

**ECRE COMMENTS ON THE AMENDED  
PROPOSAL FOR AN ASYLUM  
PROCEDURES REGULATION  
COM(2020) 611**

**BORDER ASYLUM PROCEDURES AND  
BORDER RETURN PROCEDURES**

December 2020

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# SUMMARY OF VIEWS

The main fundamental rights affected by the current proposal on the border procedure are the right to asylum (Article 18 EU Charter); the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 EU Charter, Article 3 ECHR); the right to liberty and security (Article 6 EU Charter, Article 5 ECHR); protection in the event of removal, expulsion or extradition (Article 19 EU Charter); the rights of the child (Article 24 EU Charter); and the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR).

ECRE opposes the mainstreaming of border procedures as a core instrument of the EU's common asylum policies and return policies, and is strongly opposed to any type of mandatory border procedures. Presenting border procedures as a "solution" is based on unsubstantiated assumptions about feasibility.<sup>1</sup> Rather than mainstreaming border procedures into EU policies, EU Member States should invest in regular asylum procedures, in order to make them fair and efficient, compliant with rights, and adequately resourced.

Nevertheless, if the proposal is to be adopted, ECRE submits the following (non-exhaustive) key observations and recommendations on the Commission proposal for a Regulation establishing a common procedure for international protection in the European Union, to ensure that the proposed legal framework is in compliance with these fundamental rights. The concrete proposals for amendments can be found throughout the text.

1. **Right to Asylum:** The difficulty in accessing the territory and the asylum procedure, as well as the use of the fiction of non-entry in the context of border procedures, may in certain circumstances undermine the right to asylum under Article 18 of the EU Charter. As elaborated on in ECRE's comments on the Screening Regulation, ECRE recommends that the legal fiction of non-entry is removed from the proposals, and that applicants are legally considered to have entered the territory of the EU Member States. ECRE also suggests targeted amendments to **Article 41** to ensure that each applicant has access to a fair and efficient asylum procedure. Among these proposals ECRE suggests deleting the 20% threshold as a ground for the (mandatory) application of the border procedure (**Article 40(1)(i)**).
2. **Prohibition of torture and inhuman or degrading treatment or punishment and principle of *non-refoulement*:** with its ambition of creating a "seamless" link between asylum and return procedures, the current proposal creates protection gaps, through which it might expose individuals to treatment in violation of Article 3 ECHR, Article 4 and 19 of the EU Charter, and the principle of *non-refoulement*. ECRE proposes amendments to the proposal to build in safeguards in this regard. Targeted amendments are proposed to **Article 35a**, by emphasizing that a return decision following the rejection of the asylum application can only be issued following a full examination pursuant to Article 2 and 3 ECHR and Article 2 and 4 EU Charter, covering the aspects which have not been assessed during the examination for international protection. Member States should also keep the option of granting other statuses provided for in national law after the rejection of an asylum application in the border procedure.
3. **Right to liberty and security:** to ensure respect for the right to liberty and security ECRE proposes **several amendments to Article 41 and Article 41a** regarding the location of the border procedure, and the provisions regarding detention. When applying the border procedure Member States shall take into account that an applicant for international protection should not be held in detention for the sole reason that he or she is seeking international protection. Detention can only be imposed based on the legal grounds set out in Article 8 proposed Reception Directive, and as a measure of a last resort when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied

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<sup>1</sup> See : ECRE, [Border procedures : Not a panacea](#), 2019.

effectively. Vulnerable people and children should never be detained. Where Member States impose restrictions on freedom of movement, a decision in writing should qualify the measures as either detention or a restriction on freedom of movement, with the reasons for the restrictions stated in fact and in law.

4. **Rights of the Child:** ECRE recommends **amending Article 41 (5)** to exempt all children below the age of eighteen (instead of twelve as foreseen in the proposal) and their family members from the border procedure. A similar exemption should be included in the provisions in **Article 41a** regarding the border procedure for carrying out return. This is in line with the internationally recognised definition of children, which provides that every person until the age of eighteen is a child, as included in Article 1 of the Convention on the Rights of the Child<sup>2</sup>, as well as reflecting the Commission's Communication on the rights of children in migration.<sup>3</sup>
5. **Right to an effective remedy.** ECRE proposes **several amendments to Article 54 (suspensive effect of appeal)**: In ECRE's view, providing an applicant with an automatic right to remain on the territory during the time within which the right to an effective remedy must be exercised and pending the outcome of the remedy in case the applicant exercises such a right, constitutes the best guarantee to ensure that their right to an effective remedy and the principle of *non-refoulement* are respected in practice. It also avoids creating an additional burden for over-stretched judicial systems because asylum seekers are not required to launch a separate request to remain on the territory and courts are not required to address this issue separately.

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2 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, available at: <https://bit.ly/3a2x4TQ>

3 European Commission, *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, COM/2017/0211 final, 12 April 2020, available at: <https://bit.ly/37MgswA>

# INTRODUCTION

In September 2020, the European Commission presented a New Pact on Migration and Asylum<sup>4</sup>, involving a comprehensive approach to external borders, asylum and return systems, the Schengen area of free movement and the external dimension. The Communication on a New Pact on Migration and Asylum was presented together with a set of legislative proposals, including this proposal amending the 2016 proposal for a recast Asylum Procedures Regulation (APR).

With the amended proposal, the Commission builds on the 2016 proposal. It deems the objectives of the 2016 proposal for an Asylum Procedure Regulation still relevant and to be pursued. The Commission does not consider it necessary to make far-reaching amendments to the 2016 proposal on which the co-legislators made some progress, but only makes targeted amendments on the points on which Member States could not find agreement. This concerns mainly the conditions for the use of the border procedure and the extent to which its use should be an obligation for Member States.

The Commission also issued another legislative proposal in which it establishes a pre-entry phase consisting of a “screening”.<sup>5</sup> During the screening, people will be registered and screened to establish identity, health and security risks. They will then be referred to the appropriate procedure – be it asylum, refusal of entry or return – for which a debriefing form will be used. Finally, it will be determined whether an asylum application should be assessed without authorising the applicant’s entry into the Member State’s territory in an asylum border procedure or alternatively in a normal asylum procedure. Where an asylum border procedure is used and it is determined that the individual is not in need of protection, a return border procedure will follow. How and when the referral will be carried out remains unclear. Nevertheless, the debriefing form will already contain elements, which “seem at first sight to be relevant to refer the third country nationals concerned into the accelerated examination procedure or the border procedure”.

The Commission defines the purpose of the joint asylum and return border procedure as to quickly assess “abusive” asylum requests and asylum requests made at the external border by applicants from third countries with a low recognition rate, in order to then swiftly return those without the right to stay in the Union. It sees the joint asylum and return border procedure as an important migration management tool to prevent unauthorised entry and unauthorised movement, in particular as mixed flows include what it views as a significant percentage of asylum applicants who come from countries with a low recognition rate.

The proposed border procedure is predicated on two flawed assumptions – that the majority of people arriving in Europe do not have protection needs and that assessing asylum claims can be done easily and quickly. Neither are correct. A consideration of first instance and appeal/review decisions across the EU indicates that, in the last three years, more people have received a form of protection status<sup>6</sup>, than the 33% recognition rate referred to by the Commission in its Communication on the Pact.

The proposals are also based on the use of the fiction of non-entry in the context of the screening and border procedures, which may undermine the right to asylum under Article 18 of the EU Charter. As explained in ECRE’s Comments on the Screening Regulation, ECRE recommends that the legal fiction of non-entry is removed from the proposals, and that applicants are legally considered to have entered the territory of the EU Member States. This is the most straightforward way to ensure that the legal situation, and rights and obligations deriving, matches the actual physical situation of the person concerned, namely that of being on the territory of the EU. In addition, the Pact should not persist

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4 European Commission, *Communication on a New Pact on Migration and Asylum*, COM (2020) 609 final, 23 September 2020, available at : <https://bit.ly/3oFPDkx> .

5 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020.

6 ECRE/AIDA Briefing: [Asylum statistics in Europe](#), June 2020.

with the flawed approach that fast asylum procedures can be achieved by reducing safeguards and introducing a system of triage.

The proposal will effectively result in two standards of asylum procedures, largely determined by the country of origin of the individual concerned. This undermines the individual right to asylum and will mean that more people are subject to a second-rate procedure. Proposing that Member States should issue an asylum and return decision simultaneously, without clearly specifying the requirement that important safeguards related to *non-refoulement*, the best interests of the child and the protection of family and private life are assessed, undermines obligations under EU primary law and international law. The proposal also removes the automatic suspensive effect of an appeal, i.e. the right to remain pending a decision, for cases decided in the border procedure.

The proposed border procedure deprives people of the possibility to access residence permits for grounds other than asylum, and will likely involve detention for up to 6 months at the EU's borders, with a maximum of 12 weeks for the asylum border procedure and another 12 weeks should a return border procedure follow. In addition, in the border context, the reforms remove the principle that detention should only be applied as a measure of last resort. By relying on more systematic restrictions of movement in border procedures, the proposal will restrict the individual's access to basic services provided by actors who may not operate at the border, including legal assistance and representation.

Overall, the proposal in its current form will extend the effects of policies of border containment and risk creating situations like those already witnessed in Greece, despite the Commission's claim that there would be "no more Morias" when launching the Pact.

# INDEX ASYLUM PROCEDURES REGULATION - 2016 AND 2020 PROPOSAL

These Comments focus on the asylum border procedure and the return border procedure. Reference is made to the Screening Regulation. Nevertheless, for a full picture of the extent and impact of the proposals, ECRE Comments on the different instruments should be read together. The Comments here also refer back to ECRE's Comments on the 2016 Commission Proposal for an Asylum Procedures Regulation. As mentioned above, many aspects of that proposal are still relevant and will be pursued, so for a full understanding of the proposal for the Asylum Procedure Regulation these Comments should be read together with the 2016 Comments. The table below provides an overview of the content of the APR proposal as amended by the 2020 proposal, and where to find ECRE's detailed comments and proposed amendments on the different elements.

	European Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 - 2016 Proposal	European Commission Amended Proposal for an Asylum Procedures Regulation COM(2020) 6 – 2020 Amended Proposal	ECRE Comments found in
<b>CHAPTER I - General Provisions</b>			
Article 1	Subject matter	-	-
Article 2	Scope	-	-
Article 3	Extension of the scope of application	-	-
Article 4	Definitions	Amended to add "family member" at paragraph 1 (i)	-
Article 5	Responsible authorities	-	<a href="#">ECRE Comments on the 2016 proposal</a> , p. 7-8
Article 6	Confidentiality principle	-	-
<b>CHAPTER II - Basic Principle and Guarantees</b>			
<b>Section I - Rights and Obligations of Applicants</b>			
Article 7	Obligations of applicants	-	<a href="#">ECRE Comments on 2016 proposal</a> , p. 9-10
Article 8	General guarantees for applicants	-	<a href="#">ECRE Comments on 2016 proposal</a> , p. 10-11; p. 66-67
Article 9	Right to remain pending the examination of the application	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.11-14

Section II - Personal Interviews			
Article 10	Admissibility interview	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.14-15
Article 11	Substantive interview	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.14-15
Article 12	Requirements for personal interviews	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.15
Article 13	Report and recording of personal interviews	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.15-18
Section II – Provision of legal assistance and representation			
Article 14	Right to legal assistance and representation	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.19
Article 15	Free legal assistance and representation	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.20-23
Article 16	Scope of legal assistance and representation	-	-
Article 17	Condition for the provision of free legal assistance and representation	-	-
Article 18	The role of the United Nations High Commissioner for Refugees	-	-
Section IV – Special guarantees			
Article 19	Applicants in need of special procedural guarantees	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.23-25  ECRE Comments on 2020 amended proposal
Article 20	General principles for the assessment of special procedural needs	-	-
Article 21	Guarantees for minors	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.25-26
Article 22	Special guarantees for unaccompanied minors	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.25-26
Article 23	Medical examination	-	-
Article 24	Medical examination of unaccompanied minors	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.26-28

