



**ecre**

European Council  
on Refugees and Exiles

# **REFORMING EU ASYLUM LAW: THE FINAL STAGE**

**ECRE'S ANALYSIS OF THE MOST IMPORTANT  
UNRESOLVED ISSUES IN THE LEGISLATIVE REFORM OF  
THE COMMON EUROPEAN ASYLUM SYSTEM (CEAS)  
AND RECOMMENDATIONS TO THE CO-LEGISLATORS.**

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# INTRODUCTION

After years of divisive negotiations, it appears that the reform of EU asylum law, the Common European Asylum System (CEAS), has entered its final stage. Decisions taken by the EU's co-legislators, the Council of the EU (hereafter, the Council) and European Parliament (the EP or the Parliament), since June 2022 have paved the way for legislation to be adopted. Even in the final stage of the process, there is still a lot at stake: there are multiple points of divergence between the co-legislators and it is still possible for policy-makers to make decisions that support the right to asylum in Europe. This paper focuses on the negotiations, presenting ECRE's recommendations to improve the outcome from a fundamental rights perspective. It is based on a comparison of the co-legislators' positions and only covers points that 1) are still open, i.e. where the two institutions disagree, and 2) that are important for preserving the right to asylum in Europe.

## *The EU asylum reforms*

Legislative proposals to reform EU asylum law were launched in 2016, of which the recast Reception Conditions Directive (rRCD), Asylum Procedures Regulation (APR), Union Resettlement Framework (URF), Qualification Regulation (QR), and Eurodac Regulation are still to be concluded. In 2018, a recast of the Return Directive was proposed. Additional proposals were launched in 2020 as part of the New Pact on Migration and Asylum, including amendments to the APR proposal, the Regulation on Asylum and Migration Management (RAMM), the Screening Regulation, and the Regulation for Crisis and Force Majeure (the Crisis Regulation). Finally, more proposals were launched in 2021, including a reform of the Schengen Border Code (SBC reform) and the Instrumentalisation Regulation. The 2016 regulation transforming EASO into the EU Asylum Agency (EUAA) is already in force.

Inter-institutional agreements from 2018 on the rRCD, the URF and Eurodac were revived in 2022; the content of the former two proposals is agreed and no longer subject to negotiation.

## *Recent developments: adoption of positions*

Following its internal negotiation process, in April 2023 the EP adopted its positions on the APR, the RAMM, the Crisis Regulation and the Screening Regulation (summary [here](#)). The EP is still negotiating its position on the SBC Reform and has yet to start work on the Instrumentalisation Regulation. On 8 June 2023, EU Member States in the Council agreed a "General Approach" – their negotiating mandate – for the APR and the RAMM, after having agreed on General Approaches on the Screening Regulation and the SBC reform in 2022.

In the final stage of the legislative process, now underway for most of the proposals, the Council and the European Parliament engage in trilogues to determine the final versions of the legislative instruments, with each defending its amendments. This is the case for the APR, RAMM, Screening and Eurodac. For other files, including the recast Return Directive, the Crisis Regulation, the Instrumentalisation Regulation and the SBC reform, either one or both of the co-legislators have yet to adopt their position.

This paper covers the following proposals:

- I. Asylum Procedures Regulation (Comments on [2016 proposal](#) and [2020 proposal](#))
- II. Regulation on Asylum and Migration Management (Comments on [2020 proposal](#))
- III. Screening Regulation (Comments on [2020 proposal](#))
- IV. Eurodac Regulation (Comments on [2016 proposal](#) and [Working Paper](#))
- V. Crisis and Force Majeure (Comments on [2020 proposal](#)) and Instrumentalisation Regulation (Comments on [2021 proposal](#) and revised Schengen Borders Code (Comments on [2021 proposal](#)))

ECRE maintains its positions that the overall outcome of the reforms will be a reduction of protection standards in Europe – even if risks are addressed. As well as the impact on fundamental rights, ECRE questions the workability of the proposals and the continued uneven division of responsibility among the Member States. Generally, the amendments proposed by the European Parliament represent improvements from a fundamental rights perspective, whereas the Council's amendments further reduce standards (although there are examples of the opposite).

