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International Detention Coalition
Rights and dignity for all who migrate

International Detention Coalition ("IDC"): Alternatives to Detention in the Proposed EU Migration Pact – Preliminary Scoping Paper

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1 Executive Summary

(1) On 23 September 2020, the European Commission published a Migration and Asylum package, consisting of several legislative proposals (together, the "**Pact**") and non-legislative accompanying documents which it communicated to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions for consideration. An overview of these publications is contained in **Annex 1**. As at end-June 2023, the Pact remains subject to ongoing scrutiny, as the EU co-legislators (European Parliament and Council) engage in trilogue discussions prior to the Pact's finalisation (see **Section 2** and **Annex 2** below for a more detailed overview of the current state of play).

(2) This Scoping Paper considers the viability of alternatives to detention ("**ATD**"), principally as understood in the 'wide' sense (see **Section 3** below), in the context of the Pact as currently drafted. Whilst the Pact's legislative instruments do not expressly refer to 'alternatives to detention', references are made to '*less coercive*' and '*less coercive alternative'* measures – noted where relevant in **Section 5** below.[1] It is implied within the various instruments, moreover, that immigration detention will continue to be subject to the principle of 'last resort',[2] in line with regional and international legal standards, and that alternatives should therefore be explored in order to comply with this principle.[3]

(3) However, despite this intention, the Pact arguably does not allow for ATD as currently drafted. While a substantial amount of discretion is vested in Member States as to the circumstances and modalities of detention, central to the Pact is the prevention of "entry" by individuals into Member State territory (the so-called 'fiction of non-entry') by conducting

[1] **NB:** The non-legislative *Communication on a new pact on Migration and Asylum and accompanying Commission staff working document,* contain references to 'alternatives to detention' in the context of the protection of children and compliance with the right to liberty.

[2] See UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf

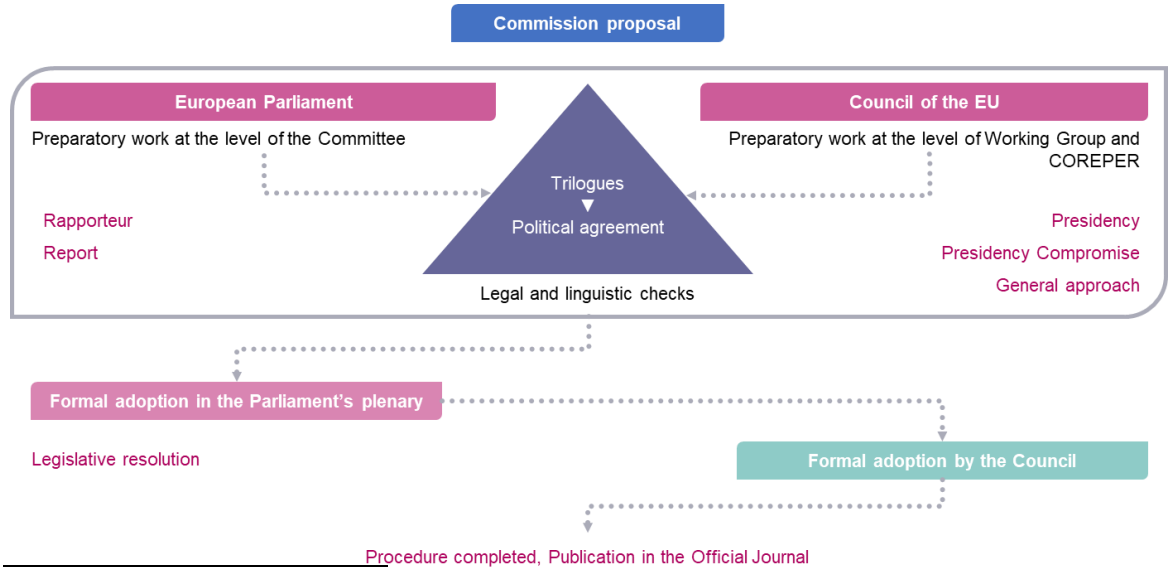
[3] By way of example, within the Proposal for a Regulation on asylum and migration management, COM(2020) 610 of 23 September 2020 ("**Proposal for a Regulation on Asylum and Migration Management**"), it is stated that when it comes to detention for the purposes of transfer, "[…] *Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively, based on an individual assessment of the person's circumstances*."

screening, asylum and return procedures at or in proximity to external borders.[4] Additionally, amendments to existing legislative instruments (principally each of the Receptions Conditions and Return Directives) further narrow the circumstances in which ATD will be possible by expanding the circumstances in which detention is mandated to be laid down in national law (see further **Section 4** below).

(4) It is therefore difficult to envisage how Member States will be able to implement 'wide' ATD while ensuring this 'fiction of non-entry' is upheld, particularly if other Member States follow the approaches already being taken in Greece (given apparent similarities between Greek national law and the Pact), Italy or Spain where border procedures have resulted in de facto detention as standard – see further **Sections 5** and **6** below. Even on a 'narrow' view of ATD (see **Section 3** below), and in circumstances where it may be possible to allege detention is justified in an individual case by reference to grounds laid down in e.g., the Reception Conditions Directive, it is difficult to envisage how a '*less restrictive means of control'* (per the definition of narrow ATD in Section **3**) would be at Member States' disposal if the 'fiction of non-entry' is to be upheld.

2 Current Status of the Pact

(5) The Pact is comprised of (i) Proposal for a Screening Regulation,[5] (ii) Amended Proposal for Asylum Procedures Regulation,[6] (iii) Proposal for a Regulation on Asylum and Migration Management, (iv) Proposal for a Migration and Asylum Crisis Regulation,[7] and (v) Amended Proposal for a Eurodac Regulation.[8] An overview of these publications is contained in **Annex 1**. These Proposals are following the ordinary legislative procedure with a view to becoming binding EU law (see simplified diagram **below**).



[4] **NB:** This approach applies to individuals 'apprehended' in connection with an unauthorised crossing of an external border or who are disembarked following a search and rescue operation. Individuals found within a Member State territory will be subject to similar processes, albeit applied in different locations.

[5] Proposal for a Regulation introducing a screening of third country nationals at the external borders, COM(2020) 612 of 23 September 2020 ("**Proposal for a Screening Regulation**").

[6] Amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 of 23 September 2020 (the "**Amended Proposal for Asylum Procedures Regulation**").

[7] Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 of 23 September 2020 (the "**Proposal for a Migration and Asylum Crisis Regulation**").

[8] Amended proposal for a Regulation on the establishment of 'Eurodac', COM(2020) 614 of 23 September 2020 ("**Amended Proposal for a Eurodac Regulation**").

(6) Under the ordinary legislative procedure, following the publication of the Commission proposal, **the European co-legislators**, the European Parliament and the Council of the EU, **scrutinise and propose amendments to the legislative proposal** with a view to agreeing on a common text. In practice, this means that the European Parliament and the Council of the EU each discuss their position on the proposals before entering trilogue negotiations. Trilogues are informal negotiations between the European Parliament and the Council, in which the European Commission acts as a broker to facilitate an agreement on a final text for the proposal.

(7) **A proposal will be adopted only once trilogues have been concluded with a political agreement**, which is then endorsed by the European Parliament Plenary and by the Council of the EU. This will be followed by the publication of the legal act in the Official Journal of the EU.

(8) The average length of the ordinary legislative procedure is c. 18 months but there is **no time limit on how long the process can take** – it is therefore possible that contentious proposals, such as asylum and migration dossiers, will take longer to negotiate and become actual EU law.

(9) The current state of play of the Proposal for a Regulation on Asylum and Migration Management, Proposal for a Screening Regulation, and Amended Proposal for Asylum Procedures Regulation are described in more detail in **Annex 2**. Each of these Proposals, following significant delays, **are now subject to trilogues negotiations**.

(10) In light of the delays which occurred in the preparatory work phase, the European Parliament and the Council issued a Joint Roadmap on the organisation, coordination and implementation of the timeline for the negotiations on the Pact.[9] According to this document, the institutions agreed trilogue negotiations should be concluded by February 2024, and we understand the Parliament and Council have agreed that the **reforms should be finalised before the next European elections in June 2024**.

(11) Diverging opinions within the European Parliament, including on geographical (e.g., 'Southern' Member States' desire for greater solidarity)[10] and political party (e.g., the Greens desire for explicit international human rights protections) lines, led to considerable delays. However **final negotiating positions** for the **Parliament** were **endorsed** for each of **the Proposal for a Regulation on Asylum and Migration Management and Proposal for a Screening Regulation** at plenary sessions in **April 2023**, following production of final reports by the relevant MEP rapporteurs. We understand that a **final negotiating position for the Asylum Procedures Regulation has been reached but is yet to be confirmed by plenary**, which may indicate further discussions are ongoing at the Parliament on this file.

(12) At the Council, the bulk of the work has been dealt with by the predecessor Swedish Presidency, who had acknowledged the need for an effective migration and asylum system

[9] A copy of the Joint Roadmap is available here: https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf.

[10] See for e.g., *Europe's south calls for more solidarity in new EU migration pact*, Reuters, 20 March 2021, Available at: https://www.reuters.com/article/us-europe-migrants-idUSKBN2BC0JY.

and worked to advance negotiations on the Pact throughout its term.[11] At a meeting of the Justice and Home Affairs Council **on 8-9 June 2023**, the **Council reached agreement** on a general approach to the (i) Proposal for a **Regulation on Asylum and Migration Management**, and (ii) Amended Proposal for **Asylum Procedures Regulation**. This followed the Council having **reached a general negotiating position on** the **Screening Regulation on 22 June 2022**. Following a briefing from the Spanish Ministry of Foreign Affairs, it seems strengthening the EU Social Pillar will be a key element of the current (from 1 July 2023) Spanish Presidency of the Council.[12] We note that Spanish national elections are due to take place in July 2023 and that their outcome may further influence the agenda and negotiating priorities throughout the Spanish Presidency at the Council.

3 Defining ATD

(13) The concept of '*alternatives to detention*' is not defined in international law and, in practice, understandings of what the concept captures differ. Broadly, interpretations can be categorised as 'wide' or 'narrow':

- *Wide* (favoured by the IDC): Suggests ATD encompasses "*any law, policy or practice by which persons are not detained for reasons related to their migration status*". ATD can therefore range from enforcement-based approaches (e.g. reporting and bail conditions) to **community-based support programmes that pre-empt and avoid immigration detention entirely and that do not necessarily involve restrictions on liberty or freedom of movement**. The IDC's advocacy efforts have focused on the latter, highlighting the importance of building trust and ensuring support through migration processes.
- *Narrow*: Suggests ATD is a practice used where detention has a "*legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State's disposal"*. With this interpretation, ATD only apply when immigration detention is legally permissible.[13] Whilst this narrow definition can include both engagement-based and enforcement-based ATD, traditionally governments have generally focused on the latter in their legislative and policy frameworks. The narrow definition does not include initiatives that aim to prevent detention of those who may be at risk but not officially subject to a detention order.

4 Current Legislative Framework

(14) The current legal framework for asylum-related migration in the EU is the Common European Asylum System ("**CEAS**"), established in 1999 and first reformed in 2013. The CEAS sets out common standards and principles of co-operation to ensure that asylum seekers in the EU are treated equally wherever they apply for asylum. The CEAS is governed by five

[11] See further, the priorities of the Swedish Presidency of the Council of the European Union on Justice and Home Affairs, available here: https://swedish-presidency.consilium.europa.eu/en/programme/programme-of-the-presidency/.

[12] See the press release by the Spanish Foreign Affairs Ministry, 12 September 2022, available here (in Spanish): https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/exteriores/Paginas/2022/120922-albaresembajadores.aspx.