<b>CHAPTER III – Administrative procedure</b>			
Section I – Access to the procedure			
Article 25	Making an application for international protection	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.30-34
Article 26	Tasks of the responsible authorities when an application is made	Extra paragraph 3 added to ensure consistency with the Screening Regulation	<a href="#">ECRE Comments on 2016 proposal</a> , p.30-34 ECRE Comments on the Screening Regulation
Article 27	Registering applications for international protection	Extra paragraphs 5 and 6 added to ensure consistency with the Screening Regulation	<a href="#">ECRE Comments on 2016 proposal</a> , p.30-34 ECRE Comments on the Screening Regulation
Article 28	Lodging of an application for international protection	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.30-34
Article 29	Documents for the applicant	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.34-37
Article 30	Access to the protection in detention facilities and at border crossing points	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.37-38
Article 31	Applications on behalf of a spouse, partner, minor or dependent adult	-	-
Article 32	Applications of unaccompanied minors	-	-
Section II – Examination procedure			
Article 33	Examination of applications	-	-
Article 34	Duration of the examination procedure	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.38-42
Section III Decisions on Applications			
Article 35	Decisions by the determining authority	New Article 35a is inserted on rejection of an application and issuance of a return decision	ECRE Comments 2020
Article 36	Decision on the admissibility of the application	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.44-45
Article 37	Decision on the merits of an application	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.43-44

Article 38	Explicit withdrawal of applications	-	-
Article 39	Implicit withdrawal of applications	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.45-46
<b>Section IV - Special Procedures</b>			
Article 40	Accelerated examination procedure	Amended in 2020 to add a new ground for when the use of the accelerated procedure is obligatory – protection rate below 20%  Amended to add a new ground for when the use of the accelerated procedure is compulsory for unaccompanied children.	<a href="#">ECRE Comments on 2016 proposal</a> , p. 47-51  ECRE Comments on 2020 amended proposal
Article 41	Border procedure	Article 41 in its 2016 version replaced by 2020 text  Article 41a is added “Border Procedure for carrying out return”	<a href="#">ECRE Comments on 2016 proposal</a> , p. 49-51  ECRE Comments on 2020 amended proposal
Article 42	Subsequent applications		
Article 43	Exception from the right to remain in subsequent applications	Point (a) deleted  New Point (c) is added	<a href="#">ECRE Comments on 2016 proposal</a> , p. 11-14
<b>Section V - Safe Country Concepts</b>			
Article 44	The concept of first country of asylum	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.52-55
Article 45	The concept of safe third country	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.55-59
Article 46	Designation of safe third country at Union level	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.59-61.
Article 47	The concept of safe country of origin	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.58-59
Article 48	Designation of safe countries origin at Union level	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.59-61.
Article 49	Suspension and removal of the designation of a third country as a third country at Union level or from the EU common list of safe country of origin	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.59-61.

Article 50	Designation of third countries as safe third countries or safe country of origin at national level	-	<a href="#">ECRE Comments on 2016 proposal</a> , p. 60-61
<b>CHAPTER IV – Procedure for the withdrawal of international protection</b>			
Article 51	Withdrawal of international protection	-	-
Article 52	Procedural rules	-	-
<b>CHAPTER V – Appeal procedure</b>			
Article 53	The right to an effective remedy	New Article in 2020 replaces 2016 version	<a href="#">ECRE Comments on 2016 proposal</a> , p.62-67; p.42.  ECRE Comments on 2020 amended proposal
Article 54	Suspensive effect of appeal	New Article in 2020 replaces 2016 version	<a href="#">ECRE Comments on 2016 proposal</a> , p.67-69  ECRE Comments on 2020 amended proposal
Article 55	Duration of the first level of appeal	-	<a href="#">ECRE Comments on 2016 proposal</a> , p.42-43
<b>CHAPTER VI – Final provisions</b>			
Article 56	Challenge by public authorities	-	-
Article 57	Cooperation	-	-
Article 58	Committee procedure	-	-
Article 59	Delegated acts	-	-
Article 60	Monitoring and evaluation	-	-
Article 61	Repeal	-	-
Article 62	Entry into force and application	-	-

# CHAPTER 1: UNDERLYING CONCEPTS AND QUESTIONS

## Refusal of entry

In both the Screening Regulation and the amended proposal regarding border procedures emphasis is put on the fact that the person has not been authorised to enter the territory of the Member State during the screening procedure (Article 4 of the screening proposal). The “pre-entry phase”, as introduced in the Screening Regulation, comprises a screening consisting of identity, health and security checks on arrival, in view of fast channelling into the procedure for the examination of an application for international protection or the return procedure or the refusal of entry. It will be determined whether an asylum application should be assessed without authorising the applicant’s entry into the Member State’s territory in an asylum border procedure or in a normal asylum procedure. Where an asylum border procedure is used and it is determined that the individual is not in need of protection, a return border procedure will follow. It also provides that the screening ends as soon as it appears that the third-country national concerned fulfils the entry conditions.

The new Article 41(1) and (2) of the Amended Proposal for an Asylum Procedures Regulation provides that only such applications can be assessed in a border procedure where applicants have not yet been authorised to enter the Member State’s territory and where they have not met the entry conditions under the Schengen Borders Code. Where the border procedure is not or no longer applied, the applicant shall be granted entry to the Member State’s territory and his/her application examined in the applicable asylum procedure (including in an accelerated procedure if relevant). The applicant (who does not fulfill the entry conditions) will only be granted entry to the territory when he/she is exempted (see further) or where the asylum procedure is still ongoing at the end of the deadline for concluding the border procedure. In that case, the applicant shall be authorised to enter the Member State’s territory for the completion of the asylum procedure.

This concept of the refusal of entry is governed by the Schengen Borders Code (SBC), which lists the entry conditions in Article 6. It should be noted that asylum applicants generally cannot meet these entry conditions<sup>7</sup>, as they intend to stay longer than 180 days and do not have a residence permit or long stay visa. Moreover, many asylum seekers do not have a valid travel document and visa for the EU.

Member States cannot refuse entry to an asylum seeker without assessing whether this asylum applicant is in need of international protection.<sup>8</sup> Article 14 SBC provides that third-country nationals who do not fulfil all the entry conditions laid down in the SBC shall be refused entry to the territories of the Member States. But the obligation to refuse entry “shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection”.<sup>9</sup>

The application of the legal fiction of non-entry does not discharge states from their legal obligations. This has been confirmed by the ECtHR, inter alia, in the case of *N.D. and N.T. v. Spain*<sup>10</sup>, where the ECtHR stated:

7 European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection*, written by Dr Galina Cornelisse and Dr Marcelle Reneman, available at: <https://bit.ly/3m8tJoy>, p.63.

8 See article 3 Schengen Borders code (regarding the scope), also Annex VI SCB, para 1.1.4.2 and Art 3(1) Dublin Regulation. See also: European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment, Part 2: Legal assessment of the implementation of Article 43 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection*, written by Dr Galina Cornelisse and Dr Marcelle Reneman, available at: <https://bit.ly/3m8tJoy>, p.63.

9 See also Recital 36 Preamble and Art 4 SBC, which requires Member States to apply the SCB in accordance with the Member States’ obligations as regards international protection and non-refoulement.

10 ECtHR (Grand Chamber) 13 February 2020, App. nos. 8675/15 and 8697/15 *N.D. and N.T. v. Spain*, § 110.

*“that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.”*

In *M.K. and others v. Poland*, the ECtHR found that the Polish authorities had failed to review the applicants’ requests for international protection despite their procedural obligations and contrary to Article 3 ECHR, by failing to allow the applicants to remain on Polish territory pending the examination of their applications.<sup>11</sup> Moreover, in the ECtHR’s view, in order for the State’s obligation under Article 3 ECHR to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his/her country of origin before such time as his/her allegations are thoroughly examined. Therefore, the ECHR considers that, pending an application for international protection, a State cannot deny access to its territory to a person presenting themselves at a border checkpoint who alleges that they may be subjected to ill-treatment if remaining on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk.<sup>12</sup>

Even though the border context does not release states from their human rights obligations under international law, States typically rely on this legal fiction to attempt to deny jurisdiction or otherwise deny the applicability of safeguards for the people in question. Practice has shown that Member States have used the legal fiction of non-entry to curtail people’s rights. This may in certain circumstances undermine the right to asylum under Article 18 of the EU Charter, the principle of non-*refoulement* under Article 19 of the EU Charter, and the right to an effective remedy under Article 47 of the EU Charter. ECRE therefore recommends the removal of the legal fiction of non-entry, and proposes that applicants are legally considered to have entered the territory of the EU Member States.<sup>13</sup>

If the fiction is maintained, ECRE recommends that Recital 40 should be amended as follows:

**Recital 40:** Many applications for international protection are made at the external border or in a transit zone of a Member State, often by persons apprehended in connection with unauthorised crossings of the external border or disembarked following a search and rescue operation. In order to conduct identification, security and health screening at the external border and direct the third-country nationals and stateless persons concerned to the relevant procedures, a screening is necessary. There should be seamless and efficient links between all stages of the relevant procedures for all irregular arrivals. After the screening, third-country nationals and stateless persons should be channelled to the appropriate asylum or return procedure, or refused entry. ~~A pre-entry phase consisting of screening and border procedures for asylum and return should therefore be established.~~ ***The additional procedural steps relating to screening and access to the procedure should be designed and applied in a way that conforms with the prohibition of inhuman and degrading treatment as prescribed for in Articles 3 ECHR and 4 Charter, the right to asylum as enshrined in Article 18 Charter and the principle of non-refoulement in Article 19 Charter.***

## No clear-cut exemption of vulnerable applicants

The proposal does not foresee a general exemption of vulnerable applicants from the border procedures. Some categories, such as unaccompanied children and families with children below the age of 12 (Article 41(5)), may only be subject to a border procedure for reasons linked to national security or public order. Article 41(9) further specifies the cases where the asylum border procedure shall not be applied. According to this article, Member States shall not apply or cease to apply the border procedure in certain cases, *inter alia*:

11 ECtHR 23 July 2020, App nos 40503/17, 42902/17 and 43643/17, *M.K. and others v Poland*.

12 ECtHR 23 July 2020, App nos 40503/17, 42902/17 and 43643/17, *M.K. and others v Poland*, § 179.

13 For more information see : ECRE Comments on Screening Regulation.

- where the necessary support cannot be provided to applicants with special procedural needs;
- where there are medical reasons for not applying the border procedure.

### **Applicants in need of special procedural guarantees (Article 41(9))**

Article 41 (9) of the current proposal should be read in connection with Article 19 of the 2016 proposal, which sets out the special guarantees for applicants in need of special procedural guarantees. **Article 19** sets an ambiguous standard as to the type of procedures that can be applied to applicants who have been identified as applicants in need of special procedural guarantees. On the one hand, **Article 19(3)** establishes a strong presumption against the examination in the accelerated or border procedure of applications from applicants in need of special procedural needs as a result of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence. On the other hand, this is not excluded either, provided adequate support can be given to applicants in such settings, while it suggests a weaker presumption with respect to other categories of applicants in need of special procedural guarantees.

Research on the implementation of the existing border procedure has shown that proper and effective vulnerability identification mechanisms are lacking in inter alia France, Italy, Germany, Greece, Portugal, Spain, and Hungary, thereby rendering any special procedural safeguards and adequate support laid down in EU law meaningless in practice.<sup>14</sup>

ECRE believes that the reform of the asylum *acquis* should be used to exclude the use of accelerated and border procedures for applicants who have been identified as in need of special procedural guarantees, regardless of an assessment as to whether or not adequate support could be provided in a border context. The very nature of the border procedure is not suitable for these applicants and adequate support cannot be provided to them within it.

This change would be coherent with the objective of these provisions and the purpose and content of “adequate support” as required in the 2016 Commission proposal. Adequate support should allow applicants to benefit from their rights and comply with their obligations under the Regulation and is defined in the preamble as “sufficient time enabling effective access to procedures and for presenting the elements needed to substantiate their application”.<sup>15</sup> This in itself militates against the use of the accelerated examination procedure or the border procedure given the shorter time limits that apply in these procedures for submitting documentation, taking first instance decisions, and lodging appeals against negative decisions. In addition, such procedures are often conducted from detention, which makes them, as a rule, ill-suited to treat applications of persons who have been subjected to extreme forms of violence or torture.<sup>16</sup>

In ECRE’s view, the approach taken in Article 19(3) combined with Article 41(9)b unnecessarily complicates the process by creating an additional procedural step – that of assessing whether or not adequate support as defined in the Regulation can be effectively provided in the context of the accelerated examination or border procedure given the individual circumstances of the applicant. Flaws in the identification process<sup>17</sup> might mean that applicants whose needs for special procedural guarantees are not identified in a timely manner, are wrongfully subjected to a border procedure.

14 European Parliamentary Research Service, *Asylum procedures at the border European Implementation Assessment, Part 3: The implementation of Article 43 of Directive 2013/32/EU in practice*, written by ECRE, available at: <https://bit.ly/3m8tJoy>, p.110.

15 See Recital 17 of the Commission proposal.

16 See IRCT, *Recognising Victims of Torture in National Asylum Procedures. A Comparative overview of early identification of victims and their access to medico-legal reports in asylum-receiving countries*, 2013, 66-67.