In this context, ECRE urges the Parliament to defend its positions and to ensure that, where it does concede on a point, it receives sufficient and equivalent concessions on other points from the Council. Notably, compromises that undermine the right to asylum must be balanced with safeguards. For ECRE's wider analysis and proposed amendments (some of which have been included among the co-legislators'

amendments), see [ECRE publications](#). ECRE will publish detailed analysis of the full legislative texts when adopted, including recommendations to support fair, rights-based and comprehensive implementation of all elements of the CEAS.

Highest priority recommendations:

The high priority recommendations for the negotiations are summarised here and examined in detail in the paper, instrument by instrument as follows:

### *Asylum Procedures Regulation*

The APR is highlighted in the paper because there are particular risks attached it, given that Parliament's position has already involved significant compromise on the key element of the 2020 proposals, the expanded use of the border procedure. Thus, if the Parliament concedes to the Council, for instance on Article 41(3) on the mandatory use of the border procedure and if it accepts the Council's extensive new provisions on "adequate capacity" and minimum targets for people to be processed in the border procedure, it must insist on receiving sufficient and equal concessions from the Council on other articles, and where needed to ensure balance, on other instruments. This includes free legal assistance for applicants in all procedures as a safeguard; tinkering with exemptions to the border procedure is not sufficient. Bolstering the right to an effective remedy is also an essential safeguard.

Article 12:

- » Remove Council additions Article 12(5)(aa), (5)(ba), and (5)(c) which remove the right to a personal interview for a wide range of applicants.
- » A compromise would at least return to the original text of the Commission proposal.

Article 14:

- » Preserve the right to free legal assistance in Article 14.
- » A compromise should at very least preserve the original text from the European Commission.

Article 40:

- » Reject the Council text expanding the scope of the category of people captured by Article 40, and thus subject to accelerated and border procedure, in particular remove the final clause, which allows a mere belief about the person's actions to bring them within the scope of the article.
- » Maintain the reference to "final" decisions rather than first instance decisions.

Article 41:

- » The border procedure should remain optional in the final compromise on Article 41(3) between co-legislators.
- » If Parliament concedes on this point, it must ensure adequate provisions are taken on other articles in the APR. The limited improvements to Article 41 are not sufficient to mitigate the risks attached to mandatory use of the border procedure.

Supporting exemptions to the border procedure as per amendments from the Parliament and from some of the Member States is also important, but is not alone sufficient to mitigate the risks to fundamental rights generated by the mandatory use of (cumulative) special procedures.

Article 35:

- » Preserve the Parliament's additional text to ensure that a full assessment of human rights risks, protection needs and applicable statuses is carried out.
- » Reject the issuing of the return decision "as part of" the rejection decision.

Article 45:

- » Remove paragraph Article 45(3) that allows Member States to presume a country is safe on the basis of an agreement, bypassing EU and international law.
- » Maintain the Parliament's definition of effective protection as per its amendments to Article 45.
- » Maintain the meaningful connection requirement as per the European Commission's initial proposal for

Article 45(3)a, but excluding the possibility of mere short transit constituting such connection.

Article 53:

- » Remove the requirement to merge appeals against asylum and return decisions, supporting Parliament's amendments in Article 53(1).
- » Add an appeal against an age assessment decision as per the Parliament's amendment to Article 53(1).
- » Delete the requirement to provide only one level of appeal, following the Council amendments to Article 53(9).
- » Reject the European Parliament amendment to remove the right to an oral hearing in Article 53 (9) .

#### *Regulation on Asylum and Migration Management*

The RAMM should be seen as linked to the APR. If responsibilities at the borders are increased through the expanded and mandatory use of special procedures, then the standard rules on allocation of responsibility and the solidarity mechanisms must be adjusted to provide a balance.

Article 10:

- » Maintain the elements introduced by the EP in Article 10, that would allow applicants to access reception conditions even if present in a Member State other than the one responsible for their application in some circumstances.

