

E-PAPER

# Reception, detention and restriction of movement at **EU external borders**



**BY THE EUROPEAN COUNCIL ON REFUGEES AND EXILES**

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The **European Council on Refugees and Exiles** (ECRE) is an alliance of 107 NGOs across 40 European countries. ECRE's mission is to protect and advance the rights of refugees, asylum-seekers and other forcibly displaced persons in Europe and in Europe's external policies. Its diverse membership ranges from large INGOs with global presence to small organisations of dedicated activists. Members' work covers the full circle of displacement from zones of conflict, to the dangerous routes and arrival in Europe, to long-term inclusion in European societies, with their activities including humanitarian relief, social service provision, legal assistance, litigation, monitoring policy and law, advocacy and campaigning. ECRE's secretariat in Brussels works in three areas:

1. Legal support and litigation at national, European and international level;
2. Advocacy on the Common European Asylum Policy, return, refugee inclusion, external migration policy, resettlement and other safe and legal routes for refugees and EU funding on asylum and migration and
3. Communications.

## Executive summary

The objective of this paper is to critically map the current EU legal framework for deprivation of liberty and restriction on freedom of movement of migrants and asylum seekers, as well as resulting practice, and finally, to discuss the 2020 legislative proposals for EU asylum reform. The discussion of the law and practice is put in the context of the international and EU human rights law framework governing deprivation of liberty and restriction on freedom of movement. After presenting the human rights framework, the paper first discusses how EU secondary legislation regulates detention and restriction on freedom of movement of third-country nationals, especially in the context of borders. Second, the paper looks at detention practices applied in the border context by several Member States. Third, against the background of current legal framework and practices, the paper discusses the 2020 legislative proposals as part of the Pact on Migration and Asylum, which introduce border procedures, namely the proposals for both the Screening Regulation and the Asylum Procedures Regulation to demonstrate their implications on movement restrictions and right to liberty at the EU external borders. The paper then presents a few concluding remarks and policy recommendations.

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# Foreword

The freedom of movement and the right to liberty of a person are fundamental rights. The Universal Declaration of Human Rights and legally binding international and regional treaties, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, prohibit arbitrary detention. EU and international law strictly regulate detention and any restrictions relating to the freedom of movement. Migrants and people seeking international protection are no exception, of course. Fundamental rights apply to everyone, and people seeking protection in Europe have the right to be received at the border, have access to asylum procedures, and to be treated in a way that complies with human rights standards.

However, when we look at the realities and practices at the EU's external borders, these rights are under severe pressure. Reception centres in front-line Member States such as Italy and Greece have turned into de facto detention centres. The restriction of movement with regard to people in transit is a common phenomenon at EU external borders, yet often violates the international, as well as EU, human rights legal framework. Detention is not always applied as last resort, as it should be, but often as a structural method at EU borders. It is also often not declared as such, but referred to with euphemistic terminology, such as "held in a waiting zone", "dedicated facility" or "movement restriction".

Camp Moria, on the Greek island of Lesbos, was clearly the most shocking example of such practices, but alarmingly not the only one. With the proposal for a reform of the Common European Asylum System, the European Commission presented a long-awaited pact that was meant to serve as a "fresh start" for EU migration policy and among other things aimed at preventing such camps in the future. Whether or not the "New Pact on Migration and Asylum" will fulfil the European Commission's promise of "no more Morias" is a key question this study aims to address.

Given the complexity of the legal governance that applies at the EU's borders, which includes EU and international law, as well as Member States' legal systems and practical applications, this paper also aims to give an overview of both the legal framework and the de facto practices. It is only against the background of the current reality that we can discuss and develop pathways for a better common system in the future. Therefore, we seek to consider both the challenges of the front-line EU Member States, as well as, of course, the rights of those seeking international protection. We cannot accept a situation in which Member States with external EU borders feel left alone by other Member States and turn towards policies that undermine fundamental rights. Neither can we accept that people fleeing war and persecution reach Europe hoping for protection, but instead experience further trauma and violence.

As the German Green Political Foundation, we hope to contribute to the debate on how to improve the human rights situation for refugees and migrants at the EU's external borders. Given the numerous breaches of international human rights law at EU borders, we seek to find policy recommendations for all actors involved: EU Member States, the EU Council, the European Commission and the European Parliament. After all, the responsibility to safeguard refugees' and migrants' rights and dignity should not fall on a few EU Member States, but should be shared by us all.

On behalf of the Heinrich-Böll-Stiftung, we would like to thank the European Council on Refugees and Exiles for its efforts and excellent cooperation in carrying out this policy paper.

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# List of abbreviations

<b>AIDA</b>	Asylum Information Database
<b>APD</b>	EU Asylum Procedures Directive (recast)
<b>APR</b>	EU Asylum Procedures Regulation
<b>CFREU</b>	Charter of Fundamental Rights of the European Union
<b>CJEU</b>	Court of Justice of the European Union
<b>EASO</b>	European Asylum Support Office
<b>ECHR</b>	European Convention on Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>ECtHR</b>	European Court of Human Rights
<b>EDAL</b>	European Database of Asylum Law
<b>EPRS</b>	European Parliamentary Research Service
<b>FRA</b>	EU Agency for Fundamental Rights
<b>HRCttee</b>	UN Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MPRIC</b>	Multi-Purpose Reception and Identification Centre (Greece)
<b>RCD</b>	EU Reception Conditions Directive (recast)
<b>RD</b>	EU Return Directive
<b>RIC</b>	Reception and Identification Centre (Greece)
<b>SAR</b>	Search and rescue
<b>SBC</b>	Schengen Borders Code
<b>SOPs</b>	Standard Operating Procedures (Italy)
<b>WGAD</b>	UN Working Group on Arbitrary Detention

# Policy recommendations

## EU Member States

- Cease detaining migrants and applicants for international protection at the border.
- Avoid arbitrary detention at the border by ensuring that detention is lawful, necessary and proportionate, imposed in good faith once less intrusive alternatives have been examined, maintained for the shortest time period possible, subject to a review, and carried out in adequate material conditions.
- Ensure that the measures preventing asylum applicants and migrants from leaving border facilities to access other parts of the territory are domestically classified as 'detention', in line with international and EU law provisions.
- Eliminate designation of transit zones or other facilities at the border as not part of their national territory according to their national law and stop using the fiction of non-entry, in line with ECtHR jurisprudence and the territorial scope of EU law.
- Restrict freedom of movement of the asylum applicants only if it is lawful and necessary.

## European Commission Directorate-General for Migration and Home Affairs (DG HOME)

- Cease using euphemisms for detention.
- Ensure that the MPRIC on Lesbos and new RICs on Samos, Kos and Leros function under clearly defined legal frameworks for restriction on, and deprivation of, liberty and apply these measures only when it is lawful and necessary.
- Ensure that all the centres in which the European Commission is involved via financing or operational support comply with the relevant standards on lawfulness and adequate material conditions and are subject to oversight by the European Parliament.
- Monitor compliance with current EU acquis and launch infringement proceedings where relevant.

## **European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)**

- Ensure that detention is qualified as such in the Screening Regulation and subject to the principles of necessity and proportionality, and procedural safeguards.
- Ensure the applicability of the RCD during the screening procedure.
- Withdraw the provision on mandatory border procedures from the proposal for the APR.
- Withdraw the provisions on the border return procedures from the proposal for the APR.
- Withdraw the fiction of non-entry from the proposals for the Screening Regulation and APR.
- Withdraw the additional ground for detention from the proposal for the recast of the RD.
- Monitor Member States' practices of detention or restriction on freedom of movement at their external borders.

## **Council of the European Union**

- Withdraw the mandatory border procedure and border return procedure from the proposal for the APR.
- Qualify detention during the screening procedures as such and subject it to adequate detention safeguards in the proposal for the Screening Regulation.



# Introduction

At the long-awaited launch of the new Pact on Migration and Asylum,<sup>1</sup> which lays down the EU's multi-annual strategy in the area of migration and asylum, the European Commission (hereafter Commission) repeatedly stressed that there will be "no more Morias" in the EU.<sup>2</sup> The launch of the Pact occurred just around two weeks after an extensive fire destroyed the Moria hotspot on the Greek Aegean island of Lesbos.<sup>3</sup> The fire was a culminating point following long-standing problems at the hotspot, ranging from severe overcrowding (over 400%), the appalling material conditions that over 12,000 persons were held in, lack of security for the vulnerable persons, and poor food and water supplies, to inadequate medical health and mental assistance, bearing in mind that persons were held in these conditions for months.<sup>4</sup> The Moria hotspot became a symbol of the EU's failure to offer access to asylum procedures and adequate reception conditions for persons seeking safety, as well as the ultimate decay of intra-European solidarity and relocation of asylum applicants from Greece and other front-line Member States. In this light, it is unsurprising that the Commission adopted the "no more Morias" rhetoric. Indeed, it fits with the "fresh start" that the Pact supposedly heralds, according to the Commission.<sup>5</sup> Yet, beyond these assertions, the specific proposals in the Pact and the accompanying legislative proposal hardly point to any measure that would ensure that the shameful situation in the Moria hotspot, which continues at remaining hotspots, will come to an end. Worse, some of the proposals appear to be inspired by the current regulation of the hotspots. They thus risk entrenching these measures in the EU legislation and diffusing them across the EU itself.

One of the most concerning aspects of the functioning of the hotspots and other facilities used in the border context are various containment measures imposed on persons placed there. In fact, there is a lack of clarity whether persons are detained or subject to a restriction on their liberty. Both the deprivation of liberty and restriction on freedom of movement are tightly regulated under international and EU law, yet detention is subject to more stringent requirements. The aim of this paper is to critically map the current EU legal framework allowing for detention and movement restrictions in the border context and the resulting practices of Member States. Against this background, the paper discusses

- 1 European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020.
- 2 EU Commissioner for Home Affairs Ylva Johansson, speech, 23 September 2020, <https://www.youtube.com/watch?v=CX49DQsbrzg>
- 3 BBC, *Moria migrants: Fire destroys Greek camp leaving 13,000 without shelter*, BBC, 9 September 2020, <https://www.bbc.com/news/world-europe-54082201>
- 4 ECRE, *Greece: 10,000 People Prevented Access, Lockdown Extended, Recognition Rate Increases*, 4 September 2020, News, <https://www.ecre.org/greece-10000-people-prevented-access-lockdown-extended-recognition-rate-increases/>
- 5 European Commission, *New Pact on Migration and Asylum: A fresh start on migration in Europe*, Website, [https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en)

the Pact proposals that have a bearing on the detention and restriction of movement at the EU's external borders. The key conclusion is that in stark contrast to the Commission's assertions, the Pact will bring about "*more Morias*."

The paper is guided by the following research questions:

- What is the legal framework for restriction of freedom of movement in the current EU legal framework, in particular the Reception Conditions Directive (RCD)? And how might the application thereof be impacted by the 2020 legislative proposals, in particular the proposals for the Screening Regulation and Asylum Procedures Regulation (APR)?
- Which Member States impose a restriction of movement on asylum applicants at their external borders (in particular, in a border context)? Under which conditions? Which of these restrictions would actually amount to detention?
- Which rights under the RCD apply when a restriction on freedom of movement is imposed? Are they respected in practice?
- What are the main implications for the rights of individuals when a restriction on freedom of movement is imposed?

As for the methodology, in order to gather both data and qualitative information, the European Council on Refugees and Exiles (ECRE) used desk research and examined material from a variety of sources, including primary evidence. The consulted sources included: 1) qualitative and quantitative information on national practices extracted from the Asylum Information Database (AIDA) managed by ECRE; 2) where relevant, statistics made available by national authorities and Eurostat; 3) case law from the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and domestic courts, as reported in the European Database of Asylum Law (EDAL), managed by ECRE; and 4) reports from civil society organisations, United Nations bodies and EU Agencies.

The analysis will unfold as follows. After this introductory part (**Section 1**), which includes policy recommendations to prevent arbitrary detention and restriction of movement at the EU's external borders, **Section 2** will map the legal framework governing deprivation of liberty and restriction on freedom of movement. First, it will present the international and EU human rights framework that circumscribes detention and movement restrictions. Second, the discussion will look at the EU secondary legislation on asylum and migration, allowing Member States to impose these measures on asylum applicants and migrants, in particular in the border context. **Section 3** will show some examples of practices carried out by Member States at the external borders, which involve restriction on, or deprivation of, liberty. It will divide them into three categories, namely those carried out in border facilities, first reception facilities and hotspots. Against the background of the discussion in Sections 2 and 3, **Section 4** will delve into the Pact proposals, which have implications for deprivation on liberty and the restriction of movement at the EU's external borders. **Section 5** will formulate several conclusions.