17 Article 20 of the 2016 proposal leaves wide discretion to the authorities in the assessment of special procedural needs, which undermines the effectiveness of this provision, making it excessively difficult to exercise in practice the rights conferred by this EU law provision.

Therefore, ECRE recommends excluding applicants who have been identified as in need of special procedural guarantees and/or present indications of vulnerability from accelerated examination or border procedures. Such procedures by definition do not present the necessary guarantees to ensure effective access of such applicants to their rights under the Regulation and the EU Charter of Fundamental Rights.

**Article 19(1):** The determining authority shall systematically and as early as possible after the application has been made assess whether an individual applicant is in need of special procedural guarantees. That assessment may be integrated into existing national procedures or into the assessment referred to in [Article 21 of proposal for the recast Reception Conditions Directive]<sup>18</sup> and need not take the form of an administrative procedure.

For the purpose of that assessment, the determining authority shall respect the general principles for the assessment of special procedural needs set out in [Article 20 of the proposal for recast Reception Conditions Directive].<sup>19</sup>

**Article 19(3):** Where an applicant has been identified as an applicant in need of special procedural guarantees, or present indications of vulnerability the determining authority shall not apply or shall cease to apply [deleted text] the accelerated examination procedure referred to in Article 40 or the border procedure referred to in Article 41 [deleted text] to the applicant.

In this regard, reference should also be made to the vulnerability check that takes place during the screening phase. According to Recital 9 of the proposed Screening Regulation, the screening should ensure that persons with special needs are identified at an early stage, so that any special reception and procedural needs are fully taken into account in the determination of and the undertaking of the applicable procedure. As recommended by ECRE in its Comments on the Screening Regulation, the outcome of the vulnerability check should be included in the debriefing form. When the vulnerability check carried out during the screening has ascertained that the person is in a vulnerable situation, is a victim of torture or has special reception or procedural needs, the person should be exempted from the border procedure.

ECRE further recommends that not only applicants with special procedural needs should be exempted from the border procedure, but also applicants with special reception needs,<sup>20</sup> as the locations where the border procedure will take place, are unlikely to meet their needs (see: "[Location of the border procedure](#)" and "[Do border procedures take place in detention](#)").

To that end, ECRE recommends amending Article 41 (9) of the current proposal as follows:

**Article 41 (9):** Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

(a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;

<sup>18</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, available at: <https://bit.ly/383Ls1C>

<sup>19</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, available at: <https://bit.ly/2K3yym7>

<sup>20</sup> The Commission proposal to recast the Reception Conditions Directive replaces the term "vulnerability" throughout the text by "special reception needs", while maintaining the individual's reduced ability to benefit from the rights granted and to comply with the obligations under the Directive as the defining factor. Moreover, the current non-exhaustive list of vulnerable asylum seekers is now part of the definition of "applicant with special reception needs".<sup>46</sup> Consequently, any person who requires special guarantees to benefit from rights and comply with obligations is automatically considered an applicant with special reception needs, regardless of whether they are vulnerable or not. 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), COM(2016) 465, 13 July 2016, Article 2(13).

(b) ~~the necessary support cannot be provided to~~ **the applicant has been identified as an** applicant with special procedural **or reception** needs in the locations referred to in paragraph 14;

(c) there are medical reasons for not applying the border procedure;

(d) detention is used in individual cases and the guarantees and conditions for detention as provided for in Articles 8 to 11 of Directive XXX/XXX/EU [Reception Conditions Directive] are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

**(e) the de-briefing following the screening contains elements that the applicant is in a vulnerable situation, is a victim of torture or has special reception or procedural needs.**

### **Exemption of families with children under twelve years of age (Article 41(5))**

The Explanatory Memorandum attached to the proposal states that the proposal guarantees that the best interests of children will always be protected, notably by excluding as a rule the application of the border procedure in cases of unaccompanied children and families with children under the age of twelve (unless they are considered to be a danger to the national security or public order of the Member State, or where the applicant has been forcibly expelled for serious reasons of public security or public order under national law). This is further reflected in Recital 40(h) and according to Article 41(5) the border procedure shall indeed not be applied to unaccompanied children or to children below the age of twelve and their family members.

The recognition that the best interests of the child shall be a primary consideration for Member States with respect to all procedures is positive and complies with the Charter. However, the proposal lowers the protection standards for children by only exempting those who are unaccompanied or under the age of twelve from border procedures. This is in contradiction with the internationally recognised definition of children according to which every person under the age of eighteen is a child, as per Article 1 of the Convention on the Rights of the Child<sup>21</sup>, ratified by all EU Member States. It is also contrary to the requirements on ensuring the best interests of the child and securing their well-being as per Article 24 EU Charter. Finally, there is also a tension with the definition of children included in Commission's Communication on the rights of children in migration.<sup>22</sup>

Furthermore, where children above the age of twelve and their family members would be subject to the border procedure, they are likely to be detained (see: "[Location of the border procedure](#)" and "[Do border procedures take place in detention](#)"), which is not in line with Joint general comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.<sup>23</sup>

In the best interest of the child the exemption should also be made unconditional by deleting the national security or public order exception.<sup>24</sup>

ECRE further recommends using the word "children" instead of "minors". The term children is also a legal term and concept, as valid as the term minor, and defined in the UNCRC. The term children reflects common usage, which legal terminology should do when possible, and underlines the principle that all children should be treated first of all as children, regardless of their migration status.

21 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, available at: <https://bit.ly/3a2lBmY>

22 European Commission, *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, COM/2017/0211 final, 12 April 2020, available at: <https://bit.ly/37MgswA>

23 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, available at: <https://bit.ly/3na7vUx>

24 See also : Hertie School, Jacques Delors Centre : [Policy Paper : Clear, fair and Fast](#), December 2020, p. 16.

To that end ECRE recommends amending Article 41 (5) as follows:

**Article 41 (5):** The border procedure *shall not* ~~may only~~ be applied to unaccompanied minors *children* and to minors *children* below the age of 18 and their family members in the cases referred to in Article 40(5) (b).

### Exemptions of the return border procedure?

The provisions relating to the exemptions of certain categories, as mentioned in the previous section, only occurs in Article 41 relating to the border procedure for the examination of applicants for international protection. There are no similar provisions in Article 41a regarding the border procedure for carrying out return. That seems in a sense logical as when reading Article 41a (1) in conjunction with Article 41 it is clear that the border procedure for return can only be applied to those persons rejected in the asylum border procedure. This would entail that those who have been exempted under Article 41 will not be channelled into a border procedure for return. It raises questions however when special procedural or reception needs are identified later on in the procedure. To avoid any unclarity in that regard an identical exemption should be included in Article 41a.

ECRE recommends to amending Article 41a by adding an additional paragraph:

**Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:**

**- an applicant has been identified as an applicant in need of special procedural or reception needs;**

**- There are medical reasons for not applying the return border procedure;**

**- detention is used in individual cases and the guarantees and conditions for detention as provided for in the Return Directive are not met or no longer met and the return border procedure cannot be applied to the applicant concerned without detention.**

**- The border procedure for carrying out return shall not be applied to unaccompanied children and to children and their family members.**

### Do border procedures take place in detention?

The proposal remains vague regarding the place where the border procedures are carried out and under which regime. Whereas the Explanatory Memorandum refers to places where persons will be “accommodated”, Article 41(13) and Article 41a(2) refer to locations at external borders or transit zones (but also in proximity to such locations) where applicants shall be “kept”.

Recital 40c offers some guidance regarding the border procedure for the examination of an application for international protection. This recital states that 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 close to the external border or transit zones, in accordance with Directive XXX/XXX/EU [Reception Conditions Directive]. It remains unclear to what extent people “kept” or “accommodated” in locations at the external border or transit zones, will be subject to restriction of movement.

Recital 40f further states that Member States must 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 a 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. Recital 26 of the proposal RCD<sup>25</sup> further specifies 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. This is missing in the new APR proposal. Whereas the Explanatory Memorandum states that detention used in the context of the border procedure can only be used as a measure of last resort if other less coercive alternative measures cannot be applied effectively, this is not reflected in the Recitals nor in the body of the legislative text of the proposal.

Article 41a(5), (6), and (7) regarding the return border procedure, on the other hand, specifically refer to situations in which persons can be detained. Several Recitals also refer to detention in a border procedure for carrying out return. (see: "[Detention in the border procedure for carrying out return \(Article 41a\)](#)")

Research on the practical implementation of the current border procedure has shown that border procedures occur either in a formal regime of detention (for example Belgium, Portugal, and France) or in situations that amount to de facto detention (for example Austria, Germany, and Greece).<sup>26</sup> The placement of an individual in a waiting zone is acknowledged as a measure of deprivation of liberty.<sup>27</sup> The ECtHR held in the landmark 1996 judgement of *Amuur v. France* that the placement of individuals in hotel accommodation near Orly airport constituted deprivation of liberty and therefore needed to comply with the safeguards set out in Article 5 of the ECHR.

More recently, the CJEU explicitly qualified keeping people at the border as detention. In the *FMS* case<sup>28</sup>, the Court held that the obligation for a person to remain permanently in a transit area whose perimeter is restricted and closed, within which the person's movements are limited and monitored, and which the person cannot legally leave voluntarily, in any direction whatsoever, appears to be "detention" within the meaning of the RD and RCD.<sup>29</sup> To reach this conclusion, the Court relied on the definition of detention in Article 2(h) of the RCD, according to which detention refers to confinement of an applicant within a particular place, where the person is deprived of his/her freedom of movement. This definition applies also to detention regulated by the Return Directive (RD), which does not include a definition.<sup>30</sup>

Once a measure amounts to detention, it becomes subject to specific requirements flowing from the right to liberty. The *FMS* ruling reaffirmed these guarantees in the context of detention in the transit zone<sup>31</sup>, hence it has wide-ranging implications for border detention. Like in-country detention, detention carried out at the border should comply with the requirements of lawfulness, necessity and proportionality; be maintained for the shortest period possible; be subject to a review; and be carried out in dedicated facilities.

ECRE opposes detention of asylum applicants at the border. However, if detention of asylum seekers continues to be possible, then it should remain an exceptional measure of last resort, used only where less coercive measures cannot be applied, and must be reviewed regularly. Vulnerable persons and children should never be detained.

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25 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, available at: <https://bit.ly/3gE1sVz>

26 European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment*, November 2020, available at: <https://bit.ly/3gAwIVH>

27 EDAL, ECtHR - *Amuur v. France*, Application No 19776/92, Judgment of 25 June 1996

28 Judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367.

29 Judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §231.

30 Judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §223-225.

31 Judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, §281.

Where measures prevent asylum seekers from leaving a transit zones or other border facilities to access other parts of the territory, Member States and the European Union through its EU asylum acquis should legally classify such measures as detention, in accordance with the jurisprudence of the European Courts as well as Article 5 of the ECHR, Article 6 of the EU Charter, and Article 8 of the recast Reception Conditions Directive.

### **Detention in the asylum border procedure (Article 41)**

Article 41 is unclear on the conditions under which detention can be imposed on applicants in the border procedure. Article 41 only mentions detention in relation to the situations in which border procedures shall not or no longer be applied:

“detention is used in individual cases and the guarantees and conditions for detention as provided for in Articles 8 to 11 of Directive XXX/XXX/EU [Reception Conditions Directive] are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.”

Recital 40f states that Member States must 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.

Recital 20 of the proposal of the recast Receptions Directive<sup>32</sup> states 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, particularly to ensure accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in the Reception Directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority. Recital 26 further reiterates 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.

As per the proposal for the new Article 8 of the Reception Directive this means that detention could *inter alia* be applied:

“(d) in order to decide, in the context of a border procedure in accordance with Article 41 of the proposed Asylum Procedures regulation (referring to the 2016) proposal, on the applicant’s right to enter the territory.”

It should also be reiterated that Article 8 of the proposal for a Reception Directive prescribes that detention on the grounds listed in the article can only be imposed when it proves necessary and on the basis of an individual assessment of each case. Member States may only detain an applicant if other less coercive alternative measures cannot be applied effectively. In that regard, it is clear from Article 52(1) of the Charter that any limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality.

According to the ECtHR, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law: lawfulness also covers the quality of the national law. This implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness.<sup>33</sup>

These safeguards should be reiterated in Article 41 to avoid a situation whereby states resort to systematic detention of asylum applicants at the border. In that regard, ECRE recommends including in

32 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, available at: <https://bit.ly/3qOrB8P>

33 See, to that effect, judgment of the European Court of Human Rights of 21 October 2013, *Del Río Prada v Spain*, CE:ECHR:2013:1021JUD004275009, §125

Article 41 a paragraph reiterating these safeguards.