[13] Council of Europe, *Analysis on legal and practical aspects of effective alternatives to detention in the context of migration*, 2018, para. 17-19, available at: https://rm.coe.int/steering-committee-for-human-rights-cddh-analysis-of-the-legal-and-pra/1680780997.

legislative instruments and one agency.[14] As a result of the refugee migration events in 2015-2016, there were further negotiations and proposals to amend the CEAS in 2016 between the European Commission, European Parliament and European Council.

(15) The key pieces of existing legislation relating to ATD are the recast Directive 2013/33/EU (the "**Reception Conditions Directive**")[15] and Directive 2008/115/EC (the "**Return Directive**").[16]

4.1 Reception Conditions Directive

(16) The Reception Conditions Directive sets out procedures in relation to the detention of and ATD for asylum seekers. In particular, Article 8(2) of the Reception Conditions Directive mandates that applicants may only be detained: (i) where necessary; (ii) on the basis of individual assessment; and (iii) if other less coercive alternative measures cannot be applied effectively. This is in line with the principle of 'last resort', referred to above and set out in European and international law.[17] Article 8(4) explicitly provides that rules concerning ATD should be laid down in national law and includes examples such as regular reporting to the authorities, deposit of a financial guarantee or an obligation to stay at an assigned place.

(17) Where applicants are to be detained, Article 8(3) of the Reception Conditions Directive establishes that the grounds for detention shall be laid down in national law and set outs an exhaustive list of such grounds. For example, applicants may be detained only to determine or verify the identity or nationality of the applicant or when protection of national security or public order requires it. Articles 9 and 10 of the Reception Conditions Directive provide certain guarantees for detained applicants and set out the conditions of detention, all of which curb a Member States' ability to detain applicants and provide protection for applicants. For example, detention should be for as short a period as possible and only for as long as the grounds set out in Article 8(3) are applicable and applicants should have access to open-air spaces.

(18) In defining 'alternatives to detention', the European Commission points to Article 8(4) of the Reception Conditions Directive and describes it as "*non-custodial measures used to monitor and / or limit the movement of third-country nationals in order to ensure compliance with international protection and return procedures*".[18] As a general principle, the European Commission notes that consideration of ATD is only relevant and legal where there are legitimate grounds to detain third-country nationals. ATD are considered by the European Commission as more favourable (meaning "less coercive") for the potential detainee and notes that ATD may also be more cost-efficient.

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[14] European Commission, *Common European Asylum System*, available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en.

[15] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

[16] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0115&from=EN.

[17] The Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants has reiterated that "[a]ny form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt." See UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018.

[18] European Commission Glossary, 'alternative to detention', available at: https://home-affairs.ec.europa.eu/pages/glossary/alternative-detention_en.

(19) Within the boundaries of ATD, the European Commission sets out the following categories (which may be used in combination):

- surrender of passports or travel documents;
- residence restrictions (please see paragraph (20) below for more details);
- release on bail and provision of sureties by third parties;
- supervision which obliges people to report to the police or immigration authorities at regular intervals (currently favoured in Member States' legislation);
- placement in open facilities with caseworker support (considered to be "innovative"); and
- electronic monitoring (considered "most intrusive" with potential "negative impact on their dignity").[19]

(20) Within Article 7 of the Reception Conditions Directive, there are provisions on the residence and freedom of movement of applicants. Article 7(1) establishes that applicants may "*move freely within the territory of the host Member State or within an area assigned to them by that Member State*", which does not affect the "*unalienable sphere of private life*". Under Article 7(2), Member States may decide the residence of applicants for reasons of public interest, public order or, where necessary, for the swift processing and effective monitoring of their application for international processing.

(21) Accordingly, the Reception Conditions Directive establishes that detention of applicants should only be available to Member States in specific circumstances and leaves Member States to set out the detail of ATD in national law. This is borne out by Recital 20 of the Reception Conditions Directive which states that "***detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined***" in order to safeguard the *"physical and psychological integrity of the applicants*".

4.2 Return Directive

(22) The Return Directive establishes rules for the repatriation of third country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

(23) Article 15 of the Return Directive prescribes the conditions of detention for third country nationals which include:

- detention is only permissible where other sufficient less coercive measures cannot be applied effectively and either (i) there is a risk of absconding, or (ii) the third country national has hampered the return process;
- the order for detention is in writing and provides justification in fact and in law;
- the period of detention shall be set out in national law, which shall not exceed six months; and
- the detention shall be reviewed at reasonable intervals and may only be extended in specific circumstances.

[19] Ibid.; European Migration Network Study, *Detention and alternatives to detention in international protection and return procedures*, May 2022, pages 16-17, available at: https://home-affairs.ec.europa.eu/whats-new/publications/detention-and-alternatives-detention-international-protection-and-return-procedures_en.

(24) Recitals 16, 17 and 20 of the Return Directive provide a framework for the use of detention establishing that:

- the use of detention for the purpose of removal should be limited and proportionate when considering the means used and objectives pursued;
- detention is justified only to prepare for return or carry out the removal process and if less coercive measures would not be sufficient;
- those in detention should be treated in a humane and dignified manner with respect for their fundamental human rights in specialised facilities; and
- detention must be carried out in accordance with national and international law.

(25) Furthermore, Articles 15 and 16 of the Return Directive provide detail on the authorities which may lawfully order the detention, conditions of release and conditions of detention of third country nationals. For example, each Member State should set a limited period of detention which may not exceed 6 months and detention as a rule should take place in specialised facilities rather than prisons.

(26) As with the Reception Conditions Directive, the Return Directive makes clear that detention may only be used in specific circumstances as a last resort where other less coercive measures would not be sufficient, which indicates an indirect encouragement of the use of ATD. However, there is no obligation for Member States to set out ATD in national law for third country nationals as there is in the Reception Conditions Directive for asylum applicants.

4.3 How would the current legal framework relating to ATD be affected by the EU Pact?

(27) The EU Pact establishes that it will seek to build on the progress made by the 2016 negotiations and proposals to reform the CEAS. The European Commission further notes that it supports the provisional political agreements already reached on the Reception Conditions Directive, as discussed in more detail below, and recommends that the revisions should be adopted quickly. It similarly endorses the 2018 proposal to recast the Return Directive in order to "*close loopholes and streamline procedures*" to create a single system of asylum and return.[20]

Revised Receptions Conditions Directive

(28) The recitals to the revised Reception Conditions Directive make clear that the revisions seek to harmonise the considerable variations in reception conditions across Member States. The use of detention for applicants continues to be limited where necessary, on the basis of individual assessment and if other less coercive measures are not available. However, there is much more focus on reducing the secondary movements and absconding of applicants, the aggregate effect of which would likely result in the increase of the use of detention for applicants.[21]

[20] European Commission, New Pact on Migration and Asylum, 2020, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020DC0609.

[21] European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 2016, available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/reception-conditions_en.

(29) Article 8(4) of the revised Reception Conditions Directive remains unaffected, such that Member States are still required to set down rules in national law on alternatives to detention. However, Article 8(3) is expanded to widen the permissible grounds for detention of applicants, to include:

- new Article 8(3)(c)) where applicants have not complied with Article 7(2) of the Reception Conditions Directive setting out the grounds on which Member States may decide on the residence of applicants (please refer to paragraph (20) above) and where there is a risk of the applicant absconding;
- amendments to new Article 8(3)(d) where a decision is being made on the applicant's right to enter the territory in the context of a *border* procedure in accordance with Article 41 of the Amended Asylum Procedures Regulation; and
- amendments to Article 8(3) to emphasise that *all* the *above* grounds for detention must be laid down in national law.

(30) Article 7(2) revised Reception Conditions Directive is amended so that Member States are now obliged where necessary (rather than simply permitted) to decide on the residence of an applicant "*in a specific place*" for an expanded list of reasons. This expanded list includes new reasons such as: (i) for the swift processing and effective monitoring of the procedure determining which Member State is responsible for the applicant in accordance with the Dublin Regulation; and (ii) to effectively prevent the applicant from absconding, in particular for applicants who have not made their application in the first Member State of entry, where applicants are required to be present in another Member State or for applicants who have been sent back to the Member State where their presence is required. Furthermore, new Article 8(3) permits Member States (where necessary and where there is a risk that the applicant may abscond) to require the applicant to report to the authorities "as frequently as necessary to effectively prevent the applicant from absconding."

(31) Article 7(2) remains unchanged and new Articles 7(7) and 7(8) provide that decisions made under Article 7 shall be based on individual circumstances of the applicant, with regard to proportionality and Member States are obliged to inform applicants of the reasons for their decisions in writing in a language which they understand.

Revised Return Directive

(32) The introductory language to the revisions explains that the purpose of the revised Return Directive is to promote the effective return of irregular migrants and that the targeted recast should "*ensure a more effective use of detention to support the enforcement of returns*." The recitals setting out the framework for the use of detention (see paragraph (24)) remain largely unchanged, however, recital (16) (new recital (27)) has been amended so that the use of detention is no longer "*limited*"– i.e. "*The use of detention for the purpose of removal should be ~~limited and~~ subject to the principle of proportionality…*".[22]

(33) The proposed amendments to the Return Directive significantly affect Article 15 (new Article 18) on detention, as set out in more detail above in **Section 4.2**. New Article 18 of the recast Return Directive has the following changes:

[22] European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0634.

- new Article 18(1) waters down the prohibition on detaining third-country nationals who are the subject of return procedures by removing the word "*only*" - i.e. unless other less coercive measures can be used, "*Member States may ~~only~~ keep in detention a third-country national…*";
- new Article 18(1) expands the conditions under which detention is permitted. Limb (c) has been added to permit the detention of third-country nationals who pose a risk to public policy, public security or national security;
- there is now a new requirement for all grounds for detention to be laid down in national law in new Article 18(1); and
- new Article 18(5) alters the time period for detention from being a "limited period of detention; which may not exceed six months" to "a maximum period of detention of not less than three months and not more than six months".

(34) As part of the package of amendments to the Return Directive, there is a new article establishing a new border procedure for the return of applicants for international protections whose application has been rejected following an asylum border procedure. New recital (32) clarifies that the purpose of this new procedure is "*to ensure direct complementarity between the asylum and return border procedures and prevent gaps*." New recital (36) goes further and notes that "*it is necessary and proportionate*" to keep in detention a third country national who has been detained as part of an asylum border procedure once their application has been rejected in order to prepare the return and/or carry out the removal process.

(35) New Article 22 sets out this new border procedure and new Article 22(7) relates specifically to the use of detention, which is permissible to prepare the return and/or carry out the removal process of a third country national who has been detained in accordance with Article 8(3) of the revised Reception Conditions Directive. Detention is limited to a four-month period unless the return decision cannot be enforced in this time period, in which case, the third country national may be further detained in accordance with new Article 18 of the revised Return Directive.

4.4 Summary of the revisions to the current legislative framework

(36) In summary, the revisions to the Receptions Conditions Directive and Return Directive are focused on controlling the movements of asylum applicants and third country nationals and minimising the risk of absconding. The result of this is an expansion of the grounds under which applicants and third country nationals can be detained and a dilution of the provisions in relation to alternatives to detention.

5 Overview of Pact, Parliament Proposed Amendments and Viability of ATD

(37) The key aspects of each of the five proposed legislative instruments contained in the EU Pact which are of relevance to viability of ATD are included below. The European Parliament has produced a study of the EU Pact, in which it provides evidence-based policy recommendations on each of the five legislative proposals (the "**EP Recommendations**") which are included below in *italics*.[23]

(38) Additionally, a non-exhaustive overview of aspects of each of the Parliament's and Council's final negotiating positions on the (i) Proposal for a Regulation on Asylum and Migration

[23] European Parliament Study, 'The European Commission's legislative proposals in the New Pact on Migration and Asylum': https://www.asileproject.eu/wp-content/uploads/2021/09/IPOL_STU2021697130_EN-1.pdf.