# 1. Legal framework governing deprivation of, and restriction on, liberty

## 1.1 International and EU human rights law

Under international human rights law, including Art. 5 of the European Convention on Human Rights (ECHR) and Art. 9 of the International Covenant on Civil and Political Rights (ICCPR), as well as Art. 6 of the Charter of Fundamental Rights of the European Union (CFREU), everyone has **the right to liberty of person**. In particular, human rights law prohibits arbitrary detention. To ensure that detention in a specific case does not amount to an arbitrary measure, international and European law impose several obligations on states if they resort to deprivation of liberty. First and foremost, immigration detention should be **lawful**. Under Art. 5(1) of the ECHR, this means that no one should be deprived of their liberty except on such grounds, and in accordance with such procedure, as are established by law. According to the ECtHR, legislation authorising detention should satisfy general principles of legal certainty, including being accessible, precise and foreseeable in its application to avoid the risk of arbitrariness.<sup>6</sup> Similarly, the CJEU ruled that detention should comply with specific safeguards, such as presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.<sup>7</sup> In line with the **principles of necessity and proportionality**, immigration detention should be imposed only as a last resort when there are no available non-custodial alternatives to detention.<sup>8</sup> Further, detainees should also be afforded **procedural safeguards**, including information about the reasons for their detention and access to judicial review (Art. 5(2) and 5(4) of the ECHR; Art. 9(2) and 9(4) of the ICCPR). Finally, states should treat all detainees with humanity and respect for the inherent dignity of the human person (Art. 10(1) of the ICCPR) and should ensure that the **conditions of detention** do not violate the prohibition of ill-treatment (Art. 3 of the ECHR).

If a restrictive measure does not amount to deprivation of liberty, it is still tightly regulated under international law. **Freedom of movement** is protected under Art. 2 of Prot. 4 to the ECHR, Art. 12 of the ICCPR and Art. 26 of the Geneva Refugee Convention. Under these provisions, everyone lawfully within the territory of a state has the right to liberty of movement and freedom to choose their residence within that territory. **Lawful presence** is the precondition for being entitled to freedom of movement. According to the Human

<sup>6</sup> ECtHR, *Sadaykov v. Bulgaria*, 75157/01, 22 May 2008, para. 23.

<sup>7</sup> CJEU, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, C-528/15, 15 March 2017, para. 37-40; see EDAL commentary, <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c-52815-al-chodor-opinion-advocate-general-h-saugmandsgaard-%C3%B8e>

<sup>8</sup> WGAD, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, A/HRC/39/45, 2 July 2018, para 12, 14, 19, 20; *HRCtee, General Comment No. 35: Liberty and Security of Person*, CCPR/C/GC/35, 15 December 2014, para. 18.

Rights Committee (HRCttee), while the question of lawful presence is governed by domestic law, which may place conditions on entry to its territory, these conditions should comply with the state's international obligations.<sup>9</sup> Within the EU legal order, the applicants for international protection are lawfully present in the host state for the purposes of the right to freedom of movement.<sup>10</sup> Art. 9(1) of the Asylum Procedures Directive (APD)<sup>11</sup> provides that the applicants for international protection are entitled to remain in the Member State until the first instance decision is rendered. This also includes a stay at the border of transit zones (Art. 2(p) of the APD). The person acquires the status of applicant once they have made an application for international protection, which means a request for protection (Art. 2(b)-(c) of the APD).

International law allows states to exceptionally impose **restrictions** on the person's freedom of movement. In order to be permissible, the interference with the right to freedom of movement should comply with three requirements. **First**, restrictions should be provided by law and be based on clear and precise criteria. **Second**, restrictions should serve one of the legitimate purposes listed in Art. 2(3) of Prot. 4 to the ECHR and Art. 12(3) of the ICCPR, such as the protection of national security, public safety, public order, health or morals, the rights and freedoms of others, or the prevention of crime. Prot. 4 spells out an additional ground, which does not have a corresponding provision under Art. 12 of the ICCPR, namely public interest in a democratic society (Art. 2(4)). **Third**, restriction of movement should be necessary for achieving one of these legitimate objectives. Under the principle of proportionality, restrictions should be appropriate to achieving their protective function, the least intrusive instrument among those which might yield the desired result and proportionate to the interest to be protected.<sup>12</sup>

The domestic classification of a measure as detention or restriction on freedom of movement does not have a bearing on the nature of the measure under international law. In particular, when a state does not qualify a measure as detention, this does not determine whether or not such measure constitutes detention under international law. In such cases, the measure is commonly referred to as *de facto* or informal detention.<sup>13</sup> The ECtHR assesses the factual situation of the individual concerned to determine whether the measure falls within the scope of the right to freedom of movement or the right to liberty. In line with the Strasbourg jurisprudence, there is no clear line between *restriction on* and *depriva-*

<sup>9</sup> HRCttee, *General Comment No. 27: Freedom of Movement*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, para. 4.

<sup>10</sup> ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive*, 2009.

<sup>11</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), OJ 2013 L 180/60, 29 June 2013.

<sup>12</sup> HRCttee, *General Comment No. 27: Freedom of Movement*, CCPR/C/21/Rev.1/Add.9, 1 November 1999, paras. 12, 13, 14 and 16.

<sup>13</sup> See Section 3.1. See also ECRE, *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU*, 2015.

vation of liberty. The difference lies in the degree or intensity of the measure, rather than its nature or substance. When determining if restriction on liberty amounts to deprivation of liberty, the ECtHR assesses the specific facts of the case and takes into account a whole range of criteria, such as the type of restrictions imposed, their duration, their effects on the individual and manner of implementation of the measure. In particular, the Court assesses the cumulative effect of the restrictions imposed, considering the particular circumstances of the affected person.<sup>14</sup>

The assessment of whether or not a measure amounts to detention hinges on the specific circumstances of the case, and recently the ECtHR and CJEU reached different conclusions regarding quite similar circumstances. When assessing whether holding applicants for international protection at the border or in an international zone amounts to detention, the ECtHR looks at the following criteria: the applicants' individual situation and their choice, the applicable domestic regime, the duration, and the nature and degree of the restriction.<sup>15</sup> In *Ilias and Ahmed v. Hungary*, the Grand Chamber of the ECtHR overturned the chamber judgment and found that the 23-day stay of applicants in the Hungarian transit zone at its border with Serbia did not amount to detention.<sup>16</sup> Conversely, in the CJEU's ruling in *FMS*, the applicants' stay in the same transit zone was qualified as detention by the CJEU. In reaching this conclusion, the CJEU focused on factors such as: the transit zone was surrounded by fences and barbed wire, applicants were accommodated in containers of no more than 13 square metres, and they were under constant surveillance. The fact that the applicants could leave the transit zone to Serbia was immaterial to the Court's assessment.<sup>17</sup>

**14** ECtHR, *Guzzardi v. Italy*, 7367/76, 6 November 1980, para. 93.

**15** ECtHR, *Ilias and Ahmed v Hungary*, 47287/15, GC, 21 November 2009, para. 217; see EDAL commentary, <https://www.asylumlawdatabase.eu/en/content/ecthr-ilias-and-ahmed-v-hungary-application-no-4728715-21-november-2019-0>

**16** ECtHR, *Ilias and Ahmed v Hungary*, 47287/15, GC, 21 November 2009, para. 228; see discussion on it in EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 77-78.

**17** CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, 14 May 2020, paras. 229-230; see EDAL commentary, <https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-92419-ppu-and-c-92519-ppu-fms-and-others-v-orsz%C3%A1gos-idegenrend%C3%A9szeti>

## 1.2. EU secondary legislation: border procedures

### 1.2.1. The refusal of entry and detention procedures

The **Schengen Borders Code** (SBC)<sup>18</sup> regulates border checks and, to a lesser extent, border surveillance along the EU's external borders. It lays down the entry conditions that third-country nationals should fulfil to be allowed entry to the Schengen area (Art. 6(1)).<sup>19</sup> The SBC provides for the derogation from the entry conditions for three categories of persons (Art. 6(5)). One of these categories is third-country nationals whose entry may be authorised on humanitarian grounds or because of international obligations. Under Art. 14(1) of the SBC, a third-country national who does not fulfil the entry conditions under Art. 6(1) and does not belong to any of the categories of persons referred to in Art. 6(5) should be refused entry to the territories of the Member States. However, the refusal of entry should be without prejudice to the application of special provisions concerning the right of asylum and international protection. Further, Art. 4 provides that when applying the SBC, Member States should act in full compliance with relevant EU law, including the CFREU, relevant international law, including the Convention Relating to the Status of Refugees, obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. Also, Art. 3(a) stresses that the SBC applies without prejudice to rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*. Hence, Member States cannot refuse entry to a person requesting international protection without assessing whether or not they are in need of protection.<sup>20</sup>

Art. 14 of the SBC regulates the refusal of entry procedure. Under Art. 14(2), entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision should be taken by an authority empowered by national law and take effect immediately. The decision should be given by means of a standard form, as set out in Annex V to the SBC, filled in by the authority empowered by national law to refuse entry. The completed standard form should be handed to the third-country national concerned, who should acknowledge receipt of the decision to refuse entry

**18** *Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) (Codification)*, OJ 2016 L 77/5, 23 March 2016.

**19** Under Art. 6(1) of the SBC, the entry conditions for third-country nationals for a stay of maximum 90 days are the following: (a) they are in possession of a valid travel document; (b) they are in possession of a valid visa; (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, or are in a position to acquire such means lawfully; (d) they are not persons for whom an alert has been issued in the Schengen Information System for the purposes of refusing entry; (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

**20** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 63.



by means of that form. According to Art. 14(3), persons refused entry should have the right to appeal, and appeals should be conducted in accordance with national law. The person should receive a written indication of contact points able to provide information on representatives competent to act on their behalf in accordance with national law. Lodging such an appeal should not have suspensive effect on a decision to refuse entry, which means that the person is obliged to depart even before the competent authority renders its decision. The SBC is silent on detention. It merely provides that the border guards should ensure that the person refused entry does not enter the territory of the Member State concerned (Art. 14(4)). In practice, as will be demonstrated below, refusal of entry implies detention or restriction on the person's freedom of movement.<sup>21</sup>

The procedures for return of persons from within the Member States' territory are laid down in the **Return Directive** (RD).<sup>22</sup> The Directive applies to third-country nationals staying irregularly in the territory of a Member State (Art. 2(1)). The term 'irregular stay' denotes that the person does not fulfil, or no longer fulfils, the conditions of entry under above-mentioned Art.6 of the SBC or other conditions for entry, stay or residence in that Member State (Art. 3(2)). Under Art. 12 of the Directive, return decisions should be issued in writing and give factual and legal reasons as well as information about available legal remedies. Upon request, states should provide a translation of the main elements of the return decision. According to Art. 13, the person should have access to an effective remedy to appeal against the return decision in front of a competent judicial or administrative authority. The said authority should have the possibility of temporarily suspending the enforcement of the decision, unless such a suspension is already applicable under domestic law. The person should have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. The return procedure under the RD thus offers broader guarantees to the person concerned than the refusal of entry procedure under the SBC does.

Contrary to the SBC, the RD regulates detention. Under Art. 15(1) of the RD, unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep a third-country national in detention who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: 1) there is a risk of absconding or 2) the third-country national concerned avoids or hampers the preparation of return or the removal process. In its 2018 proposal for the recast of the RD, the Commission proposed an additional ground for pre-removal detention, namely if the person poses a risk to public policy, public security or national security (draft Art. 18(1)(c)) and a long list of criteria for

**21** See Section 3.1.

**22** *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, OJ 2008 L 348/98, 24 December 2008.

establishing the risk of absconding (Art. 6).<sup>23</sup> Art. 15 of the RD further provides that detention should be ordered in writing and give factual and legal reasons. Detention should be subject to a speedy judicial review and subsequently be reviewed at reasonable intervals of time. The maximum period of detention is to be six months, which can be extended up to a maximum of 18 months if the removal operation is likely to last longer due to lack of cooperation from the person concerned or the destination country. Art. 16 spells out basic rules about conditions of detention. Detention should take place as a rule in specialised detention facilities, particular attention should be paid to the situation of vulnerable persons, and emergency health care and essential treatment of illness should be provided. Under Art. 17, unaccompanied children and families with children should only be detained as a last resort measure and for the shortest appropriate period of time. Families should be placed in separate accommodation and unaccompanied children should be have access, as far as possible, to personnel and facilities that take into account the needs of persons of their age.

The RD does not precisely define the place for carrying out the return procedures, hence it cannot be excluded that procedures in line with the Directive's standards, including pre-removal detention, are carried out at the border. However, Art. 2(2) (a) of the Directive allows states to not apply the Directive in two situations in the border context. **First**, states are allowed not to apply the Directive's provisions to third-country nationals who are subject to a refusal of entry in accordance with Art. 14 of the SBC. By implication, persons refused entry at the border crossing points may be subject to refusal of entry under Art. 14 of the SBC rather than return procedure under the RD. As noted above, the refusal of entry offers less guarantees to the person concerned and leaves the regulation of detention to the domestic authorities.