ECRE recommends amending Article 41 by adding an additional paragraph:

**When applying the border procedure Member States shall take into account that an applicant for international protection should not be held in detention for the sole reason that he or she is seeking international protection. Detention can only be imposed as a measure of a last resort based on the legal grounds set out in article 8 Proposal Reception Directive and when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively.**

In that regard, ECRE reiterates its proposed amendments<sup>34</sup> to Article 8 of the proposal for a Reception Directive concerning the grounds for detention of asylum seekers, in which it proposed to remove the ground relating to the border procedure.

### **Detention in the border procedure for carrying out return (Article 41a)**

Contrary to the provisions regarding the asylum border procedure, the border procedure for carrying out return is clearer on the use of detention. Article 41a foresees two scenarios:

- First, under Article 41a(5), persons who have been detained during the asylum border procedure 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.
- Second, according to Article 41a(6), persons who no longer have a right to remain and are not allowed to remain, and who were not detained during the asylum border procedure, 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.

Both scenarios raise specific concerns related to the right to liberty.

As regards the first scenario, although Article 41a(5) uses non-mandatory terms (“may”), it does not enumerate clear grounds for detention because “preventing entry” or “preparing return” cannot be considered as such. In comparison, under the Return Directive, pre-removal detention is allowed to prepare return only when one of two grounds is present (the risk of absconding or avoiding or hampering return), as spelled out in Article 15(1) of the Return Directive. Article 41a(5) this provides solely the *context* for detention, not clear grounds, and thereby fails to comply with the requirements stemming from the right to liberty under Article 5(1) of the ECHR and Article 6 of the EU Charter. As stated, according to the ECtHR and CJEU, the legal basis for detention should be clear and foreseeable in its application.<sup>35</sup> In addition, too broad a legal basis for detention would bring about quasi-systematic detention, in breach of the principles of necessity and proportionality. Therefore, the aforementioned grounds for detention as spelled out in Article 15(1) of the Return Directive should apply equally to pre-removal detention at the border.

In the second scenario as laid down in Article 41a(6), concerned people may be detained on one of three grounds, namely posing a risk of absconding, avoiding or hampering return, or posing a risk to public policy or security or national security. The first two grounds are current grounds for pre-removal detention under Article 15(1) of the Return Directive and the third was proposed by the Commission in the recast of the Return Directive (draft Article 18(1)(c)).<sup>36</sup> The new ground blurs the lines between

34 ECRE, Comments on the Reception Conditions Directive recast proposal, 2016, available at : <https://bit.ly/2Kg4fll>

35 ECtHR, Sadaykov v. Bulgaria, Application No 75157/01, Judgment of 22 May 2008, para. 23; CJEU, Al Chodor, C-528/15, 15 March 2017, para. 37-40.

36 See: ECRE, Comments on the Recast Return Directive, 2018, available at: <https://bit.ly/2IHmzdi> .

administrative and penal detention and may be used by states to avoid complying with the safeguards that typically accompany penal detention. It should thus be erased.

Like in-country detention, detention carried out at the border should comply with the requirements of lawfulness, necessity and proportionality, be maintained for the shortest period possible, be subject to a review, and be carried out in dedicated facilities. According to the CJEU, any detention ordered under the Return Directive is subject to the principle of proportionality with regard to the means used and the objectives pursued, and it can only be ordered after an assessment to ensure that other less coercive measures were not sufficient. Article 15(1) precludes detention without prior assessment of the necessity and proportionality of this measure. Article 41a(5) & (6) do not include the requirement to assess less coercive measures prior to ordering detention in the border context.

Without explicit mention of the priority of alternatives to detention in line with the principle of proportionality, the language of the proposal creates the possibility of automatic detention triggered by a mere refusal of asylum in the border procedure. Such a measure would be contrary to international and EU law requirements of necessity and proportionality of immigration detention. In line with FMS, border detention is only justified if proportionate and necessary in the individual circumstances of the case and where alternative measures are not sufficient to ensure effectiveness of return. In that regard, Article 18(1) of the recast Return Directive should apply to border pre-return detention, as it requires that detention be imposed unless other sufficient but less coercive measures can be applied effectively in a specific case. Under EU and international law rules, as mentioned above, there is no reason why people subject to pre-removal detention at the border should not be covered by the same rules as their counterparts in pre-removal detention carried out on the state's territory.

According to Article 41a(7) 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 paragraph 2 (12 weeks) and shall be included in the maximum periods of detention set in Article 15(5) and (6) of Directive XXX/XXX/EU [Return Directive]. In this regard, the Commission proposal refers to the current limits set out in Article 15(5) and (6) of the Return Directive, under which, detention may last up to six months, which can be extended for twelve months if the removal operation takes longer due to the lack of cooperation of the person concerned or delays in obtaining the documents from destination countries. Hence, the period of 12 weeks is to be counted towards the maximum permissible period of pre-removal detention of 18 months. This seems to imply that once the period of 12 weeks of border return detention has elapsed, the person may continue to be detained in in-country detention pursuant to provisions of the Return Directive.

It should also be noted that these 12 weeks, can be preceded by 12 weeks of detention in the asylum border procedure, meaning that a person could be detained up to 24 months (almost two years).

ECRE recommends amending Article 41a by amending Article 41a(3) and merging and amending Articles 41a(5) and (6) as follows:

Article 41a (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) (1) to (4) and Articles 19 to 21 of Directive XXX/XXX/EU [recast Return Directive] shall apply.

~~Article 41a (5) Persons referred to in paragraph 1 who have been detained during the procedure referred to in Article 41 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.~~

Article 41a (6) Persons referred to in paragraph 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 Article 41;~~ may be detained if there is a risk of absconding within the meaning of Directive XXX/XXX/EU [Return Directive], ~~or 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 can only be imposed as a measure of a last resort based when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively.**

## CHAPTER 2: BORDER PROCEDURE FOR THE EXAMINATION OF APPLICATIONS FOR INTERNATIONAL PROTECTION (ARTICLE 41)

Article 41 provides for a border procedure for the examination of applications for international protection. It replaces the same article on the previous proposal, and the current border procedure as foreseen in Article 43 of the APD.

### When will the border procedure be applied? (Article 41 (1))

The new Article 41 foresees that an application may be examined in a border procedure following a screening procedure as provided for in the Screening Regulation. Neither the Screening Regulation, nor the amended proposal for the APR clearly specifies who will make the decision as to whether or not a person will be channelled into a border procedure, and when this decision is made. The Screening Regulation only refers to a debriefing form that “shall point to any elements which seem at first sight to be relevant to refer the third country nationals concerned into the accelerated procedure or the border procedure” (Article 14(2)). The wording of the Explanatory Memorandum to the Screening Regulation, nevertheless, suggests that it is the relevant asylum authorities who identify the asylum applicants who fall within the scope of the border procedure.

Article 41(1) provides that the border procedure may be applied where the application has been made by a third country national or stateless person who does not fulfil the conditions for entry into the territory of a Member State as set out in Article 6 of the Schengen Borders Code (SBC). As mentioned above, asylum applicants will generally not meet these entry conditions, as they intend to stay longer than 180 days and do not have a residence permit or long stay visa. Moreover, many asylum applicants do not have a valid travel document and a visa for the EU due to the circumstances of their flight. Nevertheless, the SBC is to be applied without prejudice to the principle of *non-refoulement* and the right to asylum.

The amended APR further specifies that 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 relocation in accordance with Article [X] of Regulation (EU) No XXX/XXX [Ex Dublin Regulation].

The scope of Article 41(1)(b) is not clear and is not further specified in the Explanatory Memorandum. It raises questions as to what “in connection” means, and how long after the crossing the provision can be applied.

The Return Handbook<sup>37</sup>, offers some guidance, as it lists categories of persons who are for instance covered by the term “apprehended or intercepted by the competent authorities in connection with the irregular crossing [...] of the external border”, based on the fact that there is a *direct* connection to the act of irregular border crossing. It concerns for example:

- persons arriving irregularly by boat who are apprehended upon or shortly after arrival,
- persons arrested by the police after having climbed a border fence,
- irregular entrants who are leaving the train/bus that brought them directly into the territory of a Member State (without previous stopover in Member State territory).

The Return Handbook also offers examples of categories of persons who are not covered by the term “apprehended or intercepted by the competent authorities in connection with the irregular crossing [...] of the external border” because there is no longer a direct connection to the act of irregular border crossing:

- irregular entrants who are apprehended within the Member State’s territory, within a certain period after irregular entry,
- irregular migrants apprehended in a border region, unless there is still a direct connection to the act of irregular border crossing,
- an irregular migrant leaving a bus coming from a third country, if the bus has already made several stops in EU territory,
- irregular migrants who, having been expelled at a previous occasion, infringe a still valid entry ban (unless they are apprehended in direct connection with irregular border crossing),
- irregular migrants crossing an internal border — see judgment of the CJEU in Case C-47/15, Affum (paragraph 69), Article 2(2) of the Directive referring to external borders and Article 14 SBC applying at the external borders,
- illegally staying third-country nationals who are leaving the territories of the Member States and of the Schengen Associated countries — see judgment of the CJEU in Case C-47/15, Affum (paragraph 71).

It should be noted that Returns Handbook is not a legally binding instrument, and has a different objective from the APR proposal. It cannot thus replace clear guidance by the EU legislator in the APR. Under the quality of law argument, the provisions in the APR proposal must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness.

ECRE reiterates that wide and ill-defined provisions undermine the principle of legal certainty and will lead to similarly wide divergence in implementation, which thus renders EU law provisions ineffective. The fact that the border procedure can also be applied to people who at an earlier point crossed the border of a Member State, could lead to an increase in discriminatory policing, whereby police disproportionately stop and search people based on their racial, ethnic or religious appearance, contrary to the principle of non-discrimination.

ECRE also suggests removing the possibility that the border procedure can be carried out following relocation as provided for in the proposal for a Regulation on Asylum and Migration Management (RAMM).<sup>38</sup> This builds once again on the legal fiction of non-entry, meaning that asylum seekers can be relocated from one Member State to the other but still be kept – fictionally – at a border, and not considered as having entered the territory. As this legal fiction is used in practice to curtail people’s rights, ECRE opposes the use of it.

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37 European Commission, COMMISSION RECOMMENDATION (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks, 2017, available at: <https://bit.ly/3oF5076>

38 European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], 23 September 2020 COM(2020) 610 final, Article 45 (2)(a).

ECRE therefore recommends deleting Article 41(1)(b) and (d), amending Article 41(1) as follows:

#### Article 41(1):

Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], and provided that the applicant has not yet been authorised to enter Member States' territory, a Member State may examine an application in a border procedure where that application has been made by a third country 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; [delete provision]~~
- (c) following disembarkation in the territory of a Member State after a search and rescue operation;
- ~~(d) following relocation in accordance with Article [X] of Regulation (EU) No XXX/XXX [Ex Dublin-Regulation];~~

## What can be examined in the border procedure? (Article 41 (2))

Where a border procedure is applied, decisions may be taken on the following:

- (a) the inadmissibility of an application in accordance with Article 36;
- (b) the merits of an application in an accelerated examination procedure in the cases referred to in Article 40(1).

#### Inadmissibility grounds (article 36)

For the applicable inadmissibility grounds it is necessary to refer back to Article 36 of the 2016 APR proposal, which provides that the determining authority shall reject an application as inadmissible where any of the following grounds applies:

- (a) country which is not a Member State is considered to be a first country of asylum for the applicant pursuant to Article 44, unless it is clear that the applicant will not be admitted or readmitted to that country;
- (b) country which is not a Member State is considered to be a safe third country for the applicant pursuant to Article 45, unless it is clear that the applicant will not be admitted or readmitted to that country;
- (c) the application is a subsequent application, where no new relevant elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation) or relating to the inadmissibility ground previously applied, have arisen or have been presented by the applicant;
- (d) a spouse or partner or accompanied minor lodges an application after he or she had consented to have an application lodged on his or her behalf, and there are no facts relating to the situation of the spouse, partner or minor which justify a separate application.

ECRE has already commented extensively on the use of safe country concepts and proposed targeted amendments to the APR text.<sup>39</sup> ECRE asked for the deletion of the safe country of origin concept as it

<sup>39</sup> ECRE, Comments on the Proposal of an Asylum Procedures Regulation, 2016, available at: <https://bit.ly/376x3Mw>, p. 50; ECRE, Policy note: Debunking the safe country myth, November 2017, available at: <https://bit.ly/2W5hCOu>.

is at odds with the obligation of Member States under Article 3 of the 1951 Refugee Convention to apply its provisions without discrimination as to race, religion or country of origin. ECRE further recommended that the application of the first country of asylum and safe third country concepts should always remain optional and the criteria for their application further strengthened to properly reflect jurisprudence and international human rights standards.