Management, (ii) the Proposal for a Screening Regulation, and (iii) the Amended Proposal for Asylum Procedures Regulation, insofar as suggested amendments relate to ATD (or the absence thereof) are contained in **Annex 3** and **Annex 4** respectively.[24] Summaries of key aspects have also been included in subsections 5.1 to 5.3 below.

5.1 Asylum and Migration Management Regulation

(39) The Proposal for a new Regulation on Asylum and Migration Management aims at replacing the current Dublin Regulation and relaunches the reform of the Common European Asylum System (CEAS) through the establishment of a new common framework that will set out the principles and structures considered necessary for **an integrated approach to migration and asylum policy**, which ensures a fair sharing of responsibility and addresses effectively mixed arrivals of persons in need of international protection and those who are not. This includes a **new solidarity mechanism** to embed 'fairness' into the EU asylum system, reflecting the different challenges created by different geographical locations.

(40) Of key relevance in the ATD context is that proposed Recital 59 provides, that:

"*The detention of applicants should be applied in accordance with the **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** thereby only being allowed as a **measure of last resort**. 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, **Member States should apply the provisions of [the Reception Conditions Directive]** also to persons detained on the basis of this Regulation*."

(41) The final negotiating position at the **Parliament** involves clarifying in Recital (59) that minors, as a rule, should not be detained and efforts should be made to place them in accommodation with special provisions for minors, suggesting there may be greater scope for ATD in respect of this category of persons. However, it also deletes Article 34(3), and fails to re-insert elsewhere, 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"*.

(42) The final negotiating position at the **Council** does not appear to contain any adjustments which would alter the viability of ATD.

> ***Viability of ATD***
>
> On its face, by way of Recital 59, the Asylum and Migration Management Regulation draws in the specified list of detention grounds and protections provided for in the Reception Conditions Directive, including with respect to ATD.
>
> 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

[24] **NB:** These amendments are a representative sample only and are not intended to represent an exhaustive collation of the various amendments which may relate to ATD. These amendments have been identified through searching for certain key terms such as "*alternative"*, "*restrict*", "*coercive*" and "*custodial*".

(described further below), which the European Parliamentary Research Services' ("**EPRS**") Study on the Pact notes is likely to enhance existing problems with pervasive de facto detention.[25] The EPRS noted, "*the **blanket non-entry policies** for all migrants (during screening, thus including refugees), or particular categories of migrants (in case of the mandatory border procedure or for rejected asylum seekers in the return border procedure), **makes it impossible to ensure compliance with the guarantees** in the Reception Conditions Directive and the Return Directive*."[26] [emphasis added]

NB: In the event that use of border procedures is at the discretion of Member States (i.e., is non-mandatory), those Member States who choose not to implement border procedures would have greater scope to explore ATD. Though in practice, the likelihood of this occurring will still be subject to other factors identified in greater detail below (including political climate, national rules, and locations available for screening).

5.2 Screening Regulation

(43) The Screening Regulation proposal aims to develop a new process allowing for better management of mixed migration flows, which is to be built into the process of controls at the external borders.[27] The **pre-entry screening process** for third country nationals[28] 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 **five days**, with an extension of a further five days in exceptional circumstances.

(44) For those **'apprehended' in connection with an unauthorised crossing** of an **external border** or who are disembarked following a search and rescue operation, screening is to be conducted **at or in proximity to the external border**.[29] For **those who are found within** a Member State territory,[30] screening shall be conducted **at any appropriate location** within the Member State's territory.[31] When determining appropriate locations for screening, Member States should take "*into account geography and existing infrastructures"*.[32]

(45) The Proposal for a Screening Regulation **leaves the determination of in which situations screening requires detention (and the modalities thereof) to national law**. For those yet to enter the Member State's territory, the Proposal makes clear that during screening, "*Member States should apply measures **pursuant to national law to prevent the persons concerned from entering the territory** during the screening. In individual cases, where required, **this may include detention**, subject to the national law regulating that matter*

[25] EPRS, "*Horizontal substitute impact assessment",* August 2021, pp. 97.

[26] As above, p. 98.

[27] Based on Art. 77(2)(b) of the Treaty on the Functioning of the European Union (TFEU), which concerns the development of a policy with a view to carrying out checks on persons and efficient monitoring of the crossing of external borders; and Art. 77(2)(d) TFEU which concerns the development of a policy with a view to any measure necessary for the gradual establishment of an integrated management system for external borders.

[28] I.e. migrants who do not satisfy the conditions of the Schengen Borders Code.

[29] Art 6(1) of the Proposal for a Screening Regulation. Such individuals are not authorised to enter the territory of a Member State per. Art. 4 of the Proposal for a Screening Regulation.

[30] Where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner (Art. 5 of the Proposal for a Screening Regulation).

[31] Art. 6(2) of the Proposal for a Screening Regulation.

[32] Recital 20 of the Proposal for a Screening Regulation.

[emphasis added]".[33] The Commission's Staff Working Document, also refers to migrants being "*held by competent national authorities*" during the screening process.[34]

(46) Member States are required to establish an independent monitoring mechanism to ensure respect for fundamental rights (including that any allegations of non-respect are dealt with effectively and without undue delay). Such mechanisms should ensure compliance with EU and national law and where applicable, **with national rules on detention** of the person concerned (in particular, grounds and duration of detention).[35]

(47) *The **EP Recommendations** request that this mechanism be strengthened so it can effectively address fundamental rights violations as well as enforce the 'freezing' of EU agencies operational activities where necessary.[36]*

(48) *The EP Recommendations emphasise that the use of detention needs to be limited throughout the screening process and that alternatives to detention should be prioritised.[37] In particular, it is recommended that an effective legal remedy is provided in the de-briefing form used by national authorities upon completion of the screening procedure.[38]*

(49) The final negotiating position at the **Parliament** materially revises Recital (12) (and further, Article 6) of the Screening Regulation to provide 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*". In doing so, the Parliament signals a move away from the position that screening "***should****"* be conducted at or in proximity to the external border. A new Article 6(e) would also clarify that detention (where 'necessary' and on the basis of an individual assessment) is only available where "*other less coercive alternative measures cannot be applied effectively*" and so, at least in principle, explicitly draw in consideration of ATD. Nevertheless, the extent to which ATD would be viable in practice would appear likely to remain contingent on the factors described below.

(50) The final negotiating position at the **Council** also alters the language of Recital (12) (and further, Article 6) but does not go as far as the Parliament and instead maintains that "*in principle*" / "*generally*" screening should occur at or in proximity to the external border, though "*where there are no adequate facilities at the border or they are already occupied, it can be conducted in other designated locations*". The Council amendments 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. As with the Parliament proposals, the extent to which ATD would be viable in practice would appear likely to remain contingent on the factors described below.

Viability of ATD

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

[33] Recital 12 of the Proposal for a Screening Regulation.

[34] Commission Staff Working Document, accompanying the Proposal for Regulation of the European Parliament and of the Council on asylum and migration management, page 71.

[35] Art. 7 of the Proposal for a Screening Regulation.

[36] The EP Recommendations, p 170.

[37] The EP Recommendations, p 169.

[38] The EP Recommendations, p 170.

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). The EP Rapporteur noted that several stakeholders pointed out this legal fiction of non-entry would be difficult to apply, in practice, without the comprehensive use of detention or other forms of de facto detention / deprivation of liberty.[39]

We query if the relatively short period of five to ten days for pre-screening may lead some stakeholders (incl. NGOs) to direct resources (for advocacy or on-the-ground support efforts) towards individuals who are in the Asylum Assessment and Returns phases instead, which are anticipated to result in lengthier, multi-month periods of detention / deprivation of liberty. For example, we understand challenges to deprivation of liberty in Greece to-date have not focused on the shorter screening phase (which can be extended to c. 25 days) and instead have been directed to post-screening processes.[40]

However, we note the plausibly lower risk of individuals absconding during this phase, and query if this could increase Member State willingness to explore ATD. Much would seem to depend on (i) Member State political climate and national rules, and (ii) locations and facilities available for pre-screening processing.

Greece Example

The Screening Regulation seems to have been to a large extent modelled off the 'reception and identification procedure' that applies to 'irregular' arrivals in Greece, which like the Screening Regulation, includes a pre-screening ('reception and identification') mechanism, and involves e.g., medical checks, information on rights and obligations and referral to either asylum procedures or detention facilities. Greece is therefore a useful example of how the Screening Regulation could be implemented by States in practice.

New arrivals in Greece are directly transferred to a Reception and Identification Centre (**RIC**) to undergo the pre-screening (reception and identification) procedure. In Greece, no distinction is drawn between screening at the external border or on the territory and so these RICs are located on the mainland and islands. The reception and identification procedure occurs over 5 days (with potential for extension to 25 days) and results in an automatic "restriction of freedom within the premises of the centre", with no decision or individual assessment required.[41] During this period, individuals are prohibited from leaving the Centre. The living conditions in RICs have been widely reported as below minimum human rights standards.[42] Decisions made in respect of the reception and identification procedure are frequently made without conducting a thorough individualised assessment, with standardised decisions produced for many individuals.[43]

In practice, not all arrivals are immediately referred to RICs and often individuals are subject to arbitrary detention prior to reception and identification procedures.[44] This is

[39] Draft Report on the Screening Regulation, prepared for the Committee on Civil Liberties, Justice and Home Affairs by Rapporteur Birgit Sippel, 16 November 2021, p. 83.

[40] Discussions between representatives from a relevant stakeholder, IDC and Linklaters, 25 October 2022.

[41] Article 39(4)(a) IPA.

[42] *The Workings of the Screening Regulation Juxtaposing proposed EU rules with the Greek reception and identification procedure*, January2021, available at: https://rsaegean.org/wp-content/uploads/2021/01/Screening_Greece_Correlation.pdf, https://rsaegean.org/wp-content/uploads/2021/01/Screening_Greece_Correlation.pdf p 6.

[43] As above, p 8.

[44] As above, p 4.

often due to a lack of capacity in the RICs that exist.[45] For instance, on Kos since January 2020, all new arrivals except persons evidently falling under vulnerability categories are immediately detained in the pre-removal detention centre.[46]

5.3 Amended Asylum Procedures Regulation

(51) 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.

(52) **Border Procedure:** Asylum Assessment Phase; In certain cases, Member States will be obliged (e.g. national security threat, has misled authorities, likely application is unfounded given nationality with low chance of success – as to the latter, *see the* ***EP Recommendations*** below), and will otherwise have the option, to assess applications in a border procedure.[47] Applicants subject to the border procedure **shall not be authorised to enter** the Member State's territory.[48] The border procedure **should be as short as possible but no longer than 12 weeks**, after which time applicants have an in principle authorisation to enter.[49]

(53) Member States have **discretion as to the specific locations for processing** (which are to be notified to the Commission), and may transfer applicants to a specific location **at or in the proximity** of the external border of that Member States **where appropriate facilities exist** - though **should seek to limit this by aiming to set up facilities with sufficient capacity at border crossing points / sections of borders where the majority of applications are made** (taking into account length of border and number of crossing points/transit zones).[50]

(54) In respect of detention while undergoing the asylum assessment, the Amended Asylum Procedures Regulation would provide that, "*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]".[51]

(55) Unlike the pre-entry screening process, this is not left purely to national law, and expressly draws in the Reception Conditions and Return Directives described at **Section 4** above, as *"… **if detention is used** in the context of the border procedure, pursuant to the Reception Conditions Directive and the Return Directive **it would be justified only on specific grounds clearly defined** in those Directives, when it proves **necessary and proportionate**, on the basis of an individual assessment of each case subject to judicial review, and **as a***

[45] As above, p 7.