**Second**, under Art. 2(2)(a), states may also not apply the RD to persons "who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State." According to the CJEU, this exemption should be interpreted narrowly, and the apprehension or interception of the third-country nationals concerned must take place "in connection with the irregular crossing" of an external border, which implies a direct temporal and spatial link with that crossing of the border. Hence, this situation covers persons who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the border or near that border

**23** European Commission, *Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)*, COM(2018)634, 2 September 2018; see also ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, 2018.



after it has been so crossed.<sup>24</sup> According to the CJEU, this provision allows Member States “to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted in connection with the crossing of one such border.”<sup>25</sup> It can be expected that national return or refusal of entry procedures, which may be applied to persons apprehended or intercepted at the irregular border crossing of the green border, offer less protection than the procedures regulated under the RD.

According to the EU Agency for Fundamental Rights (FRA), most Member States with external land borders make use of Art. 2(2)(a), notably Bulgaria, France, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia and Spain. Conversely, Croatia, Estonia, Finland and Slovakia do not use this derogation.<sup>26</sup> Hence, the majority of Member States with external land borders tend to apply refusal of entry procedure under the SBC or national return procedures towards persons refused entry or apprehended at irregular border crossings, rather than RD standards. The Directive, however, ensures some basic safeguards to the persons excluded from its scope of application under Art. 2(2)(a). Under Art. 4(4), Member States should ensure that their treatment and level of protection are no less favourable than as set out in Art. 8(4) and (5) (limitations on use of coercive measures), Art. 9(2)(a) (postponement of removal), Art. 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Art. 16 and 17 (detention conditions). Also, Member States should respect the principle of *non-refoulement*. As regards detention standards, while standards under Art. 16 (conditions of detention) and 17 (detention of children and families) are to be ensured, Art. 15 (procedural standards and remedies) and not included in the list under Art. 4(4). These procedures and accompanying guarantees are thus largely regulated by domestic laws.

**24** CJEU, *Sélina Affum v. Préfet Du Pas-de-Calais, Procureur Général de La Cour d’appel de Douai*, C-47/15, 7, June 2016, para. 72; see EDAL commentary, <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c%E2%80%91s%C3%A9lina-affum-v-pr%C3%A9fet-du-pas-de-calais-procureur-g%C3%A9n%C3%A9ral-de-la-cour-d%E2%80%99appel#content>

**25** CJEU, *Sélina Affum v. Préfet Du Pas-de-Calais, Procureur Général de La Cour d’appel de Douai*, C-47/15, 7, June 2016, para. 72.

**26** FRA, *Migration and Fundamental Rights: Issues at Land Borders*, 2020, p. 8.

### 1.2.2. The asylum procedure

Art. 43 of the APD<sup>27</sup> lays down procedures that Member States may apply at the border. Under Art. 43(1) of the APD, Member States may provide for procedures to decide, at the border or transit zones, on the admissibility and/or the substance of an application for international protection made at such locations. Member States may examine the substance of the application according to grounds listed in Art. 31(8) of the APD.<sup>28</sup> As the CJEU clarified in its ruling the *FMS*, border procedure enables Member States, in well-defined circumstances, to carry out the examination of the application prior to a decision on the person's entry to the territory.<sup>29</sup> Member States should ensure that a decision in the context of border procedures is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant should be granted entry to the territory of the Member State in order for their application to be processed in accordance with the other provisions of the APD (Art. 43(2)). In the event of arrivals involving a large number of persons lodging applications for international protection at the border or in a transit zone, those procedures may also be applied where, and for as long as, these persons are accommodated normally at locations in proximity to the border or transit zone. Besides these

**27** Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), OJ 2013 L 180/60, 29 June 2013.

**28** These grounds are the following: (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 they qualify as a beneficiary of international protection; or (b) the applicant is from a safe country of origin within the meaning of this Directive; or (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to their identity and/or nationality that could have had a negative impact on the decision; or (d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish their identity or nationality; or (e) the applicant has made clearly inconsistent, contradictory, false or obviously improbable representations, which contradict sufficiently verified country-of-origin information, thus making their claim clearly unconvincing in relation to whether they qualify as a beneficiary of international protection; or (f) the applicant has introduced a subsequent application for international protection that is not inadmissible; or (g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision that would result in their removal; or (h) the applicant entered the territory of the Member State unlawfully or prolonged their stay unlawfully and, without good reason, has either not presented themselves to the authorities or not made an application for international protection as soon as possible, given the circumstances of their entry; or (i) the applicant refuses to comply with an obligation to have their fingerprints taken in accordance with Eurodac Regulation; or finally (j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.

**29** CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, 14 May 2020; EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 7.

exceptional circumstances, neither the APD nor the RCD<sup>30</sup> regulate the reception of applicants subject to a border procedure. The RCD, however, allows Member States to provide housing in “premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones,” rather than solely in accommodation centres and private houses or hotels, which are foreseen for applicants under a regular asylum procedure (Art.18(1) (a)). Given the exceptional nature of detention and restriction on freedom of movement, open reception facilities are the default position under EU law.<sup>31</sup>

#### 1.2.2.1. Restriction on freedom of movement

The RCD allows states to restrict applicants’ freedom of movement in two ways. **First**, under Art. 7(1) of the Directive, states may restrict asylum applicants’ freedom of movement to an assigned area. However, apart from requiring that the assigned area does not affect the unalienable sphere of private life and that it allows access to all benefits under the Directive, this provision fails to impose any of the above-described conditions flowing from the human rights instruments. In particular, it does not demand that assigning asylum applicants to a specific area be based on one of the legitimate grounds and is necessary for achieving these objectives. Hence, Art. 7(1) allows for restriction on freedom of movement going beyond the legitimate limits of this measure set out in the international human rights instruments and the Refugee Convention, as discussed above.<sup>32</sup> An example of this measure is the geographical restriction at the Aegean Islands, addressed below.<sup>33</sup> **Second**, under Art. 7(2) of the RCD, states may decide on the actual residence of the applicant. Unlike assignment to a specific area under Art. 7(1), allocation to a specific place of residence is to be for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of the person’s asylum application. The justification based on the swift processing or effective monitoring of the asylum application does not correspond to any of the legitimate grounds for restriction on residence under international law. Reasons of administrative convenience cannot be covered by considerations of the public interest or public order. Crucially, the RCD does not subject any of the restrictive measures under Art. 7 to the proportionality test, which is required under international law.<sup>34</sup>

**30** Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying down Standards for the Reception of Applicants for International Protection (Recast), OJ 2013 L 180/96, 29 June 2013.

**31** AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, p. 14.

**32** See Section 3.3.2.

**33** See Section 2.1.

**34** See Section 2.1.

The Commission's 2016 recast proposal expands Art. 7(2) of the RCD.<sup>35</sup> **First**, it turns the currently optional provision into an obligatory one, by replacing the word "may" with "shall." At the same time, however, it introduces a necessity test. Under draft Art. 7(2), Member States "shall where necessary" decide on the applicant's residence in a specific place, such as an accommodation centre, a private house, flat, hotel or other premises adapted for housing applicants (Recital 16). **Second**, the Commission adds two grounds for restrictions on freedom of residence, notably in order to swiftly process and effectively monitor the procedure for determining the state responsible under the Dublin rules, and to prevent the applicant absconding, if the person were likely to leave the country responsible under the Dublin system or might be required to be present in another state under the Dublin rules. Under international human rights and refugee law, reasons of administrative convenience within the Dublin system cannot justify an obligation to live in a specific place.

On a positive note, the recast proposal seeks to insert stronger safeguards for the applicants subject to the restriction on their freedom of movement. Under new Art. 7(7), the measures of restriction on freedom of movement should be based on individual behaviour and the particular situation of the person concerned, and be applied with due regard to the principle of proportionality. The reference to the principle of proportionality is thus welcome as it reflects the requirements of Art. 12 of the ICCPR and Art. 2 of Prot. 4. Pursuant to new Art. 7(8), Member States should provide reasons in fact and, where relevant, in law in any decision on restriction of movement. Applicants should be immediately informed in writing, in a language that they understand or are reasonably supposed to understand, of the adoption of such a decision, of the procedures for challenging the decision and of the consequences of non-compliance with the obligations imposed by the decision.

#### 1.2.2.2. Detention

States should not detain a person for the sole reason that they are an applicant for international protection (Art. 8(2)). However, under Art. 8(2) of the RDC, when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant if other less coercive alternative measures cannot be applied effectively. Art. 8(3) lists six grounds for detention, namely **1)** to determine or verify the person's identity or nationality, **2)** to determine the elements on which the application for international protection is based if they could not be obtained in the absence of detention, in particular when there is a risk of absconding, **3)** to decide, in the context of a procedure, on the applicant's right to enter the territory, **4)** when the

**35** 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(2018) 465, 13 July 2016; see also ECRE, *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465*, 2016; ECRE, *Taking liberties: Detention and asylum law reform*, 2018.

person is placed in pre-removal detention and they are making an application merely to delay or frustrate return, **5)** when protection of national security or public order so requires, or **6)** under the Dublin Regulation. Art. 8(3)(c) would typically allow for detention during border procedures. The Commission's recast proposal adds a further ground for detention, namely in order to ensure compliance with the restriction on the person's freedom of movement under Art. 7(2) in cases where the applicant has not complied with such obligations and there is a risk of the person absconding.

According to Art. 9 of the RCD, detention should be ordered in writing and state the factual and legal reasons for detention. If detention is ordered by administrative authorities, it should be subject to a speedy judicial review. Subsequently, it should be reviewed by judicial authorities at reasonable intervals of time. The applicants should have access to free legal assistance and representation. Under Art. 10, applicants should, as a rule, be placed in specialised detention facilities and have access to open air spaces. According to Art. 11, children should be detained only as a last resort when alternatives cannot be applied effectively and for the shortest period possible. Unaccompanied children should be detained only in exceptional circumstances. Families should be provided with separate accommodation and women should be accommodated separately from men, unless they consent thereto.

## 2. Movement restrictions and detention at the border in practice

As the previous section discussed, there is an inherent link between procedures carried out at the border and deprivation of, or restriction on, liberty. Indeed, under the EU's secondary legislation, detention may be applied when the entry is refused under the SBC,<sup>36</sup> to prevent unauthorised entry of asylum applicants to the territory under the RCD,<sup>37</sup> or pending removal under the RD.<sup>38</sup> There are thus multiple legal regimes that apply to persons intercepted at a border crossing or who have applied for international protection at the border, which may provide for detention. What further reduces clarity is the fact that the same person may be subject to different detention regimes as the procedure unfolds.<sup>39</sup> Also, the border context is less transparent than the in-country procedures due to remote locations and typically more difficult access granted to civil society organisations. It is also

**36** Section 2.2.1.

**37** Section 2.2.2.

**38** Section 2.2.1. However, as discussed in Section 2.2.1, Member States may decide not to apply the RD to people refused entry under the SBC or who are intercepted in connection with unauthorised border crossing.

**39** For instance, the newly arrived person may be first subject to detention during border asylum procedure and when the asylum application is refused, detention may fall under refusal of entry/return procedures, EPRS, The Return Directive 2008/115/EC: European Implementation Assessment, PE 642.840, 2020, p. 104.

in the border context where states frequently use euphemisms for detention and fail to qualify detention measures as such. For these reasons, it is difficult to systematically classify practices of detention and restriction of movement in the border context as well as places where these measures are carried out. With this caveat in mind, this section maps some border detention and movement restriction regimes and places relied on by Member States, dividing them into three categories.

## 2.1. Border detention facilities

The overriding aim of the procedures described in this section is the **prevention of (unauthorised) entry** into the national territory. These procedures may be intertwined with border asylum procedures or take the form of return procedures, which are often not regulated under the RD, as explained earlier.<sup>40</sup> In practice, in the framework of these procedures, some states use a so-called **legal fiction of non-entry**, claiming that the person has not formally entered the territory as long as the entry was not allowed. To uphold it, persons will most likely be detained or be subject to a restriction of movement. According to ECRE research, countries that rely on this construct include **Austria, Belgium, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Romania and Spain**. On the other hand, **Bulgaria, Croatia, Cyprus, Ireland, Malta, Poland, Slovenia and Sweden** do not use it.<sup>41</sup> To be sure, even when a country does not rely on the fiction of non-entry, it may still carry out procedures at the border, which may result in deprivation of liberty.

As regards **border asylum procedure** under Art. 43 of the APD,<sup>42</sup> according to the European Asylum Support Office (EASO), such procedure is applicable in **Austria, Belgium, Croatia, Czechia, France, Germany, Greece, Italy, Latvia, the Netherlands, Portugal, Romania, Slovenia and Spain**.<sup>43</sup> **Austria and Germany** apply the border procedure only to applications for international protection submitted at airports. **Greece** has two sorts of border procedures: a (regular) border procedure (applied for applications made in transit zones of airports or ports, usually Athens International Airport), and an “exceptional” border procedure (applied on the five eastern Aegean islands, namely the hotspots<sup>44</sup>). **Lithuania**, for its part, does not have legal provisions on border procedure, yet asylum applications submitted at border crossing points are assessed within accelerated procedure. According to EASO research, in all the countries identified by it as implementing border procedure, this procedure includes assessment of the merits of an application (rather than only examination of admissibility), except for **France and Spain** (unless the case is considered manifestly unfounded).<sup>45</sup> Research done by ECRE is more precise, as it differentiates between full and partial in-merit assessment done within border procedure. Accordingly, out of the seven

<sup>40</sup> Section 2.2.1.