### **Grounds for an accelerated examination**

The grounds for the accelerated procedure are formulated in the 2016 proposal as follows:

- (a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection in accordance with Regulation (EU) No XXX/XXX (Qualification Regulation);
- (b) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of Regulation (EU) No XXX/XXX (Qualification Regulation);
- (c) 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;
- (d) the applicant is making an application merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State;
- (e) a third country may be considered as a safe country of origin for the applicant within the meaning of this Regulation;
- (f) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member States;
- (g) the applicant does not comply with the obligations set out in Article 4(1) and Article 20(3) of Regulation (EU) No XXX/XXX (Dublin Regulation), unless he or she demonstrates that his or her failure was due to circumstances beyond his or her control;
- (h) the application is a subsequent application, where the application is so clearly without substance or abusive that it has no tangible prospect of success.

The new proposal adds a new ground to Article 40 of the 2016 proposal:

*“(i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data or the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;”*

The European Commission has justified this ground:

*“by the significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%, and hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded.”*

The provision lacks clarity. It refers to the proportion of decisions by the determining authority granting international protection according to the latest annual EU-wide Eurostat data. It does not specify whether it concerns only first instance decisions or also includes decisions by the determining authorities following judicial review. As recognition rates referred to in Eurostat concern first instance recognition rates, it can be assumed that the provision relates to first instance decisions.

A newly proposed Recital 39a and Article 40(5)(c) further recognise that there might be a change in circumstances after the publication of the relevant Eurostat data and taking into account the guidance note pursuant to Article 10 of Regulation XX/XX on the European Asylum Agency, or that the applicant belongs to a specific category of persons for whom the low recognition rate cannot be considered as representative of their protection needs due to a specific persecution ground. In these cases, the examination of the application should not be accelerated.

This does not replace the concept of safe country of origin or safe third country. Cases where a third country may be considered as a safe country of origin or a safe third country for the applicant within the meaning of this Regulation remain applicable as a separate ground for respectively the accelerated examination procedure or the inadmissibility procedure.

It should further be noted that proposal for a Crisis Regulation<sup>40</sup> foresees the possibility for members states in crisis, to derogate from the asylum border procedure under Article 41 of the proposed Asylum Procedures Regulation, by taking decisions in the context of a border procedure on the merits of an application where the applicant is of a nationality with below an EU-wide recognition rate of 75% or lower, thereby subjecting a large number of asylum applicants to a border procedure, reduced procedural safeguards and deprivation of liberty.

The use of the 20% threshold raises several concerns:

- ***The use of a 20 % threshold can negatively affect the obligation of non-refoulement and can deprive protection of those in need***

The use of the threshold carries the risk of arbitrariness and might distract authorities from the proper conduct of the asylum procedure which requires the individual examination of the protection needs of the asylum seeker, based on an objective and up-to-date assessment of the human rights situation in the country of origin and his/ her individual circumstances, rather than on the basis of general assumptions about the situation in that country. Even where case workers and decision-makers are properly trained, designating a country as “safe” based on average and flawed recognition rates from the outset, is likely to consciously or inadvertently influence their credibility assessment and result in a less thorough examination of the asylum application. This means that those in need of protection might be deprived of it, thereby violating the right to asylum and principle of *non-refoulement*.

- ***It concerns first instance recognition, thereby not reflecting the actual protection needs***

The recognition rates as referred to in Eurostat concern first instance recognition rates. First instance rates are not a reliable indicator of protection needs or even of asylum decision-making, given that a significant number of negative decisions are successfully challenged on appeal. According to Eurostat, 96,095 appeals decided in 2017 (33.2% of the total) were positive; compared to 118,640 positive appeals in 2018 (37.6% of the total) and 102,520 positive appeals in 2019 (32.3%).<sup>41</sup>

Calculation of the overall recognition rate for all stages of the asylum procedure cannot be made due to a lack of information linking the outcomes at first instance and final decisions following appeal and reviews for each person concerned. As some applicants rejected at the first instance and who lodged an appeal in the same year receive a final negative decision, it would lead to multiplication of some rejected applicants and would cause underestimation of the overall recognition rate. Final decisions on appeal statistics broken down by the year of the first instance rejection would be required to avoid this multiplication.

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40 Article 4, European Commission, Proposal for a Regulation of the European Parliament and of the council addressing situations of crisis and force majeure in the field of migration and asylum, COM (2020 ) 613, available at : <https://bit.ly/2W45Jsf>

41 ECRE, Asylum statistics in Europe: Factsheet, 2020, available at: <https://bit.ly/2JM6ZxG>

The EASO annual report<sup>42</sup> has noted that overall, the recognition rate in appeals tends to be lower than that at first instance but this is not always the case. In particular, the largest differences were noted for nationals of Bangladesh (with a final recognition rate of 28% at second or higher instances, compared to just 8% at first instance), Senegal (24% compared to 7% at first instance) and Mali (31% compared to 16% at first instance).<sup>43</sup> The use of 20% threshold thus raises questions regarding compatibility with the principle of statistical reliability, as foreseen in Article 338 TFEU.<sup>44</sup> The European statistics regulation further defines “reliability”, meaning that statistics must measure as faithfully, accurately and consistently as possible the reality that they are designed to represent and entailing that scientific criteria are used for the selection of sources, methods and procedures.<sup>45</sup>

- ***The average may be flawed due to diverging recognition rates among Member states***

Low recognition rates do not automatically point to the conclusion that an individual or particular group is not in need of international protection. Even if the protection rate is under 20%, there are still people in need of international protection among the applicants from those countries. For example, in 2020, the recognition rate for Pakistanis has so far fluctuated between 5% and 10% - relatively low rates.<sup>46</sup> However, among applicants from Pakistan there are groups who are in need of protection due to facing persecution, such as members of religious minorities and their family members, or claims such as those made by human rights defenders, activists and lawyers, including those who defend the human rights of members of religious minorities in Pakistan.<sup>47</sup> Thus, claims from the country still require particularly careful examination.

Furthermore, the decision-making across Europe continues to be an “asylum lottery”: a person’s chances of obtaining protection vary dramatically depending on the country examining their claim. Some countries’ decision-making is marred by gaps in quality, which expose individuals to risks of *refoulement*. This can be clearly illustrated by the diverging recognition rates for Afghans and Iraqis.

According to Eurostat, first instance recognition rates for Afghans in 2019 ranged from 93.8% in Italy to 4.1% in Bulgaria. In between lies a spectrum covering the Netherlands (24.6%), Belgium (32.2%), Sweden (37.7%), Germany (44.4%) and Greece (72.5%). For Iraqis recognition rates varied from 66.8% in France and 67.5% in Greece to 8.3% in Denmark, 17.2% in Sweden and 21.6% in Finland. Thus, among those receiving negative decisions, there are likely to be people who do have protection needs but whose protection needs were not recognised due to flaws in decision-making (which may be exacerbated by the lack of respect for procedural guarantees). Of course, it may also be the case that people receive positive decisions when they do not in fact need international protection due to the same or different weaknesses in decision-making. Given the political and legal context in Europe, and the factors influencing decision-making, this seems less likely.

ECRE recommends deletion of Article 40(1)(i) and Recital 39a

42 European Asylum Support Office (EASO) (2020). *EASO Asylum Report 2020: Annual Report of the Situation of Asylum in the European Union*, p.76 available at: <https://easo.europa.eu/asylum-report-2020>

43 European Asylum Support Office (EASO) (2020). *EASO Asylum Report 2020: Annual Report of the Situation of Asylum in the European Union*, p.76 available at: <https://easo.europa.eu/asylum-report-2020>

44 “The production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; it shall not entail excessive burdens on economic operators.”

45 Article 2 (D) REGULATION (EC) No 223/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities, available add: <https://bit.ly/2KjdQ1i>

46 EASO, Latest asylum trends : September 2020, available at : <https://bit.ly/3a55zZE> .

47 UN High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Members of Religious Minorities from Pakistan, January 2017, HCR/EG/PAK/17/01, available at: <https://www.refworld.org/docid/5857ed0e4.html>

## Mandatory border procedure (Article 41 (3))

The new Article 41(3) foresees three possibilities under which Member States are obliged to apply the border procedure in cases of irregular arrival at the external border or following a disembarkation after a search and rescue operation and if one of the following grounds apply:

- 1) the applicant poses a risk to national security or public order
- 2) 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
- 3) the applicant is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 percent.

In all other cases the application of the border procedure remains optional for member states.

ECRE strongly opposes the use of border procedures in general and therefore recommends that EU co-legislators at the very least firmly resist rendering border procedures mandatory.

ECRE proposes deletion of article 41 (3)

## Duration of the asylum border procedure (Article 41(11))

According to the new Article 41(11) the border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims, with a maximum of 12 weeks from when the application is registered (so not including the screening phase which can last up until 10 days), which can be prolonged by another 8 weeks in times of crisis.<sup>48</sup> These 12 weeks encompass the first instance as well as any decision on an appeal if applicable.

Within this period, Member States are entitled to set the deadline in national law both for the administrative and for the appeal stage, 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 appeal is issued within this maximum time of 12 weeks.

After that period, if the Member State failed to take the relevant decisions, the applicant should in principle be authorised to enter the territory of the Member State. The exceptions to entry are when a border procedure for carrying out return is applicable and the applicant has no right to remain, or where he/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/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 is also to be carried out as a border procedure for a period not exceeding 12 weeks. This period is to 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.

This means that applicants whose claims were rejected can be subject to a border procedure for more than 25 weeks (when including the 10 days maximum time for screening). In times of crisis, 16 weeks can be added (an additional 8 weeks to carry out an asylum border procedure and an additional 8 weeks for the return border procedure).

<sup>48</sup> Article 4 (2) Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

## Exemption from the border procedure

### Children

According to the joint reading of the new Article 41(3) and (5), unaccompanied children and children below the age of 12 and their family members are only subject to the border procedure in case they are considered to be a danger to the national security or public order of the Member State.

As mentioned above, the proposal lowers the protection standards for children, only exempting those who are unaccompanied or under the age of twelve from border procedures. This is in contradiction with the internationally recognised definition of children as every person up to the age of eighteen, included in Article 1 in the Convention on the Rights of the Child, ratified by all EU Member States. In line with Article 1 CRC and Article 24 EU Charter, Member States must provide children with specific rights, e.g. education, which will be a challenge within the border procedure.

ECRE recommends amending Article 41 (5) as follows:

**Article 41 (5):** The border procedure ~~may only~~ **shall not** be applied to unaccompanied children and to children below the age of 18 and their family members in the cases referred to in Article 40(5) (b).

As mentioned above, exemptions are also foreseen for applicants in need of special procedural needs. ECRE proposed specific amendments to extend these exemptions. (See: [No clear-cut exemption of vulnerable applicants](#))

### **When a successful readmission is unlikely** (Article 41(4))

The new Article 41(4) also allows Member States an exception from the obligation to carry out the asylum border procedure in cases where, from the outset, it is unlikely that the readmission of the person (after a negative decision) would be successful. The exception will be applicable for nationals of third countries for which that Member State has submitted a notification to the Commission in accordance with paragraph 3 of Article 25a of the Visa Code.<sup>49</sup> Such a notification may be made where the Member State is confronted with substantial and persisting practical problems in cooperating with the third country in question on the readmission of irregular migrants. Article 41(4) further specifies the situations and applicable procedures for when Member States may continue to apply this exception and when they should cease to apply it and hence (start to) apply the border procedure to the nationals of the third country concerned.

The different steps in which a Member State “may decide not to apply”, “shall again apply” or “may continue not to apply” this exception and the border procedure creates legal uncertainty and should be further clarified in the text.

To ensure legal certainty vis-à-vis the individual concerned, ECRE recommends adding an additional paragraph to Article 41(4) as follows:

**Once an applicant has been exempted from the border procedure, and referred to the regular procedure, that should remain the case for the entire procedure.**

<sup>49</sup> Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), available at: <https://bit.ly/2W810pn>

## Location of the border procedure (Article 41(13))

The new Article 41(13) states that during the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones. Each Member State shall notify to the Commission, the locations where the border procedure will be carried out, at the external borders, in the proximity to the external border or transit zones.

The Explanatory Memorandum states that Member States do not need to provide for the necessary facilities to apply the border procedure at every border crossing point or at every section of the external border where migrants may be apprehended or disembarked. They can choose the locations where they set up the necessary facilities for that purpose anywhere at the external border or in the proximity of the external border, and transfer the applicants covered by the border procedure to those locations, regardless of where the asylum application was initially made. However, to avoid excessive and time-consuming transfers of applicants for this purpose, Member States should aim to set up the necessary facilities where they expect to receive the most applications falling with the scope of the border procedure.