[46] *The Workings of the Screening Regulation Juxtaposing proposed EU rules with the Greek reception and identification procedure*, January2021, available at: https://rsaegean.org/wp-content/uploads/2021/01/Screening_Greece_Correlation.pdf p 7.

[47] Recital 40(b) of the Amended Proposal for an Asylum Procedures Regulation.

[48] Art. 41(6) of the Amended Proposal for an Asylum Procedures Regulation.

[49] Recital 40(e) of the Amended Proposal for an Asylum Procedures Regulation.

[50] Recital 40(c) of the Amended Proposal for an Asylum Procedures Regulation.

[51] Recital 40(f) of the Amended Proposal for an Asylum Procedures Regulation.

measure of last resort if other less coercive alternative measures cannot be applied effectively."[52]

(56) The regulation also introduces an 'additional acceleration ground' which applies if an applicant is from a third country for which the proportion of decisions by the determining authority granting international protection is 20% or lower. *The **EP Recommendations** recommend this is deleted as it 'runs contrary to the principle of proportionality and non-discrimination'.*[53]

(57) The final negotiating position at the **Parliament** amends and introduces a number of subparagraphs to Recital (40), including to note that Member States should retain discretion as to the specific location of border procedure facilities, "*including at or in proximity of the external border*", provided that facilities guarantee "*appropriate reception conditions, access for personnel and essential services*" (Recital (40a), (40ca)). Amendments to Recital (40f) would seek to emphasise that detention should be based on an individual assessment, determined to be necessary, reasonable and proportionate to a legitimate purpose and that "*it is not possible to effectively apply less coercive measures"*. Protections in the form of judicial oversight and regular review are also clarified. A new Recital (40fa) notes that with a view to avoiding detention, Member States should "*apply restrictions on freedom of movement or alternatives to detention*" where available in fact and law at national level. The European Union Agency for Asylum would also be tasked with developing "*guidelines on different practices as regards alternatives to detention that could be used in the context of a border procedure*" within six months after entry into force of the Regulation (new Article 41(6a) sub-para 2). As with the Screening Regulation, in principle, these amendments would explicitly draw in consideration of ATD. However, viability in practice would appear likely to remain contingent on the factors described below.

(58) The final negotiating position at the **Council** specifies that "*as a general rule*" the border procedure will be carried out at or in proximity to the external border or transit zones (and that certain cases "*should*" be assessed in a border procedure – see Recital (40b)) but that Member States should "*retain discretion in deciding at which specific locations such facilities should be set* up" and does provide that there may be other locations designated within Member State territory "*fully taking into account* [each State's] *specific geographical circumstances"* (Recital (40a), Recital (40c), new Article 41f). The Council considers the border procedure "*can be applied without recourse to detention*" but that detention can be used in accordance with the Reception Conditions Directive. However, it notes that as a rule, minors should not be detained unless certain thresholds are met, including "*after it has been established that other less coercive alternative measures cannot be applied effectively"* (new Recital (40e)). As with the Parliament proposals, the extent to which ATD would be viable in practice would appear likely to remain contingent on the factors described below.

Viability of ATD

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 – as to which see further below). As noted by the EP'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 in

[52] Amended Proposal for an Asylum Procedures Regulation, page 11.

[53] The EP Recommendations, p 171.

the Reception Conditions Directive which are technically aimed at protecting fundamental rights.[54]

The Proposal also suggests that facilities with sufficient capacity should be established at border crossing points / sections of borders where most applications are made, and we note the potential geographical limitations of providing wide ATD in such contexts (for e.g., if such borders are located on harsh terrain without existing public infrastructure and with knock-on effects to, for e.g., the ability to access effective legal representation and other support services provided by NGOs). As noted in the EPRS Study on the Pact, existing 'reception conditions' in many EU border regions are already poor. In particular, due to overcrowding at 'camps' in such areas, for e.g., the Aegean Islands (Greece), Canary Islands (Spain), Apula (Italy) and Sicily (Italy).[55]

However, risk of absconding is presumed to be lower during the Assessment Phase (prior to any returns decisions), and as Member States may be subject to greater scrutiny over imposition of lengthy periods of detention (which as noted above, has been the case in Greece), we query if this could lead to greater willingness to explore ATD.

Greece Example

While Greek legislation provides that an asylum seeker shall not be detained for the sole reason of seeking asylum or having entered the country irregularly,[56] the legislation contains many exceptions, especially where individuals are already detained at the time of application.[57] For instance, individuals may be detained where there is a risk of absconding or to determine the elements of their application, that could not have been obtained otherwise.

In practice, many asylum seekers are detained. Once an asylum application is registered, the Asylum Service provides an international protection applicant's card, which is valid for six months. This card is often required to leave a pre-removal or RIC centre where the asylum seeker is located. However, due to the geographical isolation of many of these centres, for instance Samos, this amounts to effective detention.[58] In some "closed-controlled centres", such as Samos, while individuals with applicant's cards are technically able to leave the camp during certain hours, it operates as a high security venue with double barbed wire metal fencing, CCTV and 24/7 police presence.[59] Individuals who have had their applicant cards revoked are barred from leaving the camp for an indefinite period.[60] Under Greek law, authorities must examine and apply alternatives to detention before resorting to the detention of an asylum seeker.[61] However in practice, alternatives are never applied.[62]

[54] Committee on Civil Liberties, Justice and Home Affairs, *Draft Report on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2020/2047(INI))*, 22 October 2020, p. 4.

[55] EPRS, "*Horizontal substitute impact assessment",* August 2021, pp. 30-31.

[56] Article 46(1) IPA.

[57] Article 46(3) IPA.

[58] Discussions between representatives from a relevant stakeholder, IDC and Linklaters, 25 October 2022.

[59] *Greece: Asylum seekers being illegally detained in new EU-funded camp - Amnesty International*, available at: https://www.amnesty.org/en/latest/news/2021/12/greece-asylum-seekers-being-illegally-detained-in-new-eu-funded-camp/.

[60] As above; Discussions between representatives from a relevant stakeholder, IDC and Linklaters, 25 October 2022.

[61] Articles 46(2) and 46(3) IPA.

[62] *Alternatives to detention - Asylum Information Database | European Council on Refugees and Exiles,* available at: https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/legal-framework-detention/alternatives-

(59) Return Phase; 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 "***kept for a period not exceeding 12 weeks in locations at or in proximity to the external border*** *or transit zones*".[63] If Member States are unable to accommodate individuals at these locations, then they can use locations within their territories. The Commission Staff Working Document describes this approach further as, "*irregular migrants in a return border procedure* ***would not be subject to detention as a rule****. However, when it is necessary to prevent irregular entry,* ***or there is a risk of absconding****,* ***of hampering return****, or a threat to public order or national security,* ***they may be subject to detention***."[64] This is supported by the provisions of the Returns Directive summarised in **Sections 4.2** and **4.3** above.

(60) *The* ***EP Recommendations*** *emphasise that the use of detention needs to be limited to what is 'strictly necessary' and that procedural safeguards for applying detention should be increased.*[65]

Viability of ATD

Given the perceived increased risk of absconding at the return phase, we anticipate that Member State willingness to explore ATD is likely to be limited and if individuals are already subject to detention as part of the asylum assessment phase, this is likely to continue while returns are arranged. Member States could point to the relevant provisions of the Returns Directive to justify such a stance.

Greece Example

In Greece, detention in the return phase is the default position.[66] This can be contrasted with the approach under the Return Directive, where using detention is an 'exception' in the pre-removal phase, only to be used where alternatives cannot be applied.[67]

As a result, third country nationals subject to return procedures in Greece are to be placed in detention unless it is considered that there is no risk of absconding, the third country national is cooperative or there are no national security grounds. If any of these are satisfied then other less coercive measures may be applied, if considered effective.[68] 'Less coercive measures' that may be applied include regular reporting to the authorities, providing a financial guarantee or the obligation to stay at a certain place.[69]

detention/, referring to UNHCR, "Recommendations by the Office of the United Nations High Commissioner for Refugees (UNHCR) concerning the execution of judgments by the European Court of Human Rights (ECtHR) in the cases of M.S.S. v. Belgium and Greece (Application No. 30696/09, Grand Chamber judgment of 21 January 2011) and of Rahimi v. Greece (Application No. 8687/08, Chamber judgment of 05 April 2011)", 15 May 2019, page 5.

[63] New Art. 41a(1)-(2) of the Amended Proposal for an Asylum Procedures Regulation. Individuals who were detained during the asylum assessment phase, "*may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process*" and individuals who were not "*may be detained if there is a risk of absconding within the meaning of the Return Directive, if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security*."

[64] Commission Staff Working Document, accompanying the Proposal for Regulation of the European Parliament and of the Council on asylum and migration management, page 73.

[65] The EP Recommendations, p 171.

[66] Art. 30(1) L. 3907/2011.

[67] Return Directive, art 15.

[68] Art. 30(1) L. 3907/2011.

[69] Law 3907/2011, articles 22(3) and 30(1).

Greek legislation provides a non-exhaustive list of objective factors that may indicate there is a 'risk of absconding' including a lack of travel documents, a previous history of absconding and a prior conviction of a criminal offence.[70] This has been criticised due to the non-exhaustive nature of the list, allowing authorities to use other criteria to be used to justify a risk of absconding.[71] As a result of this, and the fact that detention is automatic, third country nationals are often detained for prolonged periods reaching several months and, in some cases, years.[72]

During this phase asylum seekers are detained in pre-removal detention facilities in accordance with the provisions of the Returns Directive. Detention conditions in these facilities are widely considered to be sub-standard, including by the Greek Ombudsman.[73]

5.4 Crisis Regulation

(61) The Proposal for a Migration and Asylum Crisis Regulation envisages allowing derogations from the new migration management tools in exceptional circumstances (e.g., a mass influx of irregular arrivals that would "overwhelm" a Member State's migration systems).

(62) Of relevance is that the proposal includes the potential to extend the duration of the asylum border procedure **and** the **return border procedure** ("***including detention where necessary as a last resort***")[74] **each** with **another eight weeks**.[75] In total, this means that the proposed seamless asylum and return border procedure could last for a total period of **40 weeks plus ten days** of pre-entry screening.

(63) The EC has also produced a '*Migration Preparedness and Crisis Blueprint'* (a recommendation, not a legal instrument), which aims to **consolidate operational cooperation** developed so far, by establishing a framework which supports a more coordinated use of the relevant legislation in order to avoid crisis situations (e.g., that which occurred in 2015) / ensure the effective functioning of national migration systems. The Annex to the Blueprint in identifying measures in Member States at the EU external borders, provides that "*Hotspots and reception centres are established at the points of high pressure staffed by relevant national authorities and supported by the EU Agencies with the necessary migration and security information systems*." Roles for EASO, Frontex, and Europol are also suggested, in particular the deployment of relevant staff and equipment.

(64) *The **EP Recommendations** recommend that this proposal be withdrawn as its fundamental rights compliance has not been proven by the European Commission.*[76]

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[70] Art 18 (g) L. 3907/2011.

[71] *Grounds for detention - Asylum Information Database | European Council on Refugees and Exiles*, available at: https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/legal-framework-detention/grounds-detention/#_ftn3.

[72] *General - Asylum Information Database | European Council on Refugees and Exiles*, available at: https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/general/.

[73] *Conditions in detention facilities - Asylum Information Database | European Council on Refugees and Exiles*, available at: https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/detention-conditions/conditions-detention-facilities/#_ftn11.

[74] Proposal for a Migration and Asylum Crisis Regulation, page 16.

[75] Art. 4(1)(b) and Art. 5(1)(a) of the Proposal for a Migration and Asylum Crisis Regulation. In respect of the return border procedure, the existence of a risk of absconding in individual cases can be presumed, unless proven otherwise where there is (i) explicit expression of intent of non-compliance with return-related measures, or (ii) when the applicant, third-country national or stateless person concerned is manifestly and persistently not fulfilling the obligation to cooperate.