<sup>41</sup> AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, pp. 16-18.

<sup>42</sup> Section 2.2.2.

<sup>43</sup> EASO, *Border procedures for asylum applicants in EU+ countries*, 2020, p. 9. Croatia and Slovenia have border procedure foreseen in law, but it is not applied in practice.

<sup>44</sup> Hotspot procedure is discussed below in Section 3.2.

<sup>45</sup> EASO, *Border procedures for asylum applicants in EU+ countries*, 2020, pp. 9 and 12.



countries covered by ECRE's research for the European Parliamentary Research Service (EPRS) study,<sup>46</sup> full in-merit assessment takes place in **Greece, Italy and Portugal**,<sup>47</sup> whereas in **France, Germany and Spain** the in-merit examination carried out within the border procedure is limited to assessing whether or not an application is manifestly unfounded.<sup>48</sup>

The border asylum procedure allows Member States to process asylum applications prior to a decision on the person's entry to the territory. Hence, it involves a (temporary) refusal of entry to the territory.<sup>49</sup> The framework laid down by the RCD and APD is unclear regarding the reception of applicants subject to a border procedure. While detention of asylum applicants is allowed when necessary, based on an individual assessment, when less coercive alternative measures cannot be applied effectively (Art. 8(2) of the RCD),<sup>50</sup> the RCD nevertheless allows Member States to provide housing in "premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones," rather than solely in accommodation centres and private houses or hotels (Art.18(1)(a)). This lack of clarity results in divergent domestic practices.<sup>51</sup> A recent FRA guidance on facilities at external borders used for apprehended or intercepted persons recommends avoiding "prison-like environments" (characterised by barbed wire and prison-like fencing) and respecting the right to liberty.<sup>52</sup> Yet, as recognised by the EPRS, a refusal of entry to the territory is inherently accompanied by restrictions on the persons' liberty and border asylum procedure in most cases implies detention.<sup>53</sup> According to EASO, since the concerned persons are not allowed to enter the territory, the measure they are subject to likely amounts to detention in practice.<sup>54</sup>

According to ECRE's research for the EPRS study, in all seven countries assessed (**France, Germany, Greece, Hungary**,<sup>55</sup> **Italy, Portugal and Spain**) all applicants undergoing border procedure are subject to either officially recognised detention or **de facto detention** at the border. ECRE uses the non-legal term "de facto detention" to refer to practices whereby persons are held in closed centres, which they are not allowed exit at will unless

**46** The EPRS of the study was commissioned by the EP and delivered (in part) by ECRE.

**47** Also, Hungary belonged to this category but the country stopped using it following the *FMS* ruling in May 2020,

**48** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 13.

**49** Section 2.2.2.

**50** Section 2.2.2.2.

**51** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 201-202; AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, pp. 14-15.

**52** FRA, *Initial-reception facilities at external borders: fundamental rights issues to consider*, 2021, pp. 3-4.

**53** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 16 and 76.

**54** EASO, *Border procedures for asylum applicants in EU+ countries*, 2020, p. 11.

**55** The two transit zones described in the ECRE part of the EPRS study (Rözke and Tompa) closed in May 2020 after the *FMS* ruling.

they agree to leave the country, yet the country does not acknowledge that such practice amounts to a deprivation of liberty.<sup>56</sup> More broadly, “*de facto* detention” refers to practices whereby persons are deprived of their liberty in the absence of a detention order. Their confinement is not classified as detention under domestic law and their only possibility of release is by leaving to another country. Further, concerned persons do not have access to procedural guarantees or opportunity to seek judicial review of their detention.<sup>57</sup> According to ECRE, whereas **France, Portugal and Spain** acknowledge that asylum applicants are subject to detention and apply relevant detention safeguards, **Germany, Greece and Italy** do not qualify this measure as detention.<sup>58</sup> According to earlier ECRE research, detention of asylum applicants in border settings was acknowledged in **Belgium, Bulgaria, the Netherlands and Portugal**, whereas **Austria, France, Germany, Greece and Romania** did not qualify detention of asylum applicants in airport transit zones as such.<sup>59</sup>

Member States use a range of **euphemisms** to designate the regime and places used in the border context.<sup>60</sup> For instance, asylum applicants at the border are said to be “held in a waiting zone” in **France**, “held in a dedicated facility” in **Spain**, issued a “notification of residence in the airport facility” in **Germany**, subject to a “restriction of movement” in **Greece**, “required to stay in a designated place” in the **Netherlands**, or “placed or retained in a Temporary Installation Centre” in **Portugal**.<sup>61</sup>

As discussed earlier, domestic terminology or failure to recognise detention as such do not have a bearing on whether or not a measure amounts to deprivation of liberty under international law.<sup>62</sup> In *Amuur v. France*, the ECtHR held that where an applicant’s sole possibility of leaving a transit zone is to leave the country, such an option does not rule out deprivation of liberty, especially if it entails the abandonment of the person’s asylum application.<sup>63</sup> To determine whether or not a measure reaches a threshold of detention, the ECtHR assesses the degree or intensity of the restrictions imposed in the specific case.<sup>64</sup> In

<sup>56</sup> EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 202.

<sup>57</sup> HHC, GPD, ECRE, CIR, FAR, GCR, *Crossing a red line*, 2019, p. 7; AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, p. 8. Other authors use the term “informal detention” instead; see Migreurop, *Locked up and excluded*, 2020, p. 5.

<sup>58</sup> Also, Hungary belonged to this category, EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 203.

<sup>59</sup> AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, pp. 19-21.

<sup>60</sup> For insight into the use of euphemisms in the area of asylum and migration management, see Mariette Grange, *Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?*, GDP, 2013.

<sup>61</sup> EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 202; AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, p. 19.

<sup>62</sup> See Section 2.1.

<sup>63</sup> ECtHR, *Ilias and Ahmed v Hungary*, 47287/15, GC, 21 November 2009, para. 55, ECtHR; *Amuur v. France*, 19776/92, 25 June 1996, para 48; see EDAL commentary, <https://www.asylumlawdatabase.eu/en/content/ecthr-amuur-v-france-application-no-1977692-25-june-1996>

<sup>64</sup> ECtHR, *Guzzardi v. Italy*, No. 7367/76, 6 November 1980, para. 93.



the ruling in *FMS*, the CJEU found 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, amounts to detention within the meaning of the RD and RCD.<sup>65</sup>

The key consequence of *de facto* detention is that persons subject to it do not receive a detention order explaining reasons for detention and legal avenues to challenge it, and that this measure is not subject to judicial review or appeal.<sup>66</sup> However, in cases where border detention is formally acknowledged, it still often fails to comply with the requirements of individual assessment, proportionality and necessity, and consideration of less coercive measures.<sup>67</sup> Frequently, places of both acknowledged and *de facto* detention in the border settings offer inadequate conditions and a regime of detention, including poor material conditions, limited access to outdoors, overcrowding, and little access of lawyers and civil society organisations.<sup>68</sup> However, the situation is worse in places of *de facto* detention.<sup>69</sup>

All in all, there is a patchwork of domestic practices of, and approaches to, the qualification of refusal of entry and detention at the border, making it difficult to identify clear trends. Non-use of the fiction of non-entry would not necessarily rule out detention at the border, and the use of euphemisms for detention does not always entail that the country refuses to acknowledge that holding persons at the border amounts to detention. Even if detention at the border is recognised as such, often persons subject to it have access to narrower safeguards than persons placed in in-country detention. The below examples from Member States demonstrate various practices in this area.

The **fiction of non-entry** is most often applied to persons refused entry at the airport. In **Belgium**, for instance, persons refused entry at the **Brussels International Airport** receive a decision of refusal of entry. Their asylum application is examined while the applicant is kept in detention in a closed centre located at the border. They are subject to a distinct regime of detention and are placed in a specific detention centre (**Caricole centre near the Brussels Airport**) or closed centres in the territory. In either case, the person is considered

<sup>65</sup> CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, 14 May 2020, para. 231. 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 their freedom of movement. This definition also applies to detention regulated by the RD, which does not include a definition; see paras, pp. 223-225.

<sup>66</sup> EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 205.

<sup>67</sup> AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, p. 20.

<sup>68</sup> EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 206-207.

<sup>69</sup> AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, pp. 24-25.

as not having formally entered the country yet. If a decision has not been taken within four weeks, the person is admitted to in-country procedure.<sup>70</sup>

Likewise, persons entering **Greece** from the **Athens International Airport** without a valid entry authorisation are arrested and held in order to be returned on the next available flight. In cases where the person expresses the intention to apply for international protection, they are detained at the **holding facility of the Police Directorate of the Athens Airport**, yet without a detention decision. Their asylum application is examined under the border procedure. If no decision is taken within 28 days following the full registration of the application, the person is allowed to enter the Greek territory for the application to be examined under the regular procedure.<sup>71</sup>

In **Italy**, the border procedure may be applied where the applicant makes an application immediately at the designated border areas or transit zones after being apprehended for evading or attempting to evade controls. Unaccompanied children and vulnerable categories are exempted from the border procedure. In 2018, around 300 persons on average were held at both the **Rome Fiumicino Airport and Milano Malpensa Airport** for over three days immediately after their arrival, as they were considered not entitled to enter the national territory. Some of them were held in these areas for eight days, depending on the availability of flight connections with the place of origin. According to Italian authorities, staying even for several days in the transit area is not considered detention, and hence, concerned persons do not have access to defence rights. According to the authorities, this measure does not constitute detention because it is part of immediate return procedure and no premises have been identified within the transit areas of the two airports for the detention of those who have to be expelled, hence, according to the authorities, detention measures are not carried out in these areas. However, according to the Guarantor for Detained Persons, *de facto* detention occurs in the situation where persons are unable to enter Italy, as they are notified of an immediate *refoulement* measure and are obliged to stay at the disposal of the border police, in special rooms in the transit area of the airports.<sup>72</sup>

In **Romania**, asylum applications submitted at the border-crossing points are channelled to border procedure. Asylum seekers remain in the transit area of the border-crossing point until a decision granting access to the territory or a final decision rejecting the asylum application is issued. This period cannot exceed 20 days, after which, if the asylum application is still pending, the person is granted access to the territory. The asylum seekers are placed in “special reception and accommodation centres” at or near the border-crossing

**70** EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, 2020, p. 44, *Flemish Refugee Action, AIDA Country Report: Belgium*, ECRE, 2021, pp. 56-57.

**71** Article 90(2) of L 4636/2019; HHC, GPD, ECRE, CIR, FAR, GCR, *Crossing a red line*, 2019, p. 17; EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 205.

**72** ASGI, *AIDA Country Report: Italy*, ECRE, 2021, pp. 73-75 and 152; Migreurop, *Locked up and excluded*, 2020, pp. 12-13; EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 205.

points, established by order of the Minister of Internal Affairs and having the legal status of a transit area. Such places should exist at every border crossing point, and as of 2020, there were 16 transit area. The most frequently used ones are located at the **Moravița border crossing point, Timișoara Airport, and Bucharest Airport.**<sup>73</sup>

In the **Netherlands**, border detention may be imposed to prevent irregular entry into the territory. The persons who apply for asylum at the airports or ports are not allowed to enter the territory if they do not fulfil entry conditions. They are detained at the **Application Centre at the Amsterdam Schiphol Airport** during their border procedure for up to four weeks. The persons who are exempted from the border procedure are unaccompanied children, families with children and vulnerable categories. If the procedure takes longer than four weeks, detention is lifted, and the person is allowed to enter and continue their asylum process within a regular procedure. If the asylum application is refused within the border procedure, the RD becomes applicable. The entry is refused and the border detention can be prolonged during the appeal procedure. The asylum seeker has one week to appeal the decision and the court has four weeks to make a decision. The extension of border detention should therefore not last more than five weeks.<sup>74</sup>

**France** has a specific regime applicable to persons refused entry or apprehended upon irregular entry. They are placed in so-called **waiting zones** (*zone d'attente*) for the time prior to their departure, which is a maximum of 20 days (four days, extendable twice by eight days). The placement of the person in a waiting zone is acknowledged as a measure of deprivation of liberty. An appeal against return is not suspensive, except from the initial day (granted upon request). If the return does not take place during the period of 20 days, the person is to be admitted into the territory. The Interior Ministry establishes the waiting zones at various ports of entry such as airports, train stations and harbours open to international traffic. These zones can be "mobile and temporary" and can be created when at least 10 persons arrive in an area not more than 10km away from a border crossing point.<sup>75</sup>

Some countries apply diverse regimes contingent on the place where the person came into contact with the authorities. **Germany** has distinct rules depending on whether a person was refused entry or apprehended at irregular border crossing. Removal following unauthorised entry (*Zurückschiebung*) is applicable to persons apprehended in connection with unlawful entry. Unlike a regular removal regulated under the RD, this measure does not require a warning or the granting of a period for a voluntary departure, and legal remedies usually do not have a suspensive effect either. If the refusal of entry cannot be enforced im-

**73** Felicia Nica and JRS, *AIDA Country Report: Romania*, ECRE, 2021, pp. 63-65 and 134.

**74** EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, 2020, p. 45; Dutch Council for Refugees, *AIDA Country Report: Netherlands*, ECRE, 2021, pp. 85-87.