In cases where the operational capacity of those locations is exceeded for the purpose of processing the applicants subject to the border procedure, Member States may on a temporary basis and for the shortest time necessary, accommodate applicants at other locations within the territory of the Member State. This exception should only be applicable when the operational capacity at those locations is temporarily exceeded, since Member States should aim to have sufficient capacity for the expected caseload of applications.

As stated above the text remains vague on the regime applicable in these locations. Does it concern detention? Or will restriction of movement be imposed? The Commission used the term “kept” in Article 41(13), but uses other terms such as “to accommodate” in the Explanatory Memorandum and Recitals. While the latter might also refer to open reception facilities, the term “kept” seems to refer to detention, even though the wording in itself has no legal connotation. The use of such vague language creates legal uncertainty.

Recital(40c) offers little clarification on the detention question. It only states that 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 close to the external border or transit zones, in accordance with Directive XXX/XXX/EU [Reception Conditions Directive].

Recent research on the current use of border procedure has shown that border procedures either take place in detention, mandated by law (e.g. France, Belgium, and Portugal), or in a situation of de facto detention (for example Austria, Germany, and Greece).<sup>50</sup> In many Member States, a legal basis for practices that in actual fact amount to detention is lacking (de facto detention). In other Member States, for example those that apply the hotspot approach (Italy and Greece), the blurring of restrictions on freedom of movement and detention is a key source of concern, and domestic law does not always provide a clear legal basis for either detention or, alternatively, the restrictions on the freedom of movement of applicants. Current EU law does not require a clear legal basis in domestic law for restrictions on the freedom of movement of applicants. Member State practice, particularly with regard to the hotspots, shows that restrictions of the freedom of movement of applicants often do not satisfy the requirement in the recast Reception Conditions Directive that such restrictions respect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under the RCD.<sup>51</sup>

50 European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment*, November 2020, available at: <https://bit.ly/3gAwIVH>

51 See also: European Parliamentary Research Service, *Asylum procedures at the border: European Implementation Assessment*, p.26-27; 123, available at: <https://bit.ly/3gAwIVH>

The proposal still does not offer clarity in this regard. By not clearly defining the relationship between border procedures and detention and/or accommodation in (open) reception facilities, the current proposal still leaves Member States too much scope for applying practices of de facto detention, which are contrary to the EU Charter and the ECHR.

Any use of detention or restrictions on free movement should be formally designated as such by domestic law, in compliance with EU legislation on reception conditions for applicants for international protection, and subjected to proportionality assessment in each case, taking into account alternatives. Information must be provided pro-actively to all those apprehended at the border on an equal footing. Border detention facilities must be adequate and ensure a dignified standard of living in accordance with Article 1 of the EU Charter, which guarantees subsistence and protects physical and mental health. Detention conditions which are not in conformity with ECtHR case law should result in the release of the applicants.

The use of detention and the imposing of restrictions on freedom of movement in a border procedure are to be accompanied with procedural guarantees. (for more information on the use of detention see: [Do border procedures take place in detention](#)). During a border procedure, applicants for international protection should be entitled to free legal and linguistic assistance by qualified legal advisers and interpreters. Applicants should also be able to communicate with the outside world, in order to gather information about the asylum procedure, to gather and submit evidence in support of their asylum claim.

To ensure clarity ECRE proposed adding the following amendments to Article 41:

**15. Member States should ensure that the necessary arrangements are made to accommodate the applicants at or close to the external border or transit zones, in accordance with article 7 Directive XXX/XXX/EU [Reception Conditions Directive], which states that applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.**

**16. Where Member states impose restrictions on freedom of movement, a decision in writing should qualify the measures as either detention or restrictions on freedom of movement, and the reasons for the actual restrictions ordered should be stated in fact and in law.**

**17. When applying the border procedure Member States shall take into account that an applicant for international protection should not be held in detention for the sole reason that he or she is seeking international protection. Detention can only be imposed based on the legal grounds set out in article 8 Proposal reception directive, as a measure of last resort, and when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively.**

# CHAPTER 3: BORDER PROCEDURE FOR CARRYING OUT RETURN (ARTICLE 41A)

## Personal scope and link with asylum procedure

The new Article 41a introduces a border procedure for carrying out return, which replaces the return border procedure included in the 2018 proposal for a recast Return Directive.<sup>52</sup> Under Article 41a(1) and (2), the border procedure for carrying out return applies to applicants, third-country nationals or stateless persons whose applications have been rejected in the border procedure for asylum. Persons subject to this procedure are not authorised to enter the Member State's territory and should be kept at the external borders, or in proximity to them, or in transit zones; however, where Member States are unable to keep them in those locations, they can use other locations within their territory. The border return procedure cannot exceed 12 weeks, starting from when the person concerned no longer has a right to remain and is no longer allowed to remain.

The procedure laid down in the Regulation largely mirrors the procedure under Article 22 of the 2018 recast proposal of the Return Directive, thus ECRE reiterates its concerns. The introduction of a border procedure exclusively applicable to third-country nationals subject to an obligation to return following a decision on an application for international protection taken in border asylum procedure, will not achieve the clarity sought. Even if the objective is to establish a link between asylum and return procedures, a questionable approach in itself, the need for a specific return procedure for applicants for international protection rejected at the border has not been demonstrated. The adverse effect on fundamental rights of those concerned could be significant. If adopted, the proposed procedure would legitimise and mainstream long-term detention with seriously reduced procedural safeguards at the border. While it fits with the practice of containing applicants for international protection and migrants at the external borders of the EU during the entire process, experience with the hotspots in Greece in particular has shown the damaging effect of such a strategy.<sup>53</sup>

The Explanatory Memorandum explains that a seamless link between asylum and return procedures is necessary to increase the overall efficiency and coherence of the asylum and migration system. As noted below, linking asylum and border procedures raises concerns due to the different scope of protection from *refoulement* under these procedures; the border context considerably aggravates these concerns. In fact, border procedures and other accelerated procedures under the asylum *acquis* entail higher risks of breaches of the principle of *non-refoulement* in individual cases, in particular when combined with the systematic application of safe third country and safe country of origin concepts, because they undermine the individual assessment of asylum applications. In addition, data published by EASO reveals that the use of special procedures such as border and accelerated procedures generally result in a much higher proportion of applications being rejected than is the case in regular procedures. By combining the accelerated asylum procedures with an accelerated return procedure at the border, more people may have their applications for international protection summarily examined and, quite probably rejected, at the border, while being detained. They will then have limited opportunities to challenge the decision and be subjected to a fast-track border return procedure with even fewer safeguards.<sup>54</sup>

ECRE recommends deleting the border procedure for carrying out return. If it is kept, then ECRE recommends amending Article 41a:

52 Article 22, Commission proposal for a recast return directive COM (2018) 634.

53 ECRE Comments on the Recast Return Directive, 2018, available at: <https://bit.ly/37VggLF> , p. 22

54 ECRE Comments on the Recast Return Directive, 2018, available at: <https://bit.ly/37VggLF> , p. 23.

To ensure that:

- a reasonable time for appeal is included;
- ensuring full procedural guarantees;
- prioritising alternatives to detention;
- ensuring that detention does not become automatic, and
- exempting vulnerable persons, including children and their family members, from the border procedure.

Specific proposals for amendments can be found in the text below.

## Lack of clarity: Schengen Borders Code or Return Directive? (Article 41a(8))

In contrast to the original proposal in the draft recast of the Return Directive, Article 41a(8) of this Regulation allows states to subject the border return procedure to the provisions of the SBC. As Recital 40g provides, upon rejection of application for international protection in the context of the border procedure, the person should be subject to a return decision or a refusal entry. First of all, this possibility creates confusion as to when or in which Member States the person will be subject to return or refusal of entry. Secondly, this has implications on the level of protection. In cases where the provisions of the Return Directive apply, according to Article 41a(3) of the Regulation, the following provisions of the recast Return Directive apply to the border return procedure: 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.

In cases where the SBC applies, states are bound under the Return Directive (Article 4(4)) to nevertheless respect the following safeguards: the principle of non-refoulement, Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions). That said, people subject to refusal of entry benefit from narrower protections than those in the scope of the Return Directive. Since both categories have passed through the same asylum procedure, the difference of treatment is not justifiable.

As mentioned above and in the comments on the Screening Regulation, ECRE opposes the use of the legal fiction of non-entry, and proposes that applicants are legally considered to have entered the territory of the EU Member States.

Therefore, ECRE recommends erasing the possibility to apply the SBC to people refused international protection in the context of border procedure.

### Recital 40(g)

~~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 40 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 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.~~

## Article 41a(8)

~~Member States that, following the rejection of an application in the context of the procedure referred to in Article 41, 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 third-country 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 ones set out in paragraphs 2, 4 and 7 of this Article.~~

## Detention in the return border procedure (Article 41a (7))

ECRE elaborated on this concern in [Chapter 1](#).

Its recommendation can be summarised as follows:

ECRE recommends amending Article 41a by amending Article 41a(3) and merging and amending Articles 41a(5) and (6) as follows:

Article 41a (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) (1) to (4) and Articles 19 to 21 of Directive XXX/XXX/EU [recast Return Directive] shall apply.

Article 41a (5) ~~Persons referred to in paragraph 1 who have been detained during the procedure referred to in Article 41 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.~~

Article 41a (6) ~~Persons referred to in paragraph 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 Article 41, may be detained if there is a risk of absconding within the meaning of Directive XXX/XXX/EU [Return Directive], or 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 can only be imposed as a measure of a last resort when it proves necessary and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively.***

## Exemptions from the return border procedure?

The provisions relating to the exemptions of certain categories, as mentioned earlier, only occurs in Article 41 relating to the border procedure for the examination of applicants for international protection. There are no similar provisions in Article 41a regarding the border procedure for carrying out return. That seems in a sense logical as when reading Article 41a (1) in line with Article 41 it is clear that the border procedure for return can only be applied to those persons rejected in the asylum border procedure. This would entail that those who have been exempted under Article 41 will not be channeled into the return border procedure. It raises, however, questions when special procedural needs would be identified later on in the procedure. To avoid any confusion in that regard an identical exemption should be included in article 41a.

ECRE this recommends amending Article 41a by adding an additional paragraph:

Member States shall not apply or shall cease to apply the border procedure at any stage of the procedure where:

- an applicant has been identified as an applicant in need of special procedural or reception needs;

- There are medical reasons for not applying the border procedure;

- detention is used in individual cases and the guarantees and conditions for detention as provided for in the return directive are not met or no longer met and the border procedure cannot be applied to the applicant concerned without detention.

- The border procedure for carrying out return shall not be applied to unaccompanied children and to children and their family members.

## Procedural safeguards (Article 35a)

Article 35a states that the return decision shall be issued as part of the decision rejecting the application for international protection or, in a separate act. When issued in a separate act it is to be issued at the same time and together with the decision rejecting the application for international protection.

It should be noted that a return decision requires a broader examination than a decision on the application for international protection.<sup>55</sup> The risk of *refoulement* in the sense of Article 19(2) of the Charter does not necessarily form part of the assessment of asylum applications. First, a person may be refused international protection while still running the risk of ill-treatment in the country of origin, for example where the exclusion clause applies pursuant to Articles 12 and 17 of the recast Qualification Directive. Second, Member States are not required under the asylum *acquis* to examine risks of *refoulement* as part of the asylum procedure beyond those set out in the recast Qualification Directive. However, under Article 4 EU Charter and Article 3 ECHR Member States have the obligation to proceed, before removing someone, to a comprehensive and rigorous evaluation of the risk contrary to Article 3 ECHR.<sup>56</sup>

Moreover, a return decision should go beyond this as it requires a full examination under Article 2 (right to life) and 3 ECHR (prohibition of torture)<sup>57</sup> and Article 8 (right to family life),<sup>58</sup> and the corresponding

55 EPRS, The Return Directive 2008/115/EC: European Implementation Assessment, 2020, <https://bit.ly/2JUJuT0>, p. 49-53.

56 ECtHR (GC) 23 March 2016, no. 43611/11 F.G.v. Sweden, §120.

57 As noted in the case law guide of the ECtHR: “*The expulsion of an alien by a Contracting State may give rise to an issue under Articles 2 and 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country. In these circumstances, Articles 2 and 3 imply an obligation not to deport the person in question to that country (F.G. v. Sweden, §§ 110-111). Removal cases concerning Article 2 – notably in respect of the risk of the applicant being subjected to the death penalty – typically also raise issues under Article 3 (see paragraph 44 below): because the relevant principles are the same for Article 2 and Article 3 assessments in removal cases, the Court either finds the issues under both Articles indissociable and examines them together (see F.G. v. Sweden ([GC], § 110; L.M. and Others v. Russia, § 108) or deals with the Article 2 complaint in the context of the related main complaint under Article 3 (see J.H. v. United Kingdom, § 37)”; ECtHR, Guide on the case-law of the European Convention on Human Rights, Immigration, Updated on 31 August 2020, available at: <https://bit.ly/3gBrHvY>*

58 As noted in the case law guide of the ECtHR: “*Antwi and Others v. Norway, no. 26940/10, § 89, 14 February 2012, §§68-70? Article 8 does not entail a general obligation for a State to respect immigrants’ choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State’s obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül, cited above, § 38; and Rodrigues da Silva and Hoogkamer, cited above, § 39). Factors to be taken into account in this context are*

rights under the EU Charter.