[76] The EP Recommendations, p 177.

Viability of ATD

While the Crisis Regulation does not directly impact the abovementioned preliminary conclusions on viability of ATD, as noted, we query if the time period extensions provided in this Regulation may result in increased scrutiny on Member States and therefore willingness to explore ATD.

Greece Example

In Greece, there does not appear to be an equivalent 'crisis' regulation, though much of the regulation appears aimed at addressing large numbers of 'irregular' arrivals. The maximum periods of detention in Greece are lengthy and differ between asylum processes and detention of third-party nationals in view of removal.

Asylum

In Greece, there is an initial 50-day duration for asylum detention which can be prolonged by an extra 50 days. The maximum amount of time in detention is 18 months, not including previous periods spent in pre-removal detention.[77] Concerningly, in practice, the time limit starts from the moment an asylum application is formally lodged rather than when a person is detained.[78] Due to delays in registration of applications this extends the amount of time asylum seekers spend in detention.

Pre-removal

Greece required that the maximum length of pre-removal detention cannot exceed six months.[79] However, it allows for an extension to be made for an additional six months where there is a lack of cooperation by the third-country national concerned, or delays obtaining the relevant documents.[80]

5.5 Eurodac

(65) The Amended Proposal for a Eurodac Regulation seeks to make various 'upgrades' to the Eurodac database, including to track unauthorised movements, address irregular migration and improve return, count individual applications (*cf* applications), apply new provisions on shifting responsibility within the EU, facilitate relocation and ensure better monitoring of returnees. It is intended that the new Eurodac would be fully interoperable with the border management databases.

(66) *The **EP Recommendations** have highlighted that EU legislators need to ensure there is an explicit right to judicial protection for data subjects and introduce mechanisms to avoid racial profiling.*[81]

6 Current examples of ATD in the context of border procedures

(67) Implementation of border procedures by Member States to-date has not resulted in ATD being provided in practice – as is evident from the descriptions contained in **Section 5** above

[77] Article 46(5)(b) IPA.

[78] *Duration of detention - Asylum Information Database | European Council on Refugees and Exile*, available at: https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/legal-framework-detention/duration-detention/#_ftn1.

[79] Article 30(5) L 3907/2011.

[80] Article 30(6) L 3907/2011.

[81] The EP Recommendations, p 174.

regarding the application of analogous regulations to the Pact (including screening and border procedures) in Greece. Instead, de facto detention has been pervasive. Even in circumstances where some freedom of movement is maintained (e.g., through the use of applicant cards to enable regulated exit / entry from centres), the securitisation of such centres and their geographical isolation / lack of surrounding public infrastructure results in deprivation of liberty and thus detention in effect.

(68) The EPRS Study shows similar trends in other Southern Member States who have implemented border procedures. For example, in Italy, the entire assessment of an asylum application can take place in transit and border areas, with individuals expressly detained for 'identification purposes'. Such practices of administrative detention have been "*criticised for 'lacking legitimacy, having an ambiguous nature - formally administrative but substantially criminal - the material conditions of detention, as well as the violation of the rights of defence and the habeas corpus of migrants*." Facilities are described as "*not equipped to provide aid to vulnerable people*". The situation is similar in Spain, where the Canary Islands have been described as part of a "*migration containment policy, based on retaining migrants in island territories*". Migrants are said to feel "*'trapped' on the islands and cannot move freely*".[82]

(69) By contrast, **Member States who have not implemented border procedures appear more readily able to implement 'wide' ATD** – as is described in respect of Ireland in the box below, and in respect of Sweden in the EPRS Study where it is said that the use of detention is "*generally avoided*" and where "*the high level of rights and benefits provided to asylum applicants during the application procedure*" is highlighted.

Ireland example

The approach to arrivals presently taken in Ireland differs considerably from that in Greece, though we also note the differing geographical and political factors at play. In Ireland, individuals may apply for international protection at a port of entry or later at the International Protection Office ("**IPO**") in Dublin. If an application is made at a port of entry, individuals still have to make a formal application at the IPO office within 5 working days of arrival in Ireland. At the point of application, an IPO officer conducts a preliminary interview, and takes a photograph and fingerprints for EURODAC purposes. During this interim phase, there is nothing to suggest that individuals are held in detention (de facto or otherwise), though they do appear responsible for sourcing their own accommodation until it is determined whether their application is accepted.[83]

If an individual's application for international protection is accepted by the Department of Justice, they are able to access (should they wish to) accommodation and related services available from the Irish State via the International Protection Accommodation Service ("**IPAS**") while their claim is assessed. This includes all meals and utilities, full access to public medical services and a (minor) weekly personal allowance. After six months, International Protection applicants are eligible to work if they have not received a first decision on their application. Living in an IPAS-run centre is completely voluntary and residents may leave at any time and source their own accommodation (though they must remain in the country while claim assessment is ongoing).[84]

[82] EPRS, "*Horizontal substitute impact assessment",* August 2021, pp. 214-222.

[83] Citizens Information Board, '*Applying for international protection in Ireland'*, 9 September 2022, available at: https://www.citizensinformation.ie/en/moving_country/asylum_seekers_and_refugees/the_asylum_process_in_ireland/applying_for_refugee_status_in_ireland.html.

[84] See further information available here: https://www.gov.ie/en/publication/32a25-accommodation-services/.

7 Conclusion

(70) The **Pact as currently drafted arguably does not expressly enable recourse to ATD, in either the 'wide' or the 'narrow' sense, given the centrality of maintaining the 'fiction of non-entry'** which is to be achieved by conducting screening, asylum and return procedures **at or in proximity to external borders** (for individuals 'apprehended' in connection with external border crossings). This fiction of non-entry appears difficult to apply, in practice, without the comprehensive use of detention or other forms of deprivation of liberty. Historically, where border procedures have been implemented by Member States under national law, de facto detention has resulted.

(71) The key instruments are now the subject of trilogue discussions between the European co-legislators, and **there is some indication from their final negotiating positions** (particularly the Parliament's) of a **shift towards optional, rather than blanket mandatory**, border procedures and that **consideration of ATD may be explicitly drawn in** to the Pact. However, there is no indication that border procedures will be removed in their entirety as a result of the trilogues, and so much will depend on how Member States exercise their discretion vis-à-vis screening and application processing locations.

(72) As noted above, it is difficult to envisage how the 'fiction of non-entry' at external borders will be maintained without some form of deprivation of liberty. We anticipate that there will be (potentially, significant) variance in the facilities provided by Member States at or in proximity to external borders, and their willingness to explore models which incorporate elements of ATD. National political climate, geographical features, and existing public infrastructure will all be instructive factors. In anticipation of the Pact becoming binding law, it will be important for civil society organisations working in Brussels and in EU Member States to reflect collectively around how advocacy efforts (for e.g., as to planning and construction of reception centres or public infrastructure in the surrounding area) can be best tailored to national contexts. This will be particularly relevant if a final agreement on the Pact results in optional – rather than mandatory – border procedures, as there will then be more scope to shape national policy.

Annex 1

NB: As a reminder, note that Communications, Recommendations and Guidance notes are not legally binding, but may indicate the Commission's future intentions on particular policy developments.

Initiative	Legislative / Non-legislative
Proposal for an Asylum and Migration Management Regulation (AMR)	Legislative
Proposal for a Regulation introducing a screening of third country nationals at the external borders (Screening Regulation)	Legislative
Amended proposal for a Regulation establishing a common procedure for international protection in the Union (APR)	Legislative
Amended proposal for a Regulation on the establishment of Eurodac	Legislative
Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum	Legislative
Communication on a new pact on Migration and Asylum and accompanying Commission staff working document (pre-work)	Non-legislative
Roadmap to implement the new pact on migration and asylum	Non-legislative
Commission guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence	Non-legislative
Commission recommendations on: - An EU mechanism for preparedness and management of crises related to Migration (Migration Preparedness and Crisis Blueprint) - Legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways - Cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities	Non-legislative

Annex 2

Proposal	Parliament	Council	Next Steps
Proposal for an **Asylum and Migration Management** Regulation 2020/0279(COD)	The file is allocated to the Civil Liberties, Justice and Home Affairs Committee (LIBE), and the rapporteur is the Swedish MEP Tomas Tobé, who is responsible for drafting a report on behalf of LIBE that constitutes the basis for Parliament's position on the AMR in trilogues with the Council. Tobé's Final Report was endorsed via a vote on 20 April 2023.[85]	The Council reached a general negotiating position on the AMR at its meeting of the Justice and Home Affairs Council on 8-9 June 2023.[86]	Trilogues ongoing.
Proposal for a **Screening** Regulation 2020/0278(COD)	As above, the file is allocated to the LIBE Committee. The rapporteur is German MEP Birgit Sippel. Sippel's Final Report was endorsed via vote on 20 April 2023.[87]	The Council reached a general negotiating position on the Screening Regulation on 22 June 2022.[88]	Trilogues ongoing.
Amended Proposal for an **Asylum**	As above, the file is allocated to the LIBE Committee. The rapporteur is Irish MEP Fabienne Keller. Keller's Final Report was adopted by the Committee on 28	The Council reached a general negotiating position on the APR at its meeting of the Justice and Home Affairs Council on 8-9 June 2023.[91]	Trilogues ongoing (subject to any further changes to

[85] See here: https://www.europarl.europa.eu/doceo/document/A-9-2023-0152_EN.html. A draft report had been presented on 11 October 2021 (https://www.europarl.europa.eu/doceo/document/LIBE-PR-698950_EN.html) and other MEPs at LIBE Committee then tabled over 2500 amendments to the report, showcasing the controversial nature of the proposal. See here the amendments tabled: part 1, part 2, part 3, part 4, part 5, part 6, part 7. On 18 May 2022, the Legal Affairs Committee (JURI) issued its opinion on the legal basis of the proposal, which will feed into LIBE's discussions.

[86] See here: https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183 and https://data.consilium.europa.eu/doc/document/ST-10443-2023-INIT/en/pdf. 18 out of 27 Member States had previously signed a non-binding declaration on a temporary solidarity mechanism on 10 June 2022: https://presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/.

[87] See here: https://www.europarl.europa.eu/doceo/document/A-9-2023-0149_EN.html. A draft report had been presented on 16 November 2021 (https://www.europarl.europa.eu/doceo/document/LIBE-PR-700425_EN.html) and other MEPs then tabled amendments to the draft report: part 1, part 2, part 3.

[88] See here: https://data.consilium.europa.eu/doc/document/ST-10585-2022-INIT/en/pdf.

[91] See here: https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183 and https://data.consilium.europa.eu/doc/document/ST-10444-2023-INIT/en/pdf. The Council had reached a partial, non-exhaustive negotiating mandate on 20 December 2022: See page 2 of the negotiating mandate for an overview of the articles covered, available here: https://data.consilium.europa.eu/doc/document/ST-16261-2022-INIT/en/pdf.

Proposal	Parliament	Council	Next Steps
Procedure Regulation COM(2020) 611 final 2016/0224(COD)[89]	March 2023, however, we understand it is yet to be endorsed by plenary session of the Parliament (and did not appear on the agenda for discussion with the other, above files on 20 April 2023).[90] This may indicate that internal discussions are ongoing at the Parliament on this file.		negotiating position at the Parliament).

[89] The proposal was first published as part of a legislative package with the aim of completing the reform of the Common European Asylum System (CEAS) in response to the 2015 migration events. The European Parliament's LIBE Committee adopted its negotiating position on the file and achieved a mandate for negotiations in April 2018, whereas the Council was unable to reach a negotiating position within the previous EU legislative term, which finished in 2019. On 23 September 2020, the European Commission published an amended proposal which is currently being scrutinised by the co-legislators.