**75** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, p. 203; EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, 2020, pp. 44-45 and 104; ECRE and AIDA, *Access to asylum and detention at France's borders*, 2018, pp. 7-9 and 12-13.

mediately, the individual concerned is to be taken into custody for “detention pending exit” (*Zurückweisungshaft*). Conversely, if a person has reached German territory by air, comes from a “safe country,” or does not have identity documents and applies for international protection, they will usually be taken to an airport transit area and undergo airport asylum procedures, which can last up to nineteen days. Airports in **Berlin, Düsseldorf, Frankfurt, Munich and Hamburg** operate premises for this purpose. Germany does not consider holding a person in an airport transit zone for up to 30 days as detention, as they can leave it by leaving the country. This reasoning flows from rulings of the Federal Constitutional Court and the Federal Supreme Court.<sup>76</sup>

Likewise, **Spain** applies distinct regimes depending on the place of entry. At some airports, including **Barcelona, Madrid and Malaga**,<sup>77</sup> the country operates “transit ad-hoc spaces” (*Salas de Inadmisión de Fronteras*). Persons are placed there for up to four days, extendable to 10 days, pending decision of admission, non-admission or rejection. This measure is not recognised as detention under domestic legislation, yet it is acknowledged by the authorities. If these deadlines are not respected, the person is to be admitted to the territory to continue the asylum procedure. As regards persons attempting to enter Spain by boat or through Ceuta or Melilla, they are automatically issued a detention order and detained in police stations or **Centres for the Temporary Assistance of Foreigners in San Roque (Cadiz), Malaga, Motril and Almeria** with a combined capacity of over 1,000. If the refusal of entry cannot be executed within 72 hours, a new return procedure (*devolución*) is applied, which provides for fewer guarantees than the regular return procedure. During the procedure, concerned persons may be detained based on judicial order and in officially recognised detention centres.<sup>78</sup>

Persons applying for asylum at the airport or land border of **Portugal**, without meeting the conditions for entering the territory, can be detained for up to seven days during the admissibility procedure. If the authorities render a positive decision or fail to issue one, the person is granted access to the territory. In the remaining cases, the person can challenge the rejection before the administrative courts and remains detained for up to 60 days, which exceeds the 4-week deadline foreseen in Art. 43 of the APD.<sup>79</sup> The border detention facilities are located in transit zones of **Lisbon, Porto and Faro Airports** and are officially

<sup>76</sup> ECRE and AIDA, *Airport procedures in Germany*, 2019, p. 6; EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 204-205; Migreurop, *Locked up and excluded*, 2020, pp. 46-47; EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, 2020, pp. 89 and 105.

<sup>77</sup> There also seems to be two similar zones in the Tenerife airport; see Migreurop, *Locked up and excluded*, 2020, p. 22.

<sup>78</sup> EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 309-310; Migreurop, *Locked up and excluded*, 2020, pp. 20-22; EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, 2020, pp. 44 and 104.

<sup>79</sup> See Section 2.2.2.

recognised as detention centres for detention following a refusal of entry at the border. Reportedly, asylum applicants are systematically detained at the border for this period.<sup>80</sup>

Likewise, in **Austria**, the length of stay at the airport exceeds the 4-week deadline in Art. 43 of the APD. Persons applying for international protection at the **Vienna airport** are transferred after the interview with the police to the building of the police station hosting the so-called initial reception centre and the rejection zone. On the basis of the first interview, the authorities decide within a maximum time limit of one week whether the procedure shall be processed under the special regulations of the airport procedure, or if the case should be considered under the regular procedure. If the authorities intend to reject the application in the airport procedure, UNHCR has to be informed within one week, otherwise the person has to be admitted to the regular procedure and allowed entry. Individuals remain in detention pending the implementation of the negative decision at the border and can only be detained for a maximum duration of six weeks. Their stay in the “initial reception centre” amounts to *de facto* detention, as it is not formally recognised as detention in law.<sup>81</sup>

## 2.2. First reception facilities

Research carried out by FRA in countries with external borders shows two main approaches to hosting newly arrived persons at the border. Countries following the first approach also hold newly arrived persons in facilities at borders for their asylum and/or return procedures, which can last for many months. The previous section looked at these practices. Under the second approach identified by FRA, newly arrived persons are placed in initial-reception facilities for their first registration and identification only, which is typically of a short-term.<sup>82</sup> Such facilities are the focus of this section. In particular, it looks at facilities for initial registration and identification that are not necessarily located at external borders, but which involve (*de facto*) detention.

**Greece** operates a **First Reception Centre (FRC) in Fylakio** (Evros), which is not covered by the EU-Turkey Statement and hotspot approach but functions in a similar manner.<sup>83</sup> Persons entering Greece through the Greek-Turkish land border in Evros are placed in this facility. They undergo the reception and identification procedures, during which they are subject to a measure called “restriction of liberty” for up to 25 days. Despite the denomination, they are not allowed to leave the premises. According to official data, as of 31 December 2020, 259 newly arrived persons were held at the Fylakio RIC, with an official capacity of 282, under a *de facto* detention regime.<sup>84</sup>

**80** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 204 and 298.

**81** Asyl Koordination, *AIDA Country Report: Austria*, ECRE, 2021, pp. 58-60.

**82** FRA, *Initial-reception facilities at external borders: fundamental rights issues to consider*, 2021, p. 2.

**83** Hotspot procedures are addressed in Section 3.3.2.

**84** Greek Council for Refugees, *AIDA Country Report: Greece*, ECRE, 2021, pp. 208-210.

In **Slovenia**, all newly arrived asylum applicants are first placed in the closed reception area of the **Asylum Home in Ljubljana**. At this facility they undergo medical examination as well as Eurodac fingerprinting and photographing, followed by the information session and the lodging of the asylum application. During this period, they do not have access to other parts of the Asylum Home, which otherwise functions as a reception centre. The Migration Directorate began locking up this area as a response to the high number of persons absconding from the procedure prior to lodging applications and giving fingerprints for Eurodac. Until 2017, persons were held there for periods rarely exceeding one day. However, due to organisational difficulties such as the unavailability of interpreters and doctors, there have been cases of persons held in the reception area for five to six days on average. In 2018, this period was up to a week, and in 2019, up to 15 days. In 2020, individuals waited up to 20 days to lodge their applications, partly due to the obligatory quarantine.<sup>85</sup>

The **Czech Republic** operates two admission centres, located in **Zastávka and at the Prague Airport**. Newly arriving asylum applicants are required to stay at these facilities for initial procedures, including identification, medical examination and initial interview. Persons held at these facilities are not free to leave at will and both reception centres are secure, guarded facilities. Zastávka centre consists of an admission centre and an accommodation centre, hosting persons who have undergone the initial procedures. The maximum period of stay at the Prague Airport is 120 days.<sup>86</sup>

In **Cyprus**, persons who have arrived in an irregular manner are placed in the **Pournara First Reception Centre** for identification, registration and lodging of asylum applications, as well as medical screening and vulnerability assessments. During that period, they are not allowed to leave the centre. While officially their stay there should not exceed 72 hours, in 2020 to 2021, their stay reached 5 months.<sup>87</sup>

Since 2018, **Marsa Initial Reception Centre** in **Malta** has functioned partly as a closed centre where newly arrived persons are *de facto* detained. All migrants entering Malta irregularly by boat are first pre-screened upon arrival by the Police and Health authorities. They are then taken to the Marsa centre for medical screening and registration of the asylum application. According to the authorities, migrants can be kept in this centre for a time limit of up to seven days. As of 2020, they were held there for many months (3-7 months). Moreover, it was observed that applicants would not be released even after they were medically screened and cleared. Rather, they would only be released when a place is made available in the open centres.<sup>88</sup>

<sup>85</sup> PIC, *AIDA Country Report: Slovenia*, ECRE, 2021, pp. 23-24 and 70; AIDA, *Boundaries of liberty: Asylum and de facto detention in Europe*, ECRE, 2017, pp. 20-21.

<sup>86</sup> Global Detention Project, *Profile of the Czech Republic*, 2018, pp. 25 and 30-31.

<sup>87</sup> Cyprus Refugee Council, *AIDA Country Report: Cyprus*, ECRE, 2021, pp. 25-26 and 103-104.

<sup>88</sup> Aditus, *AIDA Country Report: Malta*, ECRE, 2021, pp. 25-26 and 81.



## 2.3. Hotspots

So-called hotspots are other kinds of border facilities, which blur the lines between detention and restriction on freedom of movement.<sup>89</sup> Established in the Commission's 2015 European Agenda on Migration,<sup>90</sup> the hotspot approach aims to manage the "refugee crisis" and help frontline Member States facing "disproportionate migratory pressure" at their borders. The hotspots are the facilities for initial reception, identification, registration, fingerprinting and referral of the newly arrived persons to asylum, return or relocation procedure. Experts from EU agencies (EASO, European Border and Coast Guard Agency (EBCG, Frontex), Europol and Eurojust) are deployed to the hotspots to support domestic authorities.<sup>91</sup> It is noteworthy that although established in the context of the so-called 2015 refugee crisis, the hotspots are by no means a temporary solution. In fact, they are referred to in the founding regulations of the EU agencies, for instance in the Frontex Regulation.<sup>92</sup> This regulation defines a "hotspot area" as an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders (Art. 2(23)). As this definition makes clear, hotspots can be established in any Member State experiencing a "disproportionate migratory challenge" at its external border, yet as of April 2021, such facilities have been set up only in **Italy and Greece**.<sup>93</sup>

- 89 Izabella Majcher, *The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part I)*, Border Criminologies, blog post, 4 April 2018, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/eu-hotspot>. Although hotspots in many respects resemble the facilities described in Section 3.2, they are discussed in a separate section to highlight EU funding and involvement.
- 90 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, COM (2015) 240, 13 May 2015.
- 91 EPRS, *Hotspots at EU external border*, 2020, p. 2.
- 92 Regulation 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295/1, 14 November 2019.
- 93 Apart from the question of detention or restriction on freedom of movements, other aspects of the functioning of the hotspots that have attracted criticism include unclear division of roles and responsibilities between EU agencies and host Member States, a lack of transparency, substandard material conditions, impeded access to the territory and asylum system, and differential treatment based on nationality; see DCR, GCR, CRI, ECRE, ProAsyl, *The implementation of the hotspots in Italy and Greece*, 2016; European Court of Auditors, *EU response to the refugee crisis: the "hotspot" approach*, 2017; DCR, *Fundamental rights and the EU hotspot approach*, 2017; FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*, 2019.

### 2.3.1. Italy

As of December 2020, **Italy** has operated four hotspots, located in **Lampedusa** (capacity of 96, reduced recently from 500), **Messina** (capacity of 160, reduced recently from 250), **Pozzallo** (capacity of 234, reduced recently from 300) and **Taranto** (capacity of 400).<sup>94</sup> As of September 2020, the total occupancy in the three hotspots in Sicily was 405, whereas Taranto was empty.<sup>95</sup>

Until a recent reform in 2018, operation of the hotspots was not properly regulated under domestic law. These hotspot facilities were addressed merely in the non-binding Standard Operating Procedures (SOPs), adopted in cooperation with the European Commission. A legal definition of the hotspots was introduced only in February 2017 by Decree Law 13/2017. It provides that foreigners apprehended at irregular crossing of the internal or external border, or arriving in Italy after rescue at sea, are directed to appropriate hotspots or first reception facilities. There they will be identified, registered and informed about the asylum procedure, the relocation programme and voluntary return.<sup>96</sup> The 2017 reform still failed to establish a clear framework for the operation of these centres.

The SOPs provide that a person can leave the premises after being fingerprinted and identified, but there is no formal decision ordering the person's stay in the centre until that moment. There can thus be no appeal and no judicial review of this measure. Until recently there was no legal basis for detaining foreigners in hotspots during identification and fingerprinting. According to the SOPs, persons should stay in these centres as short a time as possible, but in practice they are kept there for days or weeks.<sup>97</sup> Before the 2018 reform, prohibition on leaving the premises for such a period of time amounted to *de facto* detention in hotspots until the identification procedures were concluded.<sup>98</sup>

Decree Law 113/2018 has introduced the possibility of detention of persons whose nationality cannot be determined for up to 30 days in suitable facilities set up, *inter alia*, in hotspots for identification reasons.<sup>99</sup> The 2018 reform has formally given a legal basis to a practice already implemented. However, according to civil society organisations, detention still takes place in hotspots without any clear legal basis and in

**94** Migreurop, *Locked up and excluded*, 2020, p. 11. As reported by ASGI after a monitoring project in October 2020; also the Monastir centre, not officially included in the hotspots list, works with an hotspot approach. People entering Sardinia from the coasts are taken there for health care, identification purposes and security checks; see ASGI, *AIDA Country Report: Italy*, ECRE, 2021, p. 37.