In contrast to the initial proposal for border return procedure under Article 22 of the recast Return Directive, Article 41a is silent on the appeal. Under Article 41a(3) the following provisions of the recast proposal apply: Article 3 (definitions), Article 4(1) (more favourable provisions), Article 5-7 (human rights clause, definition of the risk of absconding, obligation to cooperate), Article 8(1)-(5) (return decision), Article 9(2)-(4) (voluntary departure), Articles 10-13 (removal, entry ban), Article 15 (form), Article 17(1) (safeguards pending return), Article 18(2)-(4) (detention), and Article 19-22 (conditions of detention).<sup>59</sup> Appeal is not covered by the enumerated provisions but by Article 53, which raises specific concerns, explained below in Chapter 4.

Furthermore, Member States should keep the discretion to grant the person another status provided for in national law. This is no longer possible under the proposed regulation, as the provision contains an obligation for Member States to simultaneously issue a return decision following a rejection of the application for international protection.

To ensure full compliance with the principle of *non-refoulement* and the right to family life, as well as to ensure discretion of Member States to grant another status under national law, ECRE recommends amending Article 35a by adding the following safeguards:

#### Rejection of an application and issuance of a return decision

Where an application is rejected as inadmissible, unfounded or manifestly unfounded with regard to both refugee status and subsidiary protection status, or as implicitly or explicitly withdrawn, Member States shall **may** issue a return decision that respects Directive XXX/XXX/EU [Return Directive]. The return decision shall **may** be issued as part of the decision rejecting the application for international protection or, in a separate act. Where the return decision is issued as a separate act, it shall **may** be issued at the same time and together with the decision rejecting the application for international protection. **A return decision shall only be issued following a full examination pursuant to Article 2 and 3 ECHR and article 2 and 4 Charter for Fundamental Rights, and Article 8 ECHR and Article 7 Charter for Fundamental Rights.**

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*the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Rodrigues da Silva and Hoogkamer, cited above, *ibid.*; Ajayi and Others v. the United Kingdom (dec.), no. 27663/95, 22 June 1999; Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see Jerry Olajide Sarumi v. the United Kingdom (dec.), no. 43279/98, 26 January 1999; Andrey Sheabashov c. la Lettonie (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see Abdulaziz, Cabales and Balkandali, cited above, § 68; Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others, cited above; Rodrigues da Silva and Hoogkamer, cited above, *ibid.*)." ECtHR, Guide on the case-law of the European Convention on Human Rights, Immigration, Updated on 31 August 2020, available at: <https://bit.ly/3gBrHvY>*

59 For ECRE position as regards these draft provisions, see Comments on the Recast Return Directive, 2018, available at: <https://bit.ly/3oNiK5L>.

# CHAPTER 4: THE RIGHT TO AN EFFECTIVE REMEDY

## Examination of the appeal (Article 53)

The new Article 53 states that applicants shall have the right to an effective remedy before a court or tribunal against:

- a) decision rejecting an application as inadmissible;
- b) decision rejecting an application as unfounded in relation to both refugee and subsidiary protection status;
- (c) decision rejecting an application as implicitly withdrawn;
- (d) decision withdrawing international protection;
- (e) a return decision.

Return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as decisions referred to in points (a), (b), (c) and (d).

Article 53(3) further reiterates that an effective remedy shall provide for a full and *ex nunc* examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) No XXX/XXX [Qualification Regulation].

As noted above, where an asylum decision examines whether or not the applicant meets the criteria under the Refugee Convention, or qualifies for subsidiary protection, a return decision should go beyond that and requires a full examination under ECHR Article 2 (right to life) and Article 3 (prohibition of torture)<sup>60</sup> and Article 8 (right to family life).<sup>61</sup> The need for such an examination should therefore also be reiterated in the appeals stage. It results from the ECtHR's case-law that an applicant's complaint alleging that his/her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention "must imperatively be subject to close scrutiny by a 'national authority'". That principle has led the ECtHR to rule that the notion of "effective remedy" within the meaning of Article 13 taken in conjunction with Article 3 requires, firstly, "independent and rigorous scrutiny" of any complaint made by a person in such a situation, where "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and, secondly, "the possibility of suspending the implementation of the measure impugned".<sup>62</sup>

To ensure full compliance with the principle of *non-refoulement* and the right to family life, ECRE recommends amending Article 53(3) by adding the following safeguards:

Article 53(3) further reiterates that an effective remedy shall provide for a full and *ex nunc* examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) No XXX/XXX [Qualification Regulation], **as well as an examination pursuant to Article 2 and 3 ECHR and Article 2 and 4 Charter for Fundamental Rights, and Article 8 ECHR and Article 7 Charter for Fundamental Rights.**

60 See case law cited in footnote 57; ECtHR, Guide on the case-law of the European Convention on Human Rights, Immigration, Updated on 31 August 2020, available at: <https://bit.ly/3gBrHvY>

61 See case law cited in footnote 58; ECtHR, Guide on the case-law of the European Convention on Human Rights, Immigration, Updated on 31 August 2020, available at: <https://bit.ly/3gBrHvY>

62 ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], 2012, Judgment No. [27765/09](https://www.echr.coe.int/ViewDoc.aspx?id=27765/09), § 198.

## Time-limits for the appeal (Article 53(7))

The Commission proposal sets strict time limits for the purpose of lodging an appeal. This differs from Article 46(4) of the recast Asylum Procedures Directive, according to which Member States need to provide “for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy.”<sup>63</sup>

The Commission proposal’s prescriptive approach should not undermine the right to a fair trial and to an effective remedy as guaranteed under Article 47 EU Charter. Reasonable time limits for lodging an appeal are essential to ensure the effectiveness of the remedy that is at the disposal of the applicant.

Article 53(7) prescribes the minimum time-limits for applicants to lodge appeals of (a) at least one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply. This means that for decisions in the border procedure there should be a minimum of one-week time limit to appeal the decision.

In many instances, applicants have found it difficult to comply with strict time limits when they are subject to a detention order. One of the biggest barriers applicants in detention face is the lack of effective access to legal aid and interpretation. This is particularly the case if detention centres are in remote locations, making it difficult for legal representatives to access them.

These short time limits may be too onerous, particularly when there is no flexibility to take into account the complexities and the individual circumstances of the individual.

The ECtHR provides that the applicant must be afforded a hearing “within a reasonable period of time”. When determining whether the duration of criminal proceedings was reasonable, the ECtHR has had regard to factors such as the complexity of the case, the applicant’s conduct, and the conduct of the relevant administrative and judicial authorities.<sup>64</sup> Furthermore, while the ECtHR accepts that time limits should be established, it considered that the speed of the proceeding should not undermine the effectiveness of the procedural guarantees that aim to protect the applicant against *refoulement*.<sup>65</sup>

The CJEU considered in *Samba Diouf* that the time limit for lodging an appeal against a negative asylum decision “must be sufficient in practical terms to enable the applicant to prepare and bring an effective action”. While it found that a fifteen-day time limit to appeal a first instance decision under the accelerated procedure to be sufficient, it considered that the national court should determine whether this time-limit is sufficient in light of the individual circumstances of the case. If the national courts deem the time limit insufficient, they should order that the application is examined under the ordinary procedure.<sup>66</sup>

In light of the particular vulnerabilities of applicants, particularly those in border procedures and in detention, coupled with a potential lack of access to proper interpretation and quality legal assistance and representation, ECRE considers that the proposed time limits in Article 53(7)(a) may infringe Article 47 of the EU Charter of Fundamental Rights. If the Asylum Procedures Regulation is to set specific time limits under which appeals may be lodged, these must meet the standards of reasonableness. A reasonable time period for lodging appeals contributes to better-informed proceedings before the courts and tribunals and may eventually result in more efficient appeal proceedings. As the right to an effective remedy requires a rigorous examination in fact and in law, this also implies an effective possibility for the applicant to submit factual and legal argumentation challenging the refusal decision.

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63 Article 46(4) of the recast Asylum Procedures Directive.

64 See e.g. ECtHR, *Pedersen and Baadsgaard v Denmark*, Application No 49017/99, Judgment of 17 December 2004.

65 ECtHR, *I.M. v France*, Application No 9152/09, Judgment of 2 February 2012, par. 147.

66 CJEU, Case C-69/10 *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, par. 66-68.

ECRE strongly urges co-legislators to provide a minimum 30-day time limit in the interest of ensuring applicants' access to an effective remedy, including in cases rejected as inadmissible, explicitly withdrawn or abandoned or following an accelerated or border procedure. In such cases, there seems to be little objective justification for providing applicants with lower procedural safeguards. In light of the afore-mentioned requirement of a full and *ex nunc* examination in fact and in law incumbent on the Courts and Tribunals, applicants should have an effective opportunity to analyse and submit all available evidence, in particular where no examination on the merits of their application has been carried out by applying inadmissibility grounds.

ECRE recommends amending Article 53(7) as follows:

**Article 53(7):** Applicants shall lodge appeals against any decision referred to in paragraph 1:

a) ~~at least one week~~ ***within at least one month in*** the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply;

b) ~~between a minimum of two weeks and a maximum of two months~~ ***within at least one month*** in all other cases

## One level of appeal (Article 53 (9))

Article 53(9) provides for only one level of appeal against a decision taken in the context of the border procedure. It concerns a mandatory provision. The Commission justifies the use of one level of appeal for decisions taken in the border procedure, as necessary in order to streamline the procedures and enhance their effectiveness. It is clear from the case-law of the CJEU that neither Article 46 of Directive 2013/32, nor Article 13 of Directive 2008/115, nor Article 47 of the Charter, read in the light of the safeguards laid down in Article 18 and Article 19(2) of the Charter, requires that there be two levels of jurisdiction. The only requirement is that there must be a remedy before a judicial body.<sup>67</sup>

Nevertheless, it should be noted that the principle of double level of appeals (often administrative followed by judicial) exists in several countries, specifically in the field of asylum law (see Austria, Belgium, Finland, the Netherlands, Portugal, Romania, and the UK). Reducing the level of appeal to only one appeal could possibly be considered as unconstitutional in some of the countries (e.g. Belgium and Austria).

To that end, ECRE recommends the deletion of Article 53(9).

ECRE recommends the deletion of Article 53(9).

## The right to remain - suspensive effect of appeal (Article 54)

The right to remain on the territory of the Member States pending the examination of the asylum application and until a final decision on such application is taken is crucial to ensuring that the principle of *non-refoulement* is fully respected. The right to an effective remedy under Article 13 ECHR as well as Article 47 of the EU Charter of Fundamental Rights, requires such right to remain to extend to the appeals stage in the asylum procedure.

<sup>67</sup> See, to that effect/ judgments of 28 July 2011, *Samba Diouf*, C69/10, EU:C:2011:524, paragraph 69, and of 19 June 2018, *Gnandi*, C181/16, EU:C:2018:465, paragraph 57.

According to the Explanatory Memorandum, the new Article 54(1) clarifies that all the legal effects of a return decision issued together with a decision rejecting an application for international protection shall be suspended for as long as the applicant has a right to remain or is allowed to remain in accordance with the Regulation. This is in line with the judgment of the Court of Justice of the European Union in case C-181/16, *Gnandi*, which clarified that the legal effects of a return decision must be suspended when an appeal against a rejection of an application for international protection is ongoing and if the third-country national enjoys a right to remain in accordance with the Asylum Procedure Regulation.

The explanatory memorandum further explains that the new Article 54(3) extends the circumstances where the applicant shall not have an automatic right to remain for the purpose of an appeal to also include decisions rejecting subsequent applications, decisions to withdraw international protection in the specific cases where an exclusion ground applies or where the beneficiary is considered a danger to the security of a Member State or where he or she has been convicted of a particularly serious crime.