[90] Revised MEP Amendments 1-129 were published by Keller on 20 April 2023: https://www.europarl.europa.eu/doceo/document/LIBE-AM-745488_EN.pdf. Keller had previously presented a working document on the amended proposal to the responsible Committee (LIBE) and other MEPs have tabled amendments to the working document which will likely feed into the discussions – see previous amendments here: part 1, part 2, part 3.

Annex 3 – Parliament Final Negotiating Position

Proposed amendments are included in ***bold and italics*** and proposed deletions are included in ~~***bold, italics and strikethrough***~~.

Provision	Proposed Amendment
Proposal for an **Asylum and Migration Management** Regulation 2020/0279(COD)	
Recital (59)	(59) The detention of applicants should be applied in accordance with the 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 thereby only being allowed as a measure of last resort. ***Minors, as a rule, should not be detained and efforts should be made to place them in accommodation with special provisions for minors.*** 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, Member States should apply the provisions of Directive XXX/XXX/EU [Reception Conditions Directive] also to persons detained on the basis of this Regulation.
Article 34(2)	***deleted*** ~~***2. Where there is a risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively, based on an individual assessment of the person's circumstances.***~~
Article 34(3)	***deleted*** ~~***3. 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.***~~ ~~***Where an applicant or another person referred to in Article 26(1), point (b), (c) or (d) is detained pursuant to this Article, the period for submitting a take charge request or a take back notification shall not exceed two weeks from the registration of the application. Where a person is detained at a later stage than the registration of the application, the period for submitting a take charge request or a take back notification shall not exceed one week from the date on which the person was placed in detention. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply on a take charge request. Such reply shall be given within one week of receipt of the take charge request. Failure to reply***~~

Provision	Proposed Amendment
	~~*within the one-week period shall be tantamount to accepting the take charge request and shall entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.*~~ ~~*Where a person is detained pursuant to this Article, the transfer of that person from the requesting or notifying Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within four weeks of:*~~ ~~*(a) the date on which the request was accepted or the take back notification was confirmed, or*~~ ~~*(b) the date when the appeal or review no longer has suspensive effect in accordance with Article 33(3).*~~ ~~*Where the requesting or notifying Member State fails to comply with the time limits for submitting a take charge request or take back notification or to take a transfer decision within the time limit laid down in Article 32(1) or where the transfer does not take place within the period of four weeks referred to in the third subparagraph of this paragraph, the person shall no longer be detained. Articles 29, 31 and 35 shall continue to apply accordingly.*~~
Article 34(4)	***deleted*** ~~*4. Where a person is detained pursuant to this Article, the detention shall be ordered in writing by judicial authorities. The detention order shall state the reasons in fact and in law on which it is based.*~~
New Article 34(a)	***1. By way of derogation from Articles 29 and 31, where a person is detained pursuant to Article 34, the period for submitting a take charge or take back request shall not exceed two weeks from the registration of the application for international protection.*** ***Where a person is detained at a later stage than the registration of the application, the period for submitting a take charge request or a take back request shall not exceed two weeks from the date on which the person was placed in detention.*** ***2. By way of derogation from Article 30(1), the requested Member State shall reply as soon as possible, and in any event within two weeks of receipt of the request.*** ***3. By way of derogation from Article 35, where a person is detained, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within eight weeks of:*** ***(a) the date on which the request to take charge or take back was accepted, or*** ***(b) the date on which the decision on appeal or review was taken.***

Provision	Proposed Amendment
	4. Where the requesting Member State, for reasons beyond its control fails to comply with the time limits for submitting a take charge request or take back request or to take a transfer decision within the time limit laid down in Article 32(1) or where the transfer does not take place within the period of eight weeks referred to in paragraph 3 of this Article, the person shall no longer be detained. Articles 29, 31 and 35 shall continue to apply accordingly.
Proposal for a **Screening** Regulation 2020/0278(COD)	
Recital (12)	(12) The screening ***may ~~should~~*** be conducted ***at any appropriate and adequate location within the territory of a Member State. Member States should designate any location used for the screening, which may be located*** at or in proximity to the external border, ***taking into account geography and existing infrastructures ~~before the persons concerned are authorised to enter the territory. The Member States should apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening. In individual cases, where required, this may include detention, subject to the national law regulating that matter~~***.
New Recital (12a)	***(12a) In individual cases, where required, the screening may include detention, subject to the relevant Union and national law regulating that matter, in particular Directive (EU) xxxx/xxxx [Reception Conditions Directive]. The provisions regarding detention set out in that directive should apply mutatis mutandis to all persons subject to the screening.***
Recital 20	***~~(20) The Member States should determine appropriate locations for the screening at or in proximity to the external border taking into account geography and existing infrastructures, ensuring that apprehended third-country nationals as well as those who present themselves at a border crossing point can be swiftly submitted to the screening. The tasks related to the screening may be carried out in hotspot areas as referred to in point (23) of Article 2 of Regulation (EU) 2019/1896 of the European Parliament and of the Council~~***
Article 6(1)	***deleted*** ***~~1. In the cases referred to in Article 3, the screening shall be conducted at locations situated at or in proximity to the external borders.~~***
Article 6(2)	***deleted*** ***~~2. In the cases referred to in Article 5, the screening shall be conducted at any appropriate location within the territory of a Member State.~~***
Article 6(3)	***deleted***

Provision	Proposed Amendment
	~~*3. In the cases referred to in Article 3, the screening shall be carried out without delay and shall in any case be completed within 5 days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing point. In exceptional circumstances, where a disproportionate number of third-country nationals needs to be subject to the screening at the same time, making it impossible in practice to conclude the screening within that time-limit, the period of 5 days may be extended by a maximum of an additional 5 days.*~~ ~~*With regard to persons referred to in Article 3(1)(a) to whom Article 14 (1) and (3) of Regulation (EU) 603/2013 apply, where they remain physically at the external border for more than 72 hours, the period for the screening shall be reduced to two days.*~~
Article 6(4)	***deleted*** ~~*4. Member States shall notify the Commission without delay about the exceptional circumstances referred to in paragraph 3. They shall also inform the Commission as soon as the reasons for extending the screening period have ceased to exist.*~~
Article 6(5)	***deleted*** ~~*5. The screening referred to in Article 5 shall be carried out without delay and in any case shall be completed within 3 days from apprehension.*~~
New Article 6(1a)	***The screening may be conducted at any appropriate and adequate location within the territory of a Member State to be designated by that Member State, including at or in proximity to the external borders.***
New Article 6(a)	***6a. Organisations and persons providing advice and counselling, including legal assistance and representation, shall have effective access to third-country nationals, in particular to those held in detention facilities or present at the border crossing points, including transit zones, at external borders.***
New Article 6(b)	***6b. The screening shall be carried out without delay and shall in any case be completed within five days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing point.*** ***With regard to persons referred to in Article 3(1)(a) to whom [Article 14(1) and (3)] of Regulation (EU) xxxx/xxxx [Eurodac Regulation] apply, where those persons remain physically at the external border for more than 72 hours, the screening shall apply to them thereafter and the period for the screening shall be reduced to two days.***

Provision	Proposed Amendment
New Article 6(c)	***6c. For the duration of a situation of crisis in accordance with Regulation (EU) XXX/XXXX [Crisis Regulation], the period of five days set out in paragraph 6(b) of this Article may be extended by a maximum of five additional days.***
New Article 6(d)	***6d. Member States shall ensure that all persons subject to the screening are accorded a standard of living which guarantees their subsistence, protects their physical and mental health, and respects their rights under the Charter.*** ***Directive (EU) xxxx/xxxx [Reception Conditions Directive] shall apply to persons who apply for international protection, in accordance with Article 16 of that Directive, from the moment that those persons make their application for international protection.***
New Article 6(e)	***e. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain a person subject to the screening, if other less coercive alternative measures cannot be applied effectively. Member States may, where necessary, require persons subject to the screening to report to the competent authorities at a specified time or at reasonable intervals.*** ***The provisions set out in Directive (EU) xxxx/xxxx [Reception Conditions Directive] regarding detention and the application of alternative measures, in particular Articles 8 to 12 and Article 16(2), second subparagraph of that Directive, shall apply mutatis mutandis to all persons subject to the screening.***
Amended Proposal for an **Asylum Procedure** Regulation COM(2020) 611 final 2016/0224(COD)	
Recital (40a)	(40a) The purpose of the border procedure for asylum ~~***and return***~~ should be to quickly assess ~~***at the external borders***~~ whether applications ***made during or at the end of the screening procedure*** are ***inadmissible or*** unfounded ~~***or inadmissible and to swiftly***~~, ***not only after the determination of the Member State responsible for an application for international protection in accordance with Regulation (EU) No XXX/XXX [Regulation on Asylum and Migration Management] but also during the border procedure. If unfounded or inadmissible, Member States should be able to use a border procedure to allow for a swift*** return ***of*** those with no right to stay ***and who have been issued a return decision in compliance with the principle of non-refoulement*** ~~***while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection***~~. Member States should therefore be able to require applicants for international protection to stay at ***locations, designated at their discretion, for the completion of the procedure, including at or in proximity*** to the external border or in a transit zone in order to assess the admissibility of applications, ***provided that they are in compliance with Directive XXX/XXX/EU [Reception Conditions Directive]***. In well-defined circumstances, Member States should be able to provide

Provision	Proposed Amendment
	for the examination of the merits of an application and, in the event of rejection of the application, for the return of the third-country nationals and stateless persons concerned ***in a border procedure ~~at the external borders~~.***
New Recital (40ba)	***(40ba) Member States should not apply a border procedure in particular in situations where the applicant is an unaccompanied minor or a minor below the age of 12, is a vulnerable person or has special procedural or reception needs and the necessary support cannot be provided, where there are medical reasons for not applying the border procedure or where conditions of detention are not met as provided for in the Directive XXX/XXX/EU [Reception Conditions Directive] and should cease to apply a border procedure when the grounds or conditions for applying it cease to exist. Age assessment procedures should apply the least intrusive methods and processes. It is important that Member States take into account the European Union Agency for Asylum's practical guide on age assessment. Age assessment procedures should not include a medical assessment. Where the result of an age assessment is not conclusive or includes an age-range below the age of 12, Member States should assume that the minor is below the age of 12. Competent authorities should conduct appropriate and regular vulnerability checks throughout the border procedure.***
Recital (40c)	(40c) When applying the border procedure for the examination of an application for international protection, Member States should ensure ***compliance ~~that the necessary arrangements are made to accommodate the applicants at or close to the external border or transit zones, in accordance~~*** with Directive XXX/XXX/EU [Reception Conditions Directive] ***as regards accommodation for applicants, including applicants with special needs or vulnerabilities, and that applicants remain available to the authorities. Minors and families should be considered in need of special procedural and reception guarantees and be placed in adequate accommodation. Asylum personnel, legal representatives, non-governmental organisations, Union and international institutions, and socio-medical personnel should always be allowed to access facilities used for the border procedure.*** ***~~Member States may process the applications at a different location at the external border than that where the asylum application is made by transferring applicants to a specific location at or in the proximity of the external border of that Member States where appropriate facilities exist. Member States should retain discretion in deciding at which specific locations at the external borders such facilities should be set up. However, Member States should seek to limit the need for transferring applicants for this purpose, and therefore aim at setting up such facilities with sufficient capacity at border crossing points, or sections of the external border, where the majority of the number of applications for international protection are made, also taking into account the length of the external border and the number of border crossing points~~***