**95** EPRS, *Hotspots at EU external border*, 2020.

**96** Article 10-ter TUI, inserted by Decree Law 13/2017.

**97** ASGI, *AIDA Country Report: Italy*, ECRE, 2021, p. 117.

**98** ASGI et al., *Scenari di frontiera: il caso Lampedusa*, 2018.

**99** Article 6(3-bis) Reception Decree, inserted by Article 3 Decree Law 113/2018 and L 132/2018; see HHC, GPD, ECRE, CIR, FAR, GCR, *Crossing a red line*, 2019, p. 22-23.



a manner inconsistent with the need to protect the individuals against arbitrariness. Detention is imposed in the absence of a written act adopted by the competent authority and validated by a judge, a maximum detention period, or proper information provided. According to civil society organisations, in 2020, the situation remained comparable to that of 2019 and 2018 and *de facto* detention, lacking any legitimacy by the judicial authority, continued in the hotspots during the identification phase.<sup>100</sup>

Also, the Guarantor for Detained Persons, in his opinion on Decree Law 130/2020 (which confirmed 2018 legislative changes), criticised four aspects of the detention of asylum applicants for identification purposes, notably the lack of oversight of the conditions of detention, the lack of regulation of detention in the premises identified in the hotspots, the inadequacy of the hotspots for detention of 30 days, and the lack of proportionality of the maximum terms of detention compared to other forms of detention.<sup>101</sup>

In line with the SOPs, after fingerprinting and identification procedures, migrants and asylum applicants should be transferred to other centres, notably reception centres (for persons who express their willingness to apply for asylum, including those admitted for relocation) or pre-removal detention centres (for persons who do not apply for international protection or who do not meet the requirements). Not everyone who expresses their willingness to apply for international protection is granted access to the procedure. Persons placed in hotspots are classified as asylum applicants or economic migrants depending on a summary assessment, mainly carried out by either using questionnaires filled in by migrants at disembarkation, or orally asking questions relating to the reason why they have come to Italy. Persons are often classified solely on the basis of their nationality. Those coming from countries considered safe are typically considered economic migrants.<sup>102</sup> They do not have access to asylum procedure and receive a removal decision.

However, in practice, transfer to these reception or detention centres is frequently delayed and persons continue to stay in the hotspots for a few weeks. During this period, generally, they can leave the premises during the day but are required to return at night. These measures should thus be considered in the framework of the right to freedom of movement. The SOPs fail to regulate this stage of the proceedings, which explains considerable variations in the application of the restriction of movement. For instance, whereas in the **Taranto** hotspot, persons receive passes allowing them to exit the centre during the day, in **Lampedusa**, the centre does not have an internal regulation and there is no system for regulating the entry and the exit from the facility. The military personnel who guard the entrance do not allow persons to exit and to enter the gate,

**100** ASGI, *AIDA Country Report: Italy*, ECRE, 2021, p. 147.

**101** *Ibid.*

**102** These countries include Algeria, Morocco and Tunisia; see EuroMed Rights, *The new Pact on Migration and Asylum*, 2020, p. 13.

but some persons who are in the centre manage to exit through holes in the perimeter network.<sup>103</sup> Without clear legal basis, restriction on freedom of movement in hotspots pending transfer to other centres cannot be justified as a lawful measure.<sup>104</sup>

### 2.3.2. Greece

As of September 2020, **Greece** has operated five hotspots (officially called Reception and Identification Centres (RICs)) on the Aegean Islands, namely **Lesvos** (capacity of 2,757), **Chios** (capacity of 1,014), **Samos** (capacity of 648), **Leros** (capacity of 860) and **Kos** (capacity of 816). Despite officially having a total capacity of 6,095, 23,269 were kept in the RICs as of September 2020.<sup>105</sup> Partly due to severe overcrowding, material conditions have long been appalling. After an extensive fire destroyed the Moria RIC on Lesvos in September 2020, almost 8,000 persons have been relocated to a new emergency tent camp in Kara Tepe (Mavrovouni), dubbed Moria 2.0, built on the site of a former military shooting range. The conditions are precarious, with no running water or protection from the weather.<sup>106</sup> In addition, parts of the camp lie on soil contaminated by lead.<sup>107</sup>

At the outset, the RICs functioned as open facilities to register, screen and assist arriving migrants and asylum applicants before their swift transfer to the Greek mainland (so-called first reception procedure, or reception and identification procedure). With the launch of the March 2016 EU-Turkey Statement,<sup>108</sup> the RICs were transformed into *de facto* detention centres.<sup>109</sup> All persons who arrived after 20 March 2016 have been subject to “restriction of liberty within the premises of the Reception and Identification Centres” for up to 25 days.<sup>110</sup> During this period, persons are registered and identified in view of return to Turkey. Although the measure is called “restriction of liberty,” the persons were not allowed to leave the premises. In response to criticism by civil society organisations and practical difficulties, such as overcrowding, the practice of automatic imposition of “restriction of liberty” for 25 days has been stopped since the end of 2016. Currently, in most cases, the procedure is completed

**103** ASGI, *AIDA Country Report: Italy*, ECRE, 2021, p. 148.

**104** *Ibid*, p. 147.

**105** EPRS, *Hotspots at EU external border*, 2020.

**106** GCR and Oxfam, *Lesbos Bulletin*, Briefing, 21 October 2020, [https://www.gcr.gr/media/k2/attachments/Lesbos\\_Bulletin\\_-\\_October\\_2020\\_EN.pdf](https://www.gcr.gr/media/k2/attachments/Lesbos_Bulletin_-_October_2020_EN.pdf)

**107** HRW, *Greece: Lead Contamination Threat to Migrants Unresolved*, News, 1 April 2021, <https://www.hrw.org/news/2021/04/01/greece-lead-contamination-threat-migrants-unresolved>

**108** European Council, *EU-Turkey statement*, 18 March 2016, Press release, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

**109** EPRS, *Hotspots at EU external border*, 2020.

**110** To be more precise, five days can be extended up to a maximum of 25 days if reception and identification procedures have not been completed, currently regulated under Art. 39 of the International Protection Act (IPA) (4636/2019).

within a few days.<sup>111</sup> However, as long as Art. 39 of the International Protection Act is in force, systematic prohibition of leaving the RICs upon arrival for up to 25 days may be imposed.

Under international law, deprivation of liberty is not defined according to domestic classification but is based on the factual situation of the individual concerned.<sup>112</sup> Although labelled “restriction of liberty” in the RICs, prohibition on leaving the premises should be considered *de facto* detention. In addition to the lack of legal basis in domestic law, this measure is imposed automatically, as there is no individual assessment of each case. No legal remedy is provided by national law to challenge this “restriction of freedom” measure during the initial 5-day period.<sup>113</sup>

When the obligation to stay at the hotspots for 25 days ceased being used in practice, it was in fact replaced by a so-called **geographical restriction**. All persons subject to the EU-Turkey Statement, except for unaccompanied children and vulnerable groups, are obliged to remain on the island on which they were registered. They undergo fast-track border procedure, which assesses whether Turkey is a “safe country” and, if so, they are to be readmitted to Turkey. Due to administrative delays, persons actually remain on the islands for months. In most cases, they are obliged to remain in the RICs, which have been notorious for serious overcrowding (as of September 2020, in total almost four times more persons were kept in the RICs compared to their official capacity), appalling material conditions, inadequate infrastructure (including lack of appropriate shelter for unaccompanied children), lack of security, inadequate medical care and care for vulnerable persons, and waste management.<sup>114</sup> The lawfulness of this restriction on freedom of movement is questionable. It is not based on an individual decision considering specific circumstances of the case, it is not reassessed at regular intervals, and there is no effective remedy to challenge it, in contrast to Art. 26 of the RCD. When apprehended on the mainland, persons may be subject to detention as a sanction and are transferred back to the respective island on which they were initially registered.<sup>115</sup>

Like Italian hotspots, the RICs can thus be said to have a double function. On the one hand, they function as reception facilities for persons subject to the EU-Turkey Statement (who are not allowed to leave the islands). On the other hand, they also function as detention facilities during the reception and identification procedure during which persons are subject to “restriction of liberty.”

**111** Greek Council for Refugees, *AIDA Country Report: Greece*, ECRE, 2021, pp. 42-44.

**112** See Section 2.1.

**113** Article 39(4)(b) L 4636/2019, Greek Council for Refugees, *AIDA Country Report: Greece*, ECRE, 2021, p. 208; HHC, GPD, ECRE, CIR, FAR, GCR, *Crossing a red line*, 2019, pp. 15-16.

**114** EPRS, *Hotspots at EU external border*, 2020, pp. 5-6.

**115** Greek Council for Refugees, *AIDA Country Report: Greece*, ECRE, 2021, p. 202.

On 20 November 2019, the Greek authorities announced a plan to replace RICs with “closed facilities” with a total capacity of at least 18,000 places and to detain all newly arrived persons there, including families and other vulnerable applicants, upon arrival, during the reception identification procedures and up until the completion of the asylum procedure or the removal of the person. Precisely, the RICs on **Lesvos, Samos and Chios** will be closed down and new closed facilities are planned to be built instead. The RICs on **Kos and Leros**, however, will be converted from open to closed facilities. Each of these five closed facilities will include both an RIC and a pre-removal centre.<sup>116</sup> In November 2020, the EU granted 121 million euros for the construction of centres on **Samos, Kos and Leros**, to be completed by September 2021, and another allocation was granted to build a new centre on **Chios**.<sup>117</sup> The new facilities on **Samos, Kos and Leros** will include reception facilities, safe zones for unaccompanied children and teenagers and other vulnerable persons, facilities for procedures after initial arrivals and required administrative areas, facilities needed to guarantee access to services, common and recreational areas, and pre-removal centres.<sup>118</sup>

On 3 December 2020, the European Commission concluded a Memorandum of Understanding with the Greek government for the establishment and operation of a **new Multi-Purpose Reception and Identification Centre** (MPRIC) on Lesvos, with a total capacity of 5,000.<sup>119</sup> To be established by September 2021, the centre is meant to “resolve the situation” following the fire at the Moria RIC in September 2020. The Memorandum of Understanding provides for the cooperation between the Commission, the Greek authorities and EU agencies (EASO, Frontex, Europol, and FRA) in the following areas: development and construction of the centre; improvement of the management of arrivals; asylum and return procedures, and integration measures; reception conditions in line with EU law; and staff training, capacity and planning.<sup>120</sup> The Commission will cooperate on a continuous basis with the Greek authorities to

**116** Council of Europe, Office of the Commissioner for Human Rights, *Letter to Minister of Citizen Protection of Greece and Alternate Minister for Migration Policy*, 25 November 2019, <https://rm.coe.int/letter-to-the-greek-minister-of-citizen-protection-and-the-alternate-m/168098efe3>

**117** European Commission, *Migration: Commission and Greece agree joint plan for a new reception centre in Lesvos*, Press release, 3 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2287](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2287). The construction of the new facilities is ongoing, yet has been met with protests by local residents; see ECRE, *Greece: Growing Local Tensions and Hostility Towards Asylum Seekers and Refugees as Government Continues to Implement Permanent Camp Solutions*, News, 12 February 2021, <https://www.ecre.org/greece-growing-local-tensions-and-hostility-towards-asylum-seekers-and-refugees-as-government-continues-to-implement-permanent-camp-solutions/>. [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2284](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2284)

**118** European Commission, *Memorandum of Understanding: Commission support for the situation on the Greek islands Questions and Answers*, Press corner, 3 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2284](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2284)

**119** European Commission, *Migration: Commission and Greece agree joint plan for a new reception centre in Lesvos*, Press corner, 3 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2287](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2287)

**120** *Ibid.*

jointly ensure adequate monitoring and supervision of the management of the centre.<sup>121</sup> According to the Commission, the denomination “multi-purpose” means that the centre will include reception facilities, safe zones for unaccompanied children and vulnerable persons, first arrival processing facilities and required administrative areas, as well as all facilities needed to guarantee access to services in line with the EU acquis and an adjacent, clearly separated closed detention area.<sup>122</sup>

According to the Commission, the agreement is based on the principles set out in the New Pact on Migration and Asylum and will ensure that “a situation like Moria can never happen again.”<sup>123</sup> There is thus a clear attempt to differentiate the Pact proposals likely leading to containment at the borders from the current situation at the Greek RICs, most clearly demonstrated by the fire at the Moria RIC.<sup>124</sup>

The Greek authorities have argued that the term “closed” means only that the entrance and exit of the centre will be controlled. It is, however, unclear what the denomination “closed” used by the Greek authorities will entail in practice.<sup>125</sup> Likewise, the Commission maintains that the MPRIC on Lesbos will be an open facility, subject to an entry and exit system.<sup>126</sup> Reporting on her visit in May to the island of Samos, the MEP Tineke Strik found that the MPRIC on Samos was built in a completely remote location, had the characteristics of a prison, lacked sufficient shaded places, and included 1,000 places in pre-removal detention.<sup>127</sup> The Commission admitted that the MPRIC on **Lesbos** and the new centres on **Samos, Kos and Leros** will include detention areas for persons in return procedures.<sup>128</sup> The Commission also noted that de-

**121** European Commission, *Annex to the Commission Decision approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesbos*, C(2020) 8657, 2 December 2020.