The text of the new Article 54(3) also indicates that any negative decision taken in the border procedure shall not entail the right to remain for the applicant. The article provides that the applicant shall not have the right to remain where the competent authority has taken one of the following decisions:

- (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;
- (b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];
- (c) a decision which rejects an application as implicitly withdrawn;
- (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded;
- (e) a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation).

In those cases, a court or tribunal shall have the power to decide whether or not the applicant shall be allowed to remain on the territory of the Member States pending the outcome of the remedy upon the applicant's request. The competent court or tribunal may under national law have the power to decide on this matter *ex officio*.

ECRE maintains its position<sup>68</sup> that these provisions undermine States' obligations to guarantee access to an effective remedy. ECRE also maintains that efficiency is better served by ensuring access to an appeal with automatic suspensive effect. Moreover, in ECRE's view, providing an asylum applicant with an automatic right to remain on the territory during the time within which the right to an effective remedy must be exercised and pending the outcome of the remedy when the applicant exercises this right, constitutes the best guarantee to ensure that their right to an effective remedy and the principle of *non-refoulement* are respected in practice. This reduces not only the risk of violations of the principle of *non-refoulement*, it also avoids adding burdens to judicial systems because asylum seekers are not required to launch a separate request to remain on the territory and Courts are not required to address this issue separately. Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice, would depend less on factors that may be beyond the asylum seeker's control, such as access to and availability of adequate information and quality legal assistance.

The ECtHR in asylum cases requires a remedy to have automatic suspensive effect in order to be effective.<sup>69</sup> In principle, both a system in which the appeal itself or a system in which the request for interim protection pending the outcome of the remedy have automatic suspensive effect, can be compatible with

68 ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, available at: <https://bit.ly/37elcfj>

69 M.A and others v Lithuania, para 83, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>

Article 13 ECHR. However, it can be derived from the case law that the second option is increasingly considered by the ECHR as a problem as it may not provide sufficient guarantees to ensure compliance with the principle of *non-refoulement*. In the case of *Conka v. Belgium* the ECtHR held that the extremely urgent procedure before the Conseil d'Etat did not comply with Article 13 ECHR because it was not guaranteed in fact and in law that this application for interim protection, pending the final outcome of the appeal before the Council of State, would suspend the enforcement of the expulsion measure.<sup>70</sup>

In *S.J. v Belgium*, the ECtHR concluded that Belgian law failed to enable the applicants to appeal their deportation with “automatic suspensive effect”. It found that the Belgian appeal process against a deportation was too complex and difficult to understand, even, with the benefit of specialist legal assistance. Given the complexity, coupled with the limited application of the “extreme urgency procedure”, the Court concluded that Belgium failed to comply with Article 13 ECHR, which requires the right to an effective remedy to be available and accessible in practice.<sup>71</sup>

Finally, both in the case of *Conka v. Belgium* and the case of *M.A. v. Cyprus* the ECtHR stated that the requirements of Article 13 ECHR, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and has “pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis”.<sup>72</sup> The Court held in particular that “it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13”.<sup>73</sup>

The CJEU in *Abdoulaye Amadou Tall* found that a remedy under Article 39 (the right to an effective remedy) of the 2005 Asylum Procedures Directive,<sup>74</sup> must be determined in a manner consistent with Article 47 of the EU Charter of Fundamental Rights, which is derived from Article 13 of the ECHR.<sup>75</sup> Moreover, in light of Article 19(2) of the Charter, which has its counterpart in Article 3 ECHR, an effective remedy requires that “a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to the applicant”. The Court, emphasised that a decision taken on a subsequent application and its enforcement does not lead to the applicant’s removal and so the lack of suspensive effect does not breach Article 19(2) and 47 of the Charter. In contrast, an appeal must have suspensory effect if brought against a return decision which, if enforced, could expose the person concerned to a serious risk of being subjected to inhuman or degrading treatment, in view of the requirements of Articles 19(2) and 47 of the Charter, Article 13 ECHR, and case law from the European courts.

ECRE considers that a procedural proposal involving a remedy without automatic suspensive effect is only be acceptable in limited cases. These would be the case of an appeal against a decision taken on a second or further identical subsequent application made in a Member State following a final decision rejecting a previous subsequent application as inadmissible or unfounded; or in the case of an appeal against a decision which rejects an application as explicitly withdrawn, provided that a full examination of the merits of the first asylum application has taken place in accordance with the necessary procedural safeguards and no new elements have been submitted.

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70 ECtHR, *Conka v. Belgium*, Application No 51564/99, Judgment of 5 February 2002, par. 83.

71 ECtHR, *S.J. v Belgium*, Application No 70055/10, Judgment of 19 March 2015.

72 ECtHR, *M.A. v. Cyprus*, Application No 41872/10, Judgment of 23 July 2013, par. 137.

73 ECtHR, *Conka v. Belgium*, par. 82.

74 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L326/13.

75 CJEU, Case C-239/14 *Abdoulaye Amadou Tall v CPAS de Huy*, Judgment of 17 December 2015.

To this end ECRE recommends amending article 54 (3) as follows:

Article 54(3): The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken **a decision which rejects a second or further subsequent application as inadmissible pursuant to Article 36(1)(c) or as explicitly withdrawn in accordance with Article 38.**

one of the following decisions:

~~(a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure;~~

~~(b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements];~~

~~(c) a decision which rejects an application as implicitly withdrawn;~~

~~(d) a decision which rejects a subsequent application as unfounded or manifestly unfounded;~~

~~(e) a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation).~~

However, if the interim relief option described in Article 54(4) were to be maintained by co-legislators, ECRE recommends that such a system is only applied on the basis of the court or tribunal acting *ex officio* as this would at least avoid asylum applicants having to undertake a separate procedural step to ensure their right to remain in the territory pending the outcome of the appeal, which is a core aspect of the right to an effective remedy.

Furthermore, in line with the jurisprudence of the ECtHR and the CJEU, such appeal procedures will only meet the requirements of an effective remedy if (1) sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter;<sup>76</sup> (2) the burden to prove the need to suspend the expulsion decision is not set too high;<sup>77</sup> and (3) the court or tribunal deciding on the request performs a close and rigorous scrutiny of the risk of *refoulement*.

ECRE recommends amending Article 54(4) as follows:

Article 54(4): A court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State responsible acting *ex officio*, where the applicant's right to remain in the Member State is terminated as a consequence of [deleted text] a decision which rejects a second or further subsequent application as inadmissible pursuant to Article 36(1)(c) or as explicitly withdrawn in accordance with Article 38.

## Legal assistance

The current proposal does not include any specific provisions on access to free legal assistance in the border procedure. These are included in the general provisions (Article 14-18) as provided for in the 2016 proposal.

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure the asylum applicant's access to justice and the overall fairness and efficiency of the asylum process. Asylum applicants find themselves by definition in a disadvantaged position in the asylum process, as they are unfamiliar with the legal framework and in most cases do not speak the language

<sup>76</sup> ECtHR, *I.M. v. France*, Application No. 9152/09, judgment of 23 December 2008, par. 150

<sup>77</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, judgment of 22 September 2011, par. 389.

in which the procedure is conducted. Despite its objective of establishing a simplified and streamlined common asylum procedure, the Commission's 2016 and 2020 proposal, introducing the border procedures, remains characterised by extreme complexity. It provides for special procedures with varying procedural time limits, the mainstreaming of different categories of safe country concepts and a complex system of appeals requiring separate actions to trigger suspensive effect of such appeal in certain cases, all within short time limits.

In such a context, professional and independent legal assistance and representation during the asylum procedure is indispensable for applicants for international protection in order to assert their rights under the EU asylum *acquis* and to ensure that all aspects of their case are fully taken into account by asylum authorities.

The important role of free legal assistance and representation in safeguarding the rights of applicants for international protection throughout the procedure is acknowledged in the Commission's 2016 proposal. Compared to the recast Asylum Procedures Directive, the right to legal assistance and representation is strengthened by making the provision of free legal assistance and representation in principle mandatory for Member States at both stages of the procedure, including the first instance procedure.<sup>78</sup> ECRE welcomed the extension of the obligation to provide free legal assistance and representation to the administrative stage of the procedure, as an important safeguard in the construction of the CEAS.<sup>79</sup>

Nevertheless, ECRE expressed deep concern over the possibility for Member States to exclude the provision of free legal assistance and representation in (i) the administrative procedure where "the application is considered as not having any tangible prospect of success" or in case of a subsequent application;<sup>80</sup> and in (ii) the appeal procedure "where the appeal is considered as not having any tangible prospect of success".<sup>81</sup> This leaves extensive scope for Member States to deprive applicants of the right to free legal assistance in particular through an unduly broad application of the so-called "merits test".

In ECRE's view, given the indispensable role of legal assistance in safeguarding the rights of applicants for international protection during the asylum procedure, as a rule, the applicant's entitlement to such legal assistance and representation should only be excluded where he/she has sufficient financial resources.<sup>82</sup> While in practice the vast majority of applicants are unlikely to have sufficient resources, they should not benefit from legal assistance and representation free of charge where they can afford to pay for such services, assessed through a fair means test.

ECRE remains opposed to the application of a so-called "merits-test" as envisaged in Article 15 with respect to free legal assistance and representation both in the administrative and in the appeal procedure. The refusal of free legal assistance and representation on the basis of a lack of tangible prospects of success in the administrative procedure carries even greater risks of denying applicants access to a full and thorough examination of their application. Denying applicants for international protection the right to free legal assistance and representation, based on the presumption that their application is manifestly unfounded, is likely to affect in particular applicants from countries designated as safe third country, safe country of origin, first country of asylum or even from countries within the 20% threshold. Refusing such applicants free legal assistance and representation from the outset, further adds to their already disadvantaged position compared to other groups of asylum seekers and deprives them from an indispensable tool enabling them to effectively rebut presumptions of safety at this stage in the procedure, as guaranteed in the respective provisions dealing with safe country concepts.<sup>83</sup>

78 See Article 15(1) of the 2016 Commission proposal. This is mirrored in Article 14 on the right to legal assistance and representation which is now defined as the right of applicants to consult in an effective manner a legal adviser or other counsellor on matters relating to their application at all stages of the procedure. Unlike the corresponding Article 22(1) of the recast Asylum Procedures Directive, it no longer mentions that this is at the applicant's own cost.

79 For a more extensive analysis on legal assistance see: ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, pp. 19-21, available at: <https://bit.ly/37elcfJ>

80 See Article 15(3)(b) and (c) of the 2016 Commission proposal.

81 See Article 15(5)(b) of the 2016 Commission proposal.

82 ECRE/ELENA, Note on Legal Aid, 2017, available at: <https://bit.ly/37SstRa>

83 Articles 44(3), 45(3)(b) and 47(4)(c) of the Commission proposal.

As proposed in the comments to the 2016 proposal<sup>84</sup> ECRE recommends amending Article 15(3) and (5) as indicated below.

#### **Article 15: Free legal assistance and representation**

1. Member States shall, at the request of the applicant ***and as soon as possible after an application is made***, provide free legal assistance and representation in the administrative procedure provided for in Chapter III and in the appeal procedure provided for in Chapter V.

2. For the purposes of the administrative procedure, the free legal assistance and representation shall, at least, include:

- (a) the provision of information on the procedure in the light of the applicant's individual circumstances;
- (b) assistance in the preparation of the application and personal interview, including participation in the personal interview ***[deleted text]***;
- (c) explanation of the reasons for and consequences of a decision refusing to grant international protection as well as information as to how to challenge that decision.

3. The provision of free legal assistance and representation in the administrative procedure may ***only*** be excluded where:

- (a) the applicant has sufficient resources; ***or***  
***[deleted text]***
- (b) the application is ***a second or further subsequent*** application.

4. For the purposes of the appeal procedure, the free legal assistance and representation shall, at least, include the preparation of the required procedural documents, the preparation of the appeal and participation in the hearing before a court or tribunal on behalf of the applicant.

5. The provision of free legal assistance and representation in the appeal procedure may ***only*** be excluded where:

- (a) the applicant has sufficient resources; ***or***  
***[deleted text]***
- (b) the appeal or review is at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of appeal.

Where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal on ground that the appeal is considered as having no tangible prospect of success, the applicant shall have the right to an effective remedy before a court or tribunal against that decision, and for that purpose he or she shall be entitled to request free legal assistance and representation. ***In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.***

Finally, as noted in ECRE's Comments on the Screening Regulation, access to free legal assistance should already be available during the screening process.

<sup>84</sup> ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467, pp. 19-21, available at: <https://bit.ly/3qRb7wQ>.



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