

Legislative Proposal	Overview and relevance for detention/ATD	Viability of ATD
<p><b>Asylum and Migration Management Regulation (RAMM)</b></p>	<p>The Proposal for a new Regulation on Asylum and Migration Management sets out a new common framework that will set out the principles and structures considered necessary for an <b>integrated approach to migration and asylum policy</b>. This includes a <b>new solidarity mechanism</b> to embed ‘fairness’ into the EU asylum system, reflecting the different challenges created by different geographical locations.</p> <p>The proposed Recital 59 provides that:  <i>“The detention of applicants should be applied in accordance with the <b>underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality</b> thereby only being allowed as a <b>measure of last resort</b>. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, <b>Member States should apply the provisions of [the Reception Conditions Directive] also to persons detained on the basis of this Regulation.</b>”</i></p>	<p>On the face of it, by way of Recital 59, the RAMM draws on the specified list of detention grounds and protections provided for in the Reception Conditions Directive, including with respect to ATD.</p> <p>However, this appears to be at odds with the legal fiction of non-entry which is perpetuated throughout the substance of the Screening and Amended Asylum Procedures Regulations (described further below), which is likely to enhance existing problems with pervasive de facto detention.</p> <p>Moreover, the final negotiating position at the Parliament deletes language that “detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out”. It thus undermines the idea of detention as a ‘last resort’.</p>
<p><b>Screening Regulation</b></p>	<p>The Screening Regulation proposal aims to develop a new process for management of mixed migration flows, built into the process of controls at external borders. The <b>pre-entry screening process</b> for third country nationals will comprise a preliminary health and vulnerability check, an identity check, registration of biometric data and a security check. The screening process may take up to <b>five days</b>, with an extension of a further five days in exceptional circumstances. The final negotiating position at the Parliament provides that screening “may be conducted at any appropriate and adequate location within the territory... which may be located at or in proximity to the external border, taking into account geography and existing infrastructures.” A new Article 6(e) would also <b>clarify that detention is only available where “other less coercive alternative measures [i.e. ATD] cannot be applied effectively.”</b></p>	<p>While there is technically scope within the Screening Regulation for Member States to exercise their discretion via national rules on detention as to whether detention is used (and therefore to provide ATD) during the pre-entry screening process, Member States are still required to prevent individuals from “entering” the territory during this phase (and for those apprehended while crossing, to do so at or in proximity to external borders). This legal fiction of non-entry would be difficult to apply, in practice, without the comprehensive use of detention or other forms of <i>de facto</i> detention / deprivation of liberty.</p> <p>The analysis notes the low levels of non-compliance likely during this phase, which could increase Member State willingness to explore ATD. This will depend on (i) Member State political climate and national rules, and (ii) locations and facilities available for pre-screening processing.</p>

	<p>The Council amendments, meanwhile, provide that “other alternative measures that can ensure the same objective [as detention]” may be used to “prevent absconding” from the designated screening locations, and that if detention exceeds the duration provided under national regulation then alternative measures would apply.</p>	
<p><b>Amended Asylum Procedures Regulation</b></p>	<p>On the basis of the pre-screening process, third-country nationals will be referred to the relevant procedure, be it asylum, refusal of entry or return. It will also be determined whether an asylum application should be assessed without authorising entry into the Member State’s territory (border procedure) or in a normal asylum procedure. Applicants subject to the border procedure <b>shall not be authorised to enter</b> the Member State’s territory. The border procedure – which will take place in locations defined by Member States – <b>should be as short as possible but no longer than 12 weeks</b>, after which time applicants have an in principle authorisation to enter. In respect of detention while undergoing the asylum assessment, the Amended Asylum Procedures Regulation would provide that, “<i>While the border procedure for the examination of an application for international protection can be applied without recourse to detention, Member States should be able to apply the grounds for detention during the border procedure in accordance with the Reception Conditions Directive [emphasis added]</i>”. Individuals whose applications are rejected in the asylum assessment phase of the border procedure are not authorised to enter the Member State’s territory and shall be “<b>kept for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones</b>”.</p> <p>The final negotiating positions of both the Parliament and the Council set out the requirement that <b>Member States retain discretion as to the specific location of border procedure facilities</b>. Both also make reference to <b>the need to explore less coercive measures prior to any detention taking place</b>.</p>	<p>Use of the Border Procedure maintains the ‘fiction of non-entry’ during the Asylum Assessment Phase, which may last up to 12 weeks (or 20 weeks if the Crisis Regulation is deployed – see below). As noted by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, historically when border procedures based on the legal fiction of non-entry have been deployed by EU Member States, they have resulted in de facto detention – often without providing ATD and frequently ignoring safeguards set out in the Reception Conditions Directive.</p> <p>The Proposal also suggests that facilities with sufficient capacity should be established at border crossing points / sections of borders where most applications are made. Given that in many cases border areas lack key services and public infrastructure, the implication is that rights-based ATD might not be viable as individuals will not have access to legal representation and other support services.</p> <p>The willingness of states to explore ATD may be higher during the Assessment Phase than the Return Phase, given the fact that risk of absconding is presumed to be lower prior to a return decision being issued. However, if individuals are subject to detention as part of the Assessment Phase, this is likely to continue while returns are arranged.</p>
<p><b>Crisis Regulation</b></p>	<p>The Proposal for a Migration and Asylum Crisis Regulation envisages allowing derogations from the new migration management tools in exceptional circumstances (e.g., a large number of people arriving irregularly that would “overwhelm” a Member State’s migration systems).</p>	<p>No direct consequences for the viability of ATD, beyond the elements set out above.</p>

	<p>The proposal includes the potential to extend the duration of the asylum border procedure <b>and the return border procedure</b> (<i>“including detention where necessary as a last resort”</i>) <b>each with another eight weeks</b>. In total, this means that the proposed seamless asylum and return border procedure could last for a total period of <b>40 weeks plus ten days</b> of pre-entry screening.</p>	
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