Provision	Proposed Amendment
	~~***or transit zones. They should notify the Commission of the specific locations at the external border, transit zones or proximity of the external border where the border procedures will be carried out.***~~ ~~***In cases where the border procedure is applied and the capacity of the locations at or in proximity of the external border as notified by a Member State is temporarily exceeded, Member States may process those applications at another location within its territory, for the shortest time possible.***~~
New Recital (40ca)	***(40ca) Member States should retain discretion in deciding at which specific locations facilities for the border procedure should be set up. Member States should be able to situate such facilities at or in proximity of the external border or transit zones, provided that they guarantee appropriate reception conditions, access for personnel and essential services. Member States should notify the Commission of the specific locations where the border procedures will be carried out.*** ***Where the border procedure is applied and the capacity of the locations as notified by a Member State is temporarily exceeded, the capacity of personnel is insufficient or the reception conditions are not met, the Member State should be able, for the shortest time possible, to process applications at another location within its territory.***
Recital (40f)	(40f) ~~***While the border procedure for the examination of an application for international protection can be applied without recourse to detention,***~~ Member States should ~~***nevertheless***~~ be able to apply the grounds for detention during the border procedure in accordance with the provisions of the [Reception Conditions] Directive (EU) XXX/XXX. ***Administrative detention during the examination of an application for international protection should remain a measure of last resort. A decision to detain an applicant during a border procedure should always be based on an individual assessment of each case and determined to be necessary, reasonable and proportionate to a legitimate purpose and that it is not possible to effectively apply less coercive measures. Such decisions should be subject to judicial oversight. The necessity to maintain an applicant in detention should be reviewed regularly*** ~~***in order to decide on the right of the applicant to enter the territory. If detention is used during such procedure, the provisions on detention of the [Reception Conditions] Directive (EU) XXX/XXX should apply, including the guarantees for detained applicants and the fact that an individual assessment of each case is necessary, judicial control and conditions of detention.***~~
New Recital (40fa)	***(40fa) With a view to avoiding detention where less stringent measures might be applicable, Member States should apply restrictions on freedom of movement or alternatives to detention as provided in the [Reception Conditions Directive] (EU) XXX/XXX. Such alternatives should be available both in law and fact at national level. Member States should prioritise non-***

Provision	Proposed Amendment
	custodial community-based placements for minors and their families and for applicants with vulnerabilities or special procedural or reception needs.
Recital (40i)	(40i) Where an applicant, ~~***third-country national or stateless person***~~ who was detained during the border procedure for the examination of ***her or his*** application for international protection no longer has a right to remain and has not been allowed to remain, Member States should be able to continue the detention for the purpose of preventing entry into the territory and carrying out the return procedure, respecting the guarantees and conditions for detention laid down in Directive XXX/XXX/EU [Return Directive ***Recast***]. An applicant, ~~***third-country national or stateless person***~~ ***whose application was not successful***, who was not detained during the border procedure for the examination of an application for international protection, and who no longer has a right to remain and has not been allowed to remain, could also be detained if there is a risk of absconding, if he or she avoids or hampers return, or if he or she poses a risk to ~~***public policy***~~, public security or national security, ***and provided that less coercive measures cannot be applied effectively***. Detention should be for as short a period as possible, ~~***and***~~ should not exceed the maximum duration of the border procedure for carrying out return ***and should not exceed the maximum period of detention set by Article 15 of Directive XXX/XXX/EU [Return Directive Recast]***. When the ~~***illegally***~~ ***irregularly*** staying third-country national does not return or is not removed within that period and the border procedure for carrying out return ceases to apply, the provisions of the [Return Directive ***Recast***] should ***continue to*** apply. ~~***The maximum period of detention set by Article 15 of that Directive should include the period of detention applied during the border procedure for carrying our return.***~~
New Article 41(6a), sub-para 1	***6a. Any restriction of an applicant's freedom of movement or any application of detention as part of the border procedure shall be in accordance with Directive XXX/XXX/EU [Reception Conditions Directive recast]. Minors shall, as a rule, not be detained in accordance with Article 11(2) of that Directive.***
New Article 41(6a), sub-para 2	***By ... [six months after the date of entry into force of this Regulation], the European Union Agency for Asylum shall, in accordance with Article 13(2) of Regulation (EU) 2021/2303, develop guidelines on different practices as regards alternatives to detention that could be used in the context of a border procedure.***
Article 41(13)	13. During the examination of applications subject to a border procedure, the applicants shall be ~~***kept***~~ ***accommodated in accordance with Directive XXX/XXX/EU [Reception Conditions Directive recast]. The competent national authorities may require applicants to stay at locations, designated at their discretion, for completing the border procedure on the Member States' territory. A border procedure may take place*** at or in proximity to the external border or transit zones ***on the Member State's territory, provided that the conditions under this paragraph are fully respected and applicants' special needs are properly safeguarded***. Each Member State shall notify to the Commission, [two months after the date of the application of this

Provision	Proposed Amendment
	Regulation] at the latest, the locations where the border procedure will be carried out, at the external borders, in the proximity to the external border or transit zones, including when applying paragraph 1 and ensure that the capacity of those locations is sufficient to process the applications covered by that paragraph. Any changes in the identification of the locations at which the border procedure is applied ***on the basis of a decision from competent national authorities*** shall be notified to the Commission ***as early as possible and at least*** two ~~***months***~~ ***weeks*** in advance of the changes taking effect.
Article 41a(2)	2. Persons referred to in paragraph 1 shall be ***accommodated*** ~~***kept***~~ for a period not exceeding 12 weeks in locations ***designated at the discretion of the Member States. Such locations may be situated*** at or in proximity to the external border or transit zones ~~***; where a Member State cannot accommodate them in those locations, it can resort to the use of other locations within its territory***~~ ***in the territory of the Union. The conditions in those locations shall meet standards equivalent to those of the material reception conditions and health care provided to applicants in accordance with Articles 16 and 17 of Directive XXX/XXX/EU [Reception Conditions Directive recast].*** The 12-week period shall start from when the applicant**, third-country national or stateless person** no longer has a right to remain ~~***and***~~ ***or*** is not allowed to remain.

Annex 4 – Council Final Negotiating Position

Proposed amendments are included in ***bold and italics*** and proposed deletions are included in ~~***bold, italics and strikethrough***~~.

Provision	Proposed Amendment
Proposal for an **Asylum and Migration Management** Regulation 2020/0279(COD)	
N/A	Nil identified
Proposal for a **Screening** Regulation 2020/0278(COD)	
Recital (12)	(12) The screening should ***in principle*** be conducted at or in proximity to the external border. ***However, notably where there are no adequate facilities at the border or they are already occupied, it can be conducted in other designated locations***, ~~***before the persons concerned are authorised to enter the territory***~~. The Member States should ~~***apply measures pursuant to***~~ ***lay down in their*** national law ***provisions to ensure*** ~~***to***~~ ***the presence of those third-country nationals in the designated locations*** during the screening ***in order to prevent absconding***. In individual cases, where required, this may include detention, ***as well as other alternative measures that can ensure the same objective,*** subject to the national law regulating that matter. ***Detention should always be necessary, proportionate and subject to an effective remedy, in line with national, EU and international law and should not exceed the duration provided for by the national regulatory framework. Beyond this duration, alternative measures would apply. The third country nationals subject to screening should remain, for the duration of the screening, at the disposal of the screening authorities. Should they abscond from these authorities, they could be subject to penalties if it is provided for under national law, in line with EU law. Those penalties would complement the framework set out by Regulation (EU) 2016/399 and should be effective, proportionate and dissuasive. Screening within the territory should be conducted in any appropriate location.***
Recital (20)	(20) The Member States should determine appropriate locations for the screening at or in proximity to the external border ***or, in any other designated location***, taking into account geography and existing infrastructures, ensuring that apprehended third-country nationals as well as those who present themselves at a border crossing point can be swiftly submitted to the screening. The tasks related to the screening may be carried out in hotspot areas as referred to in point (23) of Article 2 of Regulation (EU) 2019/1896 of the European Parliament and of the Council. ***For the screening within the territory Member States should determine appropriate locations in the territory***.

Provision	Proposed Amendment
Article 6(1)	1. In the cases referred to in Article 3, the screening shall ***generally*** be conducted at locations situated at or in proximity to the external borders ***or in other designated locations within its territory***.
New Article 6a	***Obligations of third country nationals submitted to screening*** ***1. The third country nationals subject to screening shall remain, for its duration, at the disposal of the screening authorities, in the locations referred to in Article 6 (1) and (2) for that purpose.*** ***2. They shall cooperate with the screening authorities in all elements of the screening as set in Article 6(6), in particular, by providing: a) Name, date of birth, gender and nationality as well as documents and information that can prove this data; b) fingerprints and facial image as referred to in [Regulation (EU) XXX/XXX (EURODAC III Regulation)].*** ***3. Member States may introduce penalties, in accordance with their national law, in case of non-compliance with the obligations referred to in this Article. Those penalties shall be effective, proportionate and dissuasive.***
Amended Proposal for an **Asylum Procedure** Regulation COM(2020) 611 final 2016/0224(COD)	
New Recital 40(a)	***(40a) The purpose of the border procedure for asylum and return should be to quickly assess at the external borders whether applications are unfounded or inadmissible and to swiftly return those with no right to stay, while ensuring that those with well-founded claims are channelled into the regular procedure and provided quick access to international protection. Member States should therefore be able to require applicants for international protection to reside at or in proximity of the external border or in a transit zone as a general rule, or in other designated locations within their territory, in order to assess the admissibility of applications. In well-defined circumstances, Member States should be able to provide for the examination of the merits of an application and, in the event of rejection of the application, for the return of the third-country nationals and stateless persons concerned. In order to carry out the asylum and return border procedures, Member States should take the required measures to establish an adequate capacity, in terms of reception and human resources, required to examine at any given moment an identified number of applications and to enforce return decisions.***
New Recital (40aa)	***(40aa) The adequate capacity of a Member State should be established by means of a Commission implementing act through a formula based on aggregating irregular border crossings, as reported by Member States to Frontex, which also includes arrivals following Search and Rescue operations, and refusals of entry at the external border, as per Eurostat data, calculated over a three-year period. When the implementing act is adopted in accordance with this Regulation, its adoption should be aligned with the adoption of the European Migration Management Report [under Regulation (EU) No XXX/XXX (Asylum and Migration Management Regulation]], which assesses the situation along all migratory routes and in all Member States. As an***

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	additional element of stability and predictability, the maximum number of applications a Member State should be required to examine in the border procedure per year should be set, amounting to four times that Member State's adequate capacity. The extent of the obligation of the Member State to set up the adequate capacity should take appropriate account of Member States' concerns regarding national security and public order.
New Recital (40b)	***(40b) Member States should assess applications in a border procedure where the applicant is a danger to national security or public order, where the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision and where it is likely that the application is unfounded because the applicant is of a nationality for whom the proportion of decisions granting international protection is lower than 20% of the total number of decisions for that third country. In other cases, such as when the applicant is from a safe country of origin or a safe third country, the use of the border procedure should be optional for the Member States.***
New Recital (40c)	***(40c) When applying the border procedure for the examination of an application for international protection, Member States should ensure that the necessary arrangements are made to accommodate the applicants at or in proximity of the external border or transit zones as a general rule, in accordance with Directive XXX/XXX/EU [Reception Conditions Directive]. Member States may examine the applications at a different location at the external border than that where the asylum application is made by transferring applicants to a specific location at or in proximity of the external border of the concerned Member State, or in other designated locations within its territory where appropriate facilities exist. Member States should retain discretion in deciding at which specific locations such facilities should be set up. However, Member States should seek to limit the need for transferring applicants for this purpose, and therefore aim at setting up such facilities with sufficient capacity at border crossing points, or sections of the external border, where the majority of the number of applications for international protection are made, also taking into account the length of the external border and the number of border crossing points or transit zones. They should notify the Commission of the specific locations where the border procedures will be carried out.*** ***Where a Member State uses these locations also to examine applications which are not subject to the border procedure, applications not subject to the border procedure should not be calculated towards reaching the adequate capacity of that Member State***
New Recital (40d)	***(40d) The duration of the border procedure for the examination of applications for international protection should be as short as possible while at the same time guaranteeing a complete and fair examination of the claims. It should in any event not exceed 12 weeks. Member States should in certain defined circumstances be able to extend this deadline to 16 weeks. This***