**122** *Ibid.*

**123** *Ibid.*

**124** See Section 3.3.2.

**125** WGAD, *Visit to Greece*, A/HRC/45/16/Add.1, 29 July 2020, para. 92.

**126** Beate Gminder (Deputy Director-General in charge of the ‘Task Force Migration Management’ in DG Migration and Home Affairs (HOME)), *Five Years of EU Refugee Response on the Greek Islands, What does the future hold?*, organised by Oxfam and Refugee Rights Europe, 18 March 2021.

**127** Tineke Strik (MEP), *Letter to Vice President Schinas and Commissioner Johansson*, 26 May 2021, <https://tinekestrik.eu/sites/default/files/2021-05/Letter%20to%20Vice%20President%20Schinas%20and%20Commissioner%20Johansson%20by%20Tineke%20Strik%20.pdf>

**128** European Commission, *Memorandum of Understanding: Commission support for the situation on the Greek islands Questions and Answers*, Press corner, 3 December 2020, [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_2284](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2284); European Commission, *ANNEX to the COMMISSION DECISION approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesbos*, C(2020) 8657, 2 December 2020.

tention may be applied to asylum seekers after “individual assessment.”<sup>129</sup> It remains to be seen how these centres will be physically and administratively separate from the remaining parts of the RICs. In addition, given the current legislation and practice in Greece, it is to be expected that in the “first arrivals processing” sections of the RICs, persons will be *de facto* detained (currently called “restriction on freedom”).

Besides the civil society organisations, international organisations have also raised concerns regarding deprivation of liberty in the new facilities. The UN Working Group on Arbitrary Detention (WGAD) inquired into the extent to which these facilities will be closed centres, meaning that residents would be in effect deprived of their liberty. The WGAD stressed that it is important to ensure that any new centres are open centres and do not reinforce the practice of detaining asylum seekers.<sup>130</sup> The Council of Europe Commissioner for Human Rights also asked the Greek authorities to clarify the reasons why the Greek government has opted for closed rather than open reception and identification centres, as well as about the deprivation of liberty regime that will be applicable to these new reception and identification centres. In view of the large numbers of persons involved, the Commissioner also asked for clarification regarding safeguards that will be put in place in order to ensure that detention is used as a measure of last resort in each individual case and only for as short a period as necessary.<sup>131</sup>

### 3. The Pact on Migration and Asylum and its implications on movement restrictions at EU external borders

The practices of detention and restriction on freedom movement in the border context, described in the previous section, risk being exacerbated under the new Pact on Migration and Asylum, published by the Commission in September 2020.<sup>132</sup> The Pact lays down three consecutive procedures to be carried out at the external borders, which in certain (broad) circumstances will be mandatory. In addition, it formally inserts the legal fiction of non-entry

**129** European Commission, *ANNEX to the COMMISSION DECISION approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesbos*, C(2020) 8657, 2 December 2020.

**130** WGAD, *Visit to Greece*, A/HRC/45/16/Add.1, 29 July 2020, para. 93.

**131** Council of Europe, Office of the Commissioner for Human Rights, *Letter to Minister of Citizen Protection of Greece and Alternate Minister for Migration Policy*, 25 November 2019, <https://rm.coe.int/letter-to-the-greek-minister-of-citizen-protection-and-the-alternate-m/168098efe3>

**132** European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020.



into EU legislation, which until now has been a policy choice of Member States.<sup>133</sup> These provisions will likely result in newly arrived asylum seekers and migrants being subject to at least movement restrictions or, depending on the case, deprivation of liberty. The three stages of the border procedures, namely the screening procedure, border asylum procedure and border return procedure, are discussed in turn.

### 3.1. The screening procedure

The proposal for the Screening Regulation<sup>134</sup> introduces a **mandatory screening procedure** that Member States will be obliged to conduct at the external borders as regards all third-country nationals in three scenarios (Art. 1 and 3). States will have to conduct the screening of all persons who **1)** are apprehended in connection with an unauthorised crossing of the external land, sea or air border (Art. 3(1)(a)), **2)** are disembarked in the territory of the state following a search and rescue (SAR) operation (Art. 3(1)(b)), or **3)** apply for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions under the SBC (Art. 3(2)).<sup>135</sup> These three categories of persons tend to cover all the persons apprehended or presenting themselves at the border without fulfilling entry conditions under the SBC.<sup>136</sup> The declared objective of the screening is to strengthen the control of persons and their referral to the appropriate procedure (Art. 1). There are four elements of the screening, namely health and vulnerability checks, identification using data bases, registration of biometric data in the Eurodac, and security checks using data bases (Art. 6(6)). At the end of the screening, the competent authorities should fill out a “de-briefing form” (Art. 13) and refer the person to either asylum, return or refusal of entry procedure (Art. 14). The screening procedure thus resembles the hotspot procedure implemented at Greek and Italian hotspots, in particular mirroring the reception and identification procedure in Greece.<sup>137</sup> As discussed above, the procedures and functioning of hotspots have been dysfunctional in many respects.<sup>138</sup> Above all, they lead to *de facto* detention in degrading conditions. It is questionable how the proposed screening procedure will avoid the failures in currently operating hotspots in order to operationalise the Commission’s promise of “no more Morias”.

**133** See Section 3.1.

**134** European Commission, *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; see also ECRE, *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612*, 2020.

**135** The Regulation also provides for the screening within the territory, which Member States will be obligated to apply to persons found within their territory where there is no indication that they have crossed an external border in an authorised manner (Art. 5).

**136** The entry conditions under the SBC are discussed in Section 2.2.1.

**137** See Section 3.3.2. RSA, HIAS, GCR, LCL, DRC, Fenix, ActionAid, Mobile Info Team, *The Workings of the Screening Regulation*, 2021, p. 2.

**138** Section 3.3.

Regarding the **length of the screening process**, according to Art. 6(3), the screening is to be completed within five days. It is questionable whether this period will be sufficient to carry out the aforementioned elements of the screening, especially when a bigger group of persons is to be screened at the same time. The implementation of the hotspot approach in Greece and Italy shows that the screening procedure tends to be considerably longer,<sup>139</sup> especially where vulnerability and health checks are concerned, which typically require a longer period of time.<sup>140</sup> The Screening Regulation allows Member States to extend the time period for completing the screening. Under Art. 6(3), in exceptional circumstances, where a disproportionate number of third-country nationals needs to be subject to the screening at the same time, making it impossible in practice to conclude the screening within the 5-day time limit, the period of five days may be extended by a maximum of an additional five days. The notions of “exceptional” and “disproportionate” leave Member States with a broad discretion to extend the period of the screening up to 10 days. In particular, the situations in which Member States may extend the screening are not necessarily solely the “crisis situations” regulated under the proposal for the Crisis Regulation (Recital 19).<sup>141</sup> Hence, the risk is that states will systematically extend the screening procedure for up to 10 days.

As regards the **place**, under Art. 4, persons undergoing the screening are not authorised to enter the territory of the Member State. Since borders are part of the state’s territory, this provision introduces into the EU legislation the **fiction of non-entry**, which is currently not followed by all the Member States.<sup>142</sup> One of the practical implications of Art. 4 is that states will have to prevent the person’s entry inside their territory during the screening. As demonstrated earlier, in practice the measures aiming at preventing the access to the territory frequently amount to **detention**.<sup>143</sup> Yet, the operational part of the Regulation is silent on detention. Only Recital 12 provides that in individual cases, where required, the measures preventing entry may include detention, subject to the national law regulating the

**139** In the Messina hotspot in Italy, for instance, the average length of stay was 42 days in late 2020; see EuroMed Rights, *New Pact, Wrong Impact: How the EU Migration Pact disadvantages both Italy and Greece*, 2020, p. 4. See also, DCR, GCR, CRI, ECRE, ProAsyl, *The implementation of the hotspots in Italy and Greece*, 2016; European Court of Auditors, *EU response to the refugee crisis: the “hotspot” approach*, 2017; DCR, *Fundamental rights and the EU hotspot approach*, 2017.

**140** RSA, HIAS, GCR, LCL, DRC, Fenix, ActionAid, Mobile Info Team, *The Workings of the Screening Regulation*, 2021, pp. 13-15. Art. 14(7) provides that the screening of people in the first two aforementioned categories should end when the person is referred to an appropriate asylum or return procedure. Crucially, if not all the checks have been completed within the 5-day period, screening should nevertheless end and the person should be referred to a relevant procedure. It is not clear why Art. 14(7) does not cover people who applied for international protection at the border. By excluding this category, the Regulation implies that the screening applicable to them does not need to end within five days.

**141** 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, 23 September 2020, Art. 1; see also ECRE, *ECRE Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum*, COM(2020) 613, 2021.

**142** See Section 3.1.

**143** See Section 3.1.



matter. In its Staff Working Document, the Commission highlights that during the screening, migrants would be *held* by competent national authorities.<sup>144</sup> A combined reading of these provisions shows that the persons undergoing screening risk being, as a rule, deprived of their liberty, or at least being subject to restriction on freedom of movement. By leaving it to domestic authorities, the Regulation risks thus triggering *de facto* detention practices at the EU external borders. In most of the cases, it is hardly conceivable that a measure to hold the person in premises at, or close to, the border to prevent the person's entry to the territory for 10 days, would not qualify as detention, in particular if the person belongs to the category of vulnerable persons. Although Recital 12 refers to individual assessment and uses a "may" clause rather than a "shall" formulation, the obligation to carry out screening on every third-country national without authorisation of entry may trigger systematic deprivation of, or restriction on, liberty.<sup>145</sup>

Under Art. 6(1), the screening at the external border should be conducted "**at locations situated at or in proximity to the external borders.**" The option to conduct screening "in proximity" to the external borders is worrisome as it allows states to hold persons subject to a border regime in facilities that are not necessarily at the border, thereby extending the fiction of non-entry. In either case, the front-line Member States will be obliged to have facilities at/close to the border to carry out the screening procedure, including to keep/detain persons during that period. According to EuroMed Rights, to detain persons during the screening procedure and the border asylum and return procedures, Italy, for instance, would need to multiply the number of places in hotspots and detention centres by 7.5 times in a normal situation, and by 50 times in case of high numbers of arrivals.<sup>146</sup> The aforementioned MPRIC currently under construction in Lesbos appears to be intended to serve this purpose. As noted above, there are concerns relating to the question of whether or not this facility will function as a detention centre in practice.<sup>147</sup>

**Overall**, it is not difficult to draw parallels between the screening procedure and currently applied practices in **first reception procedures involving *de facto* detention**<sup>148</sup> and **hotspot procedures blurring lines between detention and restriction of movement in**

**144** European Commission, *Commission Staff Working Document Accompanying the Document 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]*, SWD(2020) 270, 23 September 2020, para. 5.1.2.

**145** For a similar conclusion, see ICJ, *Detention in the EU Pact proposals*, 2021, p. 7, which concludes that "If adopted as proposed, the Regulation would necessarily involve deprivation of liberty, certainly for people newly arriving at the external EU borders, although detention is not explicitly mandated in the text" and "this suggests that deprivation of liberty, of up to 10 days, is at least a likely and expected feature of the process."

**146** EuroMed Rights, *New Pact, Wrong Impact: How the EU Migration Pact disadvantages both Italy and Greece*, 2020, pp. 6-8; see also EuroMed Rights, *The new Pact on Migration and Asylum*, 2020, pp. 11-18 and 22-25.

**147** See Section 3.3.2.

**148** See Section 3.2.

**Italy and Greece.**<sup>149</sup> Given the involvement of the EU Agencies in the screening procedure foreseen in the Screening Regulation, this model appears to particularly rely on the hotspots approach. This is especially striking, given serious long-standing concerns regarding functioning of the hotspots. In light of the similarities between reception and identification procedures in Greece and the screening procedure under the Screening Regulation, the Commission's promise of "no more Morias," appears to be just a slogan.<sup>150</sup> What is particularly worrying is that the Commission has inserted the ambiguous language allowing *de facto* detention in an EU regulation, which will diffuse these practices across the EU.

