-transparent.⁵²

ECRE believes that state-run legal assistance schemes should always be free from undue political interference. It is of paramount importance that the provision of information and legal assistance exclusively serves the interests of asylum applicants. Guarantees of independence should be applied at all levels of the Federal Agency, from the appointment and selection of its officials, to the guarantees in the exercise of their functions and their dismissal. Independence in the provision of legal assistance is a procedural safeguard that should be measured not only by how influence *is* being exercised, but also by how it *could* be exercised. International standards, albeit not related specifically to proceedings in asylum-related cases, also clearly indicate that lawyers should be able to perform their professional functions without "improper interference".⁵³

5. FINANCING OF THE FEDERAL AGENCY

One of the stated main objectives of the law is a reduction in costs of the provision of legal assistance and especially in the use of external legal aid providers.

In the current system, the external service providers are funded both by the Asylum, Migration and Integration Fund (AMIF) and by the Ministry of Interior.⁵⁴ A few other organisations and initiatives exist, but they depend on private donations and are supported by a network of volunteers.⁵⁵ They can therefore offer free legal assistance only to a limited number of cases and practice has shown that the lack of funding necessarily limits their activities. Caritas for example offers assistance in appeal proceedings before the Federal Administrative Court, but had to limit its activities as AMIF funding for the period 2017-2019 was not granted.⁵⁶

External service providers have been considered as cost-ineffective and accused of trying to make a profit for their respective organisations.⁵⁷ Thus, the Federal Government argues that the Agency, as a non-profit agency would avoid this perceived risk. However, the Government's evaluation of the potential costs has been criticised as unrealistic. This includes overestimating or deliberately inflating the costs of legal assistance under the current system; not taking into account certain additional costs that might arise, e.g. additional costs linked to pending cases which would have to be revised under the new system; and suggesting unrealistically low costs for the provision of legal aid under the future system. In its statement on the law, Diakonie provides a detailed cost-benefit analysis of the establishment of the Federal Agency and of the provision of legal assistance.⁵⁸

Imposing monetary restrictions on the provision of legal and procedural information is in principle allowed by the recast Asylum Procedures Directive, as long as it does not "arbitrarily restrict" asylum seekers' access to information.⁵⁹ Therefore, it remains to be seen if and to what extent potential financial restrictions imposed in the future will affect the work of the Federal Agency and subsequently access to legal assistance. It should be

51. UNCHR, Analysis of the law establishing a Federal Agency for Supervision and Support Services, 1, available in German at: <https://bit.ly/2W8c1Fx>; Diakonie Austria, Position statement on the Federal law amending the BFA Procedures Act (BFA-VG), the Asylum Act and the Basic care act, 3, available in German at: <https://bit.ly/2W4cAAb>.

52. UNCHR, Analysis of the law establishing a Federal Agency for Supervision and Support Services, 1-2, available in German at: <https://bit.ly/2W8c1Fx>.

53. Principle 16 of the United Nations (UN) Basic Principles on the Role of Lawyers; Principle 2 and 12 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

54. AIDA, Country report Austria, 2018 Update, March 2019, 28, available at : <https://bit.ly/2ID5uzH>.

55. Diakonie for example operates independent legal counselling centres across Austria. See their website available at : <https://bit.ly/2x68r3L>.

56. AIDA, Country report Austria, 2018 Update, March 2019, 31, available at : <https://bit.ly/2ID5uzH>.

57. Parliamentary correspondence, No 505 of 09 May 2019, available in German at: <https://bit.ly/2FimlP>.

58. Diakonie Austria, Position statement on the Federal law amending the BFA Procedures Act (BFA-VG), the Asylum Act and the Basic care act, 10-16, available in German at: <https://bit.ly/2W4cAAb>.

59. Article 15(4) recast Asylum Procedures Directive (Directive 2013/32/EU).

noted, however, that obstacles relating to funding or the availability of resources could negatively affect the quality of legal assistance to asylum applicants. The provision of quality legal assistance can only be achieved effectively if the resources and staffing are sufficient.

ECRE further regrets that external service providers are excluded from the benefit of funding from the Federal Government as they play a key role in the provision of legal assistance. Not only does this contribute to a “closed system”, but it may also affect further important activities carried out by external service providers for the purpose of providing information and legal assistance. Reports have demonstrated that the provision of early legal assistance is, in the long term, cost efficient, as it reduces possible costs of detention or social support throughout longer asylum procedures.⁶⁰

III. RECOMMENDATIONS

On the provision of free legal assistance at first instance:

- » The Federal Government should ensure that applicants for international protection understand their rights and obligations at the earliest stage of the asylum procedure by allowing the presence of a lawyer or a legal adviser at asylum interviews at first instance. Early legal assistance contributes to fair, efficient and transparent asylum procedures and is crucial to safeguard the fundamental rights of people applying for asylum.

On the provision of legal assistance at second instance:

- » ECRE calls on the Federal Government to withdraw the provisions which regulate that free legal assistance at second instance will be provided by the Federal Agency. The Ministry of Interior’s influence on the employees of the Federal Agency inevitably affects the provision of objective and independent legal assistance. The Federal Government should maintain the current system and provide sufficient funding to independent external service providers who provide free legal assistance, thus allowing for more transparency and generating greater trust of asylum seekers in the procedure.

60. Irish Refugee Council, Providing Protection: Access to early legal advice for asylum seekers (2014), available at: <http://bit.ly/117X9dz>.