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	deadline should be understood as a stand-alone deadline for the asylum border procedure, from the registration of the application until the applicant does not have the right to remain and is not allowed to remain. Within this period, Member States are entitled to set the deadline in national law both for the administrative and for the various subsequent procedural steps, but should set them in a way so as to ensure that the examination procedure is concluded and that subsequently, if relevant, the decision on the request to remain and, if applicable, the decision on appeal are issued within 12 weeks or, if applicable, 16 weeks. After that period, if the Member State nevertheless failed to take the relevant decisions, the applicant should in principle be authorised to enter the territory of the Member State. Entry into the territory should however not be authorised where the applicant has no right to remain, where he or she has not requested to be allowed to remain for the purpose of an appeal procedure, or where a court or tribunal has decided that he or she should not be allowed to remain pending the outcome of an appeal procedure. In such cases, to ensure continuity between the asylum procedure and the return procedure, the return procedure should also be carried out in the context of a border procedure for a period not exceeding 12 weeks. This period should be counted starting from the moment in which the applicant, third-country national or stateless person no longer has a right to remain or is no longer allowed to remain
New Recital (40e)	***(40e) While the border procedure for the examination of an application for international protection can be applied without recourse to detention, Member States should nevertheless be able to apply the grounds for detention during the border procedure in accordance with the provisions of the [Reception Conditions] Directive (EU) XXX/XXX in order to decide on the right of the applicant to enter the territory. If detention is used during such procedure, the provisions on detention of the [Reception Conditions] Directive (EU) XXX/XXX should apply, including the guarantees for detained applicants, conditions of detention, judicial control, and the fact that an individual assessment of each case is necessary. As a rule, minors should not be detained. Minors may be detained only in exceptional circumstances, as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively, and after detention is assessed to be in their best interests in accordance with the [Reception Conditions] Directive (EU) XXX/XXX***
New Recital (40f)	***(40f) When an application is rejected in the context of the border procedure, the applicant, third-country national or stateless person concerned should be immediately subject to a return decision or, where the conditions of Article 14 of Regulation (EU) No 2016/399 of the European Parliament and of the Council are met, to a refusal of entry. To guarantee the equal treatment of all third-country nationals whose application has been rejected in the context of the border procedure, where a Member State has decided not to apply the provisions of Directive XXX/XXX/EU [Return Directive] by virtue of Article 2(2), point (a), of that Directive and does not issue a return decision to the third- country national concerned, the treatment and level of protection***

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	of the applicant, third- country national or stateless person concerned should be in accordance with Article 4(4) of Directive XXX/XXX/EU [Return Directive] and be equivalent to those applicable to persons subject to a return decision.
New Recital (40g)	***(40g) When applying the border procedure for carrying out return, certain provisions of the [recast Return Directive] should apply as these regulate elements of the return procedure that are not determined by this Regulation, notably those on definitions, more favourable provisions, non-refoulement, best interests of the child, family life and state of health, risk of absconding, obligation to cooperate, period for voluntary departure, return decision, removal, postponement of removal, return and removal of unaccompanied minors, entry bans, safeguards pending return, detention, conditions of detention, detention of minors and families and emergency situations. To reduce the risk of unauthorised entry and movement of illegally staying third-country nationals subject to the border procedure for carrying out return, a period for voluntary departure may be granted. Such period for voluntary departure shall only be granted upon request and should not exceed 15 days without the right to enter the territory of the Member State. The person should surrender any valid travel document in his possession to the competent authorities for as long as necessary to prevent absconding***
New Recital (40ga)	***(40ga) Where the illegally staying third-country national does not return or is not removed within the maximum period of the border procedure for carrying out return, the return procedure should continue in line with the provisions of the [recast Return Directive] which should apply.***
New Recital (40h)	***(40h) Where an applicant, third-country national or stateless person who was detained during the border procedure for the examination of their application for international protection no longer has a right to remain and has not been allowed to remain, Member States should be able to continue the detention for the purpose of preventing entry into the territory and carrying out the return procedure, respecting the guarantees and conditions for detention laid down in Directive XXX/XXX/EU [Return Directive]. An applicant, third-country national or stateless person who was not detained during the border procedure for the examination of an application for international protection, and who no longer has a right to remain and has not been allowed to remain, could also be detained if there is a risk of absconding, if he or she avoids or hampers return, or if he or she poses a risk to public policy, public security or national security. Detention should be for as short a period as possible and should not exceed the maximum duration of the border procedure for carrying out return. When the illegally staying third-country national does not return or is not removed within that period and the border procedure for carrying out return ceases to apply, the provisions of the [recast Return Directive] should apply. The maximum period of detention set by Article 18 of that Directive should include the period of detention applied during the border procedure for carrying out return.***

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New Recital (40i)	***(40i) It should be possible for a Member State to which an applicant is transferred in accordance with Regulation (EU) No XXX/XXX [Asylum and Migration Management Regulation] to examine the application in a border procedure provided that the applicant has not yet been authorised to enter the territory of the Member States and the conditions for the application of such a procedure are met in by the Member State from which the applicant was transferred***
Article 41	***Conditions for the asylum border procedure […]*** ***1. Following the screening carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], in order to apply Article 36 or if any of the circumstances listed in Article 40(1)(a)–(h) and (i) and (5)(b) applies and provided that the applicant has not yet been authorised to enter Member States' territory, a Member State may, in accordance with the basic principles and guarantees of Chapter II, examine an application in a border procedure where that application has been made by a thirdcountry national or stateless person who does not fulfil the conditions for entry in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:*** ***(a) following an application made at an external border crossing point or in a transit zone;*** ***(b) following apprehension in connection with an unauthorised crossing of the external border;*** ***(c) following disembarkation in the territory of a Member State after a search and rescue operation;*** ***(d) following a transfer pursuant to Article [57(9)] of Regulation (EU) No XXX/XXX [[…] Regulation on Asylum and Migration Management]*** ***2. Applicants subject to the border procedure shall not be authorised to enter the territory of a Member State, without prejudice to […]Articles 41c(2) and 41e(2). Member States shall take all appropriate measures in accordance with Directive XXX/XXX/EU [Recast Reception Conditions Directive] to prevent unauthorised entry into their territory.*** ***3. By way of derogation from […]Article 41c(2) last sentence of the first subparagraph, the applicant shall not be authorised to enter the Member State's territory where:*** ***(a) the applicant's right to remain in accordance with Article 9(3), points (a) or(bb) has been revoked;*** ***(b) the applicant has no right to remain in accordance with Article 54 and has not requested to be allowed to remain for the purposes of an appeal procedure within the applicable time-limit;*** ***(c) the applicant has no right to remain in accordance with Article 54 and a court or tribunal has decided that the applicant is not to be allowed to remain pending the outcome of an appeal procedure. In such cases, where the applicant has been subject***

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	to a return decision issued in accordance with the Directive XXX/XXX/EU [Return Directive] or a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399, Article 41g shall apply
New Article 41f	***Locations for carrying out the asylum border procedure*** ***[…]*** ***1. During the examination of applications subject to a border procedure, Member States shall require, pursuant to Article 7 of Directive XXX/XXX/EU [Recast Reception Conditions Directive] and without prejudice to Article 8 thereof, the applicants […]to reside at or in proximity to the external border or transit zones as a general rule, or in other designated locations within its territory, fully taking into account the specific geographical circumstances of the Member States. Each Member State shall notify to the Commission, two months prior to the date of the application of this Regulation at the latest, the locations where the border procedure will be carried out, including when applying […]Article 41b and ensure that the capacity of those locations is sufficient to examine the applications covered by that Article. Any changes in the identification of the locations at which the border procedure is applied, shall be notified to the Commission within two months of the changes having taken place. […]*** ***2. The requirement to reside at a particular place in accordance with paragraphs 1 and 2 shall not be regarded as authorisation to enter into and stay on the territory of a Member State.*** ***3. Where an applicant subject to the border procedure needs to be transferred to the determining authority or to a competent court or tribunal of first instance for the purposes of such a procedure, or transferred for the purposes of receiving medical treatment, such travel shall not in itself constitute an entry into the territory of a Member State.*** ***[…]***
New Article 41g	***Border procedure for carrying out return*** ***1. Third-country nationals and stateless persons whose application is rejected in the context of the procedure referred to in Articles 41-41f shall not be authorised to enter the territory of the Member State.*** ***2. Member States shall require the persons referred to in paragraph 1 […]to reside for a period not exceeding 12 weeks in locations at or in proximity to the external border or transit zones; where a Member State cannot accommodate them in those locations, it may resort to the use of other locations within its territory. The 12-week period shall start from when the applicant, third-country national or stateless person no longer has a right to remain and is not allowed to remain. The requirement to reside at a particular place in accordance with this paragraph shall not be regarded as authorisation to enter into and stay on the territory of a Member State.***

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	3. For the purposes of this Article, Article 3, Article 4(1), Articles 5 to 7, Article 8(1) to (5), Article 9(2) to (4), Articles 10 to 13, Article 15, Article 17(1), Article 18(2) to (4) and Articles 19 to 21 of Directive XXX/XXX/EU [recast Return Directive] shall apply. 3a. When the return decision cannot be enforced within the maximum period referred to in paragraph 2, Member States shall continue return procedures in accordance with Directive XXX/XXX/EU [Recast Return Directive]. ***4. Without prejudice to the possibility to return voluntarily at any moment, persons referred to in paragraph 1 may be granted a period for voluntary departure. The period for voluntary departure shall be granted only upon request and shall not exceed 15 days without the right to enter the territory of the Member State. For the purpose of this provision, the person shall surrender any valid travel document in his possession to the competent authorities for as long as necessary to prevent absconding.*** ***5. Member States that, following the rejection of an application in the context of the procedure referred to in Articles 41-41f, issue a refusal of entry in accordance with Article 14 of Regulation (EU) 2016/399, and that have decided not to apply Directive XXX/XXX/EU [Return Directive] in such cases pursuant to Article 2(2), point (a), of that Directive, shall ensure that the treatment and level of protection of the thirdcountry nationals and stateless persons subject to a refusal of entry are in accordance with Article 4(4) of Directive XXX/XXX/EU [Return Directive] and are equivalent to the treatment and level of protection set out in Articles 41g(2) and 41h(3)***
New Article 41h	***Detention*** ***[…]*** ***1. Persons referred to in […] Article 41g(1) who have been detained during the procedure referred to in Articles 41-41f and who no longer have a right to remain and are not allowed to remain may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process.*** ***[…]*** ***2. Persons referred to in […]Article 41g(1) who no longer have a right to remain and are not allowed to remain, and who were not detained during the procedure referred to in Articles 41-41f, may be detained if there is a risk of absconding within the meaning of Directive XXX/XXX/EU [Return Directive], if they avoid or hamper the preparation of return or the removal process or they pose a risk to public policy, public security or national security. Detention may only be imposed as a measure of last resort when it proves necessary on the basis of an individual assessment of each case and if other less coercive measures cannot be applied effectively. […]*** ***3. Detention shall be maintained for as short a period as possible, as long as removal arrangements are in progress and executed with due diligence. The period of detention shall not exceed the period referred to in […]Article 41g(2) and shall be***

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	included in the maximum periods of detention set in Article […] 18(5) and (6) of Directive XXX/XXX/EU [Recast Return Directive] where a consecutive detention is issued immediately following the detention under this Article