### 3.2. The border asylum procedure

The Screening Regulation foresees three main outcomes of the screening procedure, namely asylum, return, and refusal of entry procedure (Art.14).<sup>151</sup> Asylum procedure, according to the revised proposal for the Asylum Procedures Regulation,<sup>152</sup> may be carried out at the border if the applicant does not fulfil the conditions for entry under the SBC<sup>153</sup> and one of nine acceleration grounds apply. In three of these circumstances, the **border asylum procedure becomes mandatory** (Art. 41(3)). These circumstances are if the person **1)** poses a risk to national security or public order, **2)** has misled the authorities by presenting false information or documents, or by withholding relevant information or documents with respect to their identity or nationality, or **3)** is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent. The 20 per cent recognition rate threshold is particularly questionable. It concerns only the first instance recognition rate, which is an incomplete indicator of protection needs since a significant number of negative decisions are successfully challenged on appeal. Moreover, Eurostat includes inadmissibility decisions in its rejection rate, rather than solely negative in-merit decisions, which heightens the rejection rate.<sup>154</sup> In addition, a lower recognition rate for a country does not show that the person concerned is not in need of international

**149** See Section 3.3.

**150** GCR and Oxfam, *Lesbos Bulletin*, Briefing, 21 October 2020, HRW et al, *Joint CSO Letter on Containment at External Borders*, 18 March 2021, <https://www.hrw.org/news/2021/03/18/joint-cso-letter-containment-external-borders>; Marion MacGregor, *Europe warned against migrant "hotspot" approach*, InfoMigrants, 16 March 2021, <https://www.infomigrants.net/en/post/30902/europe-warned-against-migrant-hotspot-approach>

**151** Under Art. 14(3) of the Screening Regulation, relocation is another option, as regulated by the 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]*, COM(2020) 610, 23 September 2020; see also ECRE, *ECRE Comments on the Commission Proposal for a Regulation on Asylum and Migration Management*, 2021.

**152** European Commission, *Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM(2020) 611, 23 September 2020; see also ECRE, *ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border Asylum Procedures and Border Return Procedures*, 2020.

**153** The entry conditions under the SBC are discussed in Section 2.2.1.

**154** ECRE, *Asylum statistics in Europe: Factsheet*, 2020.

protection.<sup>155</sup> Unaccompanied children and accompanied children below the age of 12 are excepted from the border procedure unless they pose a security threat (Art. 41(5)).<sup>156</sup>

As discussed above, not all Member States provide for border procedures in their domestic law, and authorities have discretion on whether or not to apply them based on an individual assessment.<sup>157</sup> Border procedures raise **long-standing concerns** regarding protection of fundamental rights, in particular the principle of *non-refoulement*, the rights of the child, the right to an effective remedy and the right to liberty.<sup>158</sup> According to EASO, border procedures have a considerably lower recognition rate compared to regular procedures. In 2019, the recognition rate in border procedures was merely of seven per cent, compared to the overall EU recognition rate of 33 per cent.<sup>159</sup> The proposed border asylum procedure under the APR entrenches these practices, as it would involve accelerated examination of asylum claims, a shorter time period to appeal and narrower scope of suspensive effect of appeal.<sup>160</sup> In addition, these procedures are not necessarily effective and cost-efficient.<sup>161</sup> By rendering border procedures mandatory for a considerable proportion of persons seeking international protection at the border, the APR would make those deficient procedures standard in the EU, while in-country procedures would become the exception.

In terms of the **length of the procedure**, the border asylum procedure, including the first instance and any decision on an appeal, should be completed within 12 weeks (Art. 41(11)). This period can be extended by eight weeks under Art. 4(1)(b) of the Crisis Regulation in a so-called situation of crisis. The crisis situation is defined in Art. 1(2) of the Crisis Regulation as an exceptional situation, or a risk thereof, of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following SAR operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature that it renders the Member State's asylum, reception or return systems non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the Asylum and Migration Management Regulation. It is submitted that in such a situation,

**155** ECRE, *ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border Asylum Procedures and Border Return Procedures*, 2020, pp. 25-28; Jens Vedsted-Hansen, *Admissibility, Border Procedures and Safe Country Notions*, Forum ASILE, blog post, 18 November 2020, <https://www.asileproject.eu/admissibility-border-procedures-and-safe-country-notions/>

**156** Under Art. 41(4), another category of persons who may be excepted from the mandatory border procedure are people coming from countries not cooperating with readmission as defined under Art. 25a(3) of the Visa Code.

**157** Section 3.1.

**158** EPRS, *Asylum Procedures at the Border: European Implementation Assessment*, PE 654.201, 2020, pp. 151-152; ECRE, *Border Procedures Not A Panacea*, 2019, p. 3.

**159** EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, p. 8.

**160** ECRE, *ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border Asylum Procedures and Border Return Procedures*, 2020.

**161** ECRE, *Border Procedures Not A Panacea*, 2019.

rather than extending the border procedures, lifting them would alleviate the burden of the front-line Member States.

As regards the **place**, just as during the screening procedure, Art. 41(6) provides that applicants subject to the border procedure should not be authorised to enter the territory of the Member State. So, the APR extends the **fiction of non-entry** for the entire asylum procedure, which can last up to five months. As discussed earlier, the current practices of Member States regarding border asylum procedure, coupled with the fiction of non-entry frequently resulting in detention, are either officially recognised or *de facto*.<sup>162</sup> Only the preamble to the APR refers to **detention**. Recital 40f provides that Member States must be able to apply the grounds for detention during the border procedure in accordance with the provisions of the proposal for the recast RCD. To recall, under Art. 8(3)(d) of the recast proposal of the RCD, detention can be applied in order to decide, in the context of a border procedure in accordance with Art. 41 of the 2016 proposal for the APR, on the applicant's right to enter the territory. Recital 40f of the APR further stresses that if detention is used during such procedure, the provisions on detention of the recast RCD 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.<sup>163</sup>

Art. 41(13) details in which facilities Member States will have to keep the applicants during the border asylum procedure. Each Member State should notify the Commission, within two months after the date of application of the APR, about the locations where the border procedure will be carried out, either **at the external borders, in the proximity to the external border or at transit zones**. The Explanatory Memorandum clarifies that 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

**162** Section 3.1.

**163** See Section 2.2.2.2. Recital 20 of the proposal of the recast RCD 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 they are 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 RCD 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, they 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. It is not clear whether states will be bound by these detention safeguards in the context of the border procedure.

with the scope of the border procedure.<sup>164</sup> States should ensure that the capacity of the locations where the border procedure will be carried out is sufficient to process the applications (Art. 41(13)). Under Art. 41(14), in situations where the capacity of these locations is temporarily insufficient to process the applicants, Member States may designate **other locations within their territory** and, upon notification to the Commission, accommodate applicants there on a temporary basis and for the shortest time necessary. According to the Explanatory Memorandum, this exception should only be applicable when the operational capacity at those locations is temporarily exceeded, since states should aim to have sufficient capacity for the expected caseload of applications.<sup>165</sup> Like the Screening Regulation, the APR allows the fiction of non-entry to be extended beyond the border.

**All in all**, by providing for a mandatory border asylum procedure in a wide set of circumstances, alongside the fiction of non-entry, the APR will likely result in systematic restriction on freedom of movement for the vast majority of asylum applicants and migrants and, in some cases, detention at the EU's external borders. The MPRIC currently being constructed on Lesbos appears to unveil how the Commission envisages functioning of the centres where persons will undergo border asylum procedures. As pointed out earlier, there are concerns that this centre will not allow persons to leave the premises at their will.<sup>166</sup>

### 3.3. The border return procedure

Under Art. 41a of the APR, persons whose applications for international protection are rejected in the border asylum procedure will be channelled to the newly established border return procedure.<sup>167</sup> Given reduced procedural safeguards concerning applicants for international protection at the border, discussed above, it is to be expected that the considerable proportion of persons will have their asylum claim refused. Border return procedure raises several human rights concerns, such as lack of clarity due to a parallel procedure to the one regulated under the Return Directive, unjustified difference in treatment compared to persons subject to regular return procedure, and narrower procedural safeguards compared to in-country regular return procedure.<sup>168</sup>

As regards the **length of the procedure**, the procedure can last up to 12 weeks from the moment the person no longer has a right to remain or is not allowed to remain (Art. 41a(2)). Like the border asylum procedure, Member States may extend this period by a further eight weeks in a crisis situation regulated under the Crisis Regulation (Art. 5(1)(a)).<sup>169</sup> The period

**164** European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM(2020) 611, 23 September 2020, p. 15.

**165** *Ibid.*

**166** See Section 3.2.2.

**167** The border return procedure was initially proposed in the proposal for the recast of the RD.

**168** ECRE, *ECRE Comments on the Commission Amended Proposal for an Asylum Procedures Regulation COM(2020) 611: Border Asylum Procedures and Border Return Procedures*, 2020.

**169** See the definition of a crisis situation above in Section 4.2.

of detention should be included in the maximum period of detention under the Return Directive, which means that the person may continue being detained after the period of border return procedure. This raises a question regarding whether or not there is a reasonable prospect of removal if the person has not been removed during the border return procedure, deemed efficient by the Commission.

The provisions on the **place** where the procedure is to be carried out mirror those regulating the border asylum procedure. The APR extends the **fiction of non-entry** to the border return procedure. Under Art. 41a(1), persons undergoing the border return procedure should not be authorised to enter the territory of the Member State. Under Art. 41a(2), they should be kept in **locations at or in proximity to the external border or transit zones**. If a Member State cannot accommodate the concerned persons in those locations, it can use other locations within its territory. These provisions imply the use of **detention**. The APR lays down two scenarios in this regard. **First**, under Art. 41a(5), persons who have been detained during the border asylum procedure may continue to be detained for the purpose of preventing entry to the territory of the Member State, to prepare the return or to carry out the removal process. This provision does not lay down specific grounds for detention as preparation of return or removal is a general context of detention, similar to the one spelled out in Art. 15(1) of the RD. In order to be lawful under Art. 5(1) of the ECHR and Art. 6 of the CFREU, the legal basis for detention should be precise and foreseeable in its application. Without clear grounds for detention, Art. 41a(5) will allow systematic detention, in violation of the principles of proportionality and necessity. **Second**, under Art. 41a(6), persons who have not been detained during border asylum procedure may be detained on grounds for detention established in the recast RD. To recall,<sup>170</sup> under Art. 18(1) of the re-cast RD, the grounds are the risk of absconding, avoiding or hampering return, and threat to public policy or public/national security. The third ground has not yet been accepted by the co-legislators and its inclusion in the APR should not influence the negotiations on the recast.

Based on the current practices of Member States,<sup>171</sup> it can be assumed that most of the persons subject to the border return procedure will be detained. This is compounded by the fact that the **principles of proportionality and necessity of detention** have not been enshrined in the proposal for the APR. Among the provisions of the recast RD applicable to the border return procedure, Art. 18(1) is not included. Under this provision, detention may be imposed when other sufficient but less coercive measures cannot be applied effectively. Arguably, the Commission attempted to isolate this detention regime from international law standards. Yet, states should be mindful that regardless of the provisions in EU law, they remain subject to their human rights obligations flowing from the right to liberty under international law, including the lawfulness, necessity and proportionality of detention, as discussed earlier.<sup>172</sup>

**170** See Section 2.2.1.

**171** See Section 3.1.

**172** See Section 2.1.



**In summary**, mandatory border return procedures for persons refused international protection in border asylum procedures, coupled with a mandatory application of the fiction of non-entry, appears designed to prevent Member States from applying the regime of the RD. This procedure will likely involve detention. Such detention, furthermore, risks having a systematic character as the Commission omitted to insert the principle of proportionality and assessment of less coercive measures in the proposal for APR. The MPRIC currently being constructed on Lesbos and the three RICs on other Aegean Islands demonstrate how the Commission perceives the implementation of border return procedure, as these centres will include pre-removal detention centres.<sup>173</sup>

**173** See Section 3.3.2.

## 4. Conclusions

This paper aimed to critically discuss law and practice as regards detention and restriction on freedom of movement at the EU's external borders. Under international and EU human rights law, arbitrary deprivation of liberty is prohibited. In order not to amount to arbitrary deprivation of liberty, detention should be based on a clear legal basis, imposed when less coercive measures are not adequate, as short as possible, subject to a review, and carried out in adequate conditions of detention. Given these stringent requirements, Member States often fail to qualify detention in border settings as such. Yet, under international law, domestic terminology is irrelevant; rather, the very nature of the measure and the cumulative effect of its restrictive features is a determining factor in the assessment of whether a measure constitutes detention or restriction on freedom of movement. If a measure does not amount to detention, restriction on freedom of movement is still subject to specific requirements, in particular lawfulness and necessity. The EU secondary legislation, in particular the RCD and RD, allows states to impose detention and restriction on freedom of movement on migrants and asylum applicants, including in the border context. However, in the border context the lines between these legal regimes are unclear. This is reflected in practice, as states impose a variety of measures towards persons refused entry. Frequently, deprivation of liberty takes the form of *de facto* detention, and the same person may be subject to diverse regimes as the procedure progresses. The hotspot approach particularly blurs the lines between detention and restriction on freedom of movement. The most concerning practices provided the impetus for the Commission's Pact proposals. The Pact introduces three consecutive stages of border procedure during which the person will not be allowed to enter the territory. The proposed Screening Regulation will likely lead to *de facto* detention and the revised proposal of the APR risks resulting in systematically applied (formal) detention. Despite the Commission's assertions of "no more Moria," the proposals are inspired, in particular, by the hotspot approach, and the new MPRIC currently being constructed on Lesbos may serve as a prototype for the centres to be established at the EU's external borders. By putting current and proposed EU provisions on detention and restriction on freedom of movement, and resulting practices of the Member States, in the context of the requirements stemming from international human rights law, this paper is a reminder to states of their international legal obligations. The EU law provisions, or gaps therein, do not dissolve states from their obligations under the right to liberty and freedom of movement.

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