Article 33:

- » Maintain the EP position on remedies in Article 33, as it expands safeguards for applicants subjected to the provision of the Regulation.

Article 14 and 25:

- » Maintain the "meaningful link" with a Member State as a criterion for establishing responsibility in the Parliament's amendments to Article 14 and 25.

Articles 2, 15, 25, 25a and 30:

- » Maintain the improvements to responsibility rules in relation to expanded possibilities for family reunification, the fast track procedure for family reunification and proposed changes to evidential requirements in the Parliament's position on Articles 2, 15, 25, 25a and 30.

Article 45:

- » Maintain the focus on solidarity through relocation present in the EP position Article 45b.

#### *Screening Regulation*

Article 5:

- » Reject the screening process on the territory of Member States and delete Article 5.

Article 7:

- » Agree on a strengthened monitoring mechanism as per the EP's position on Article 7.

Article 13:

- » Agree to the EP's position on Article 13 and ensure that the person concerned has access to the debriefing form and can check the information contained therein is correct.

#### *Eurodac Regulation:*

Articles 12(v), 13(r), 14(s), 14a(r):

- » Remove the category of personal data on individuals posing a threat to internal security data, given the impact on the fundamental rights of privacy, data protection and asylum for the persons concerned, and given the lack of relevant safeguards

If this category is included, then the following should apply, as per the second compromise option of the European Parliament's negotiating position:

- » Add rules on the information to be included, the criteria to be implemented for inclusion, and safeguards on the treatment of persons with an internal security flag.

*Crisis and Force Majeure Regulation, Instrumentalisation Regulation, SBC reform:*

- » (to Member States) Reject the merged Crisis, Force Majeure and Instrumentalisation proposal.
- » (to co-legislators) Reject the codification of instrumentalisation in EU law via the Schengen Borders Code or other legislative proposals.

# ANALYSIS

## I. Asylum Procedures Regulation (APR)

The Asylum Procedures Regulation (APR) seeks to harmonise procedural requirements across the Member States. At the same time, it adds considerable complexity by proposing the expanded use of special procedures, including their mandatory use in some circumstances, and by granting considerable discretion for Member States despite the transition from a directive to a regulation. The APR proposal was launched in 2016, with amendments to the proposal presented in 2020.

The co-legislators have added to the complexity by amending the categories of applicants for whom different procedures may or must apply, and by amending the exemptions to the use of special procedures. The original proposal both enhanced some procedural guarantees (provision of legal assistance) and restricted others (the right to a remedy, the use of detention, safeguards for vulnerable applicants). Again, the co-legislators have put forward extensive amendments. Very often, the proposed amendments pull in opposite directions, with the Council's amendments further undermining protection standards and Parliament's amendments improving protection standards (often slightly and only in comparison to the proposals as, with few exceptions, they would still represent a deterioration compared to the status quo). However, first, there are also examples of the opposite, where the Council's amendments are preferable from a protection perspective. Second, in many cases, the Parliament's amendments are minimal; overall, its position is very close to the original Commission proposal.

Cumulatively, compared to the current recast Asylum Procedures Directive (APD), the changes brought in by the APR will mean that more people will be detained in centres, usually at the border, and have their applications heard in border procedures. It is likely that fewer people will receive protection in Europe given the erosion of procedural guarantees. ECRE is also concerned that there may be more denials of entry due to the increased responsibilities of countries at the external borders. For these reasons ECRE retains its opposition to the adoption of the text as a whole. A detailed analysis will follow when the text is adopted. Here, the paper focuses on elements which can still be influenced.

The Council's General Approach can be found [here](#). The European Parliament's positions are contained in different documents and can be found [here](#).

### 1. Maintain Access to the Procedure and Essential Safeguards

#### **Article 5: Ensure information is provided on applying for international protection**

In the proposal, Article 5 included largely useful simplification and clarification of the related article of the APD, requiring the Member States to designate a single authority as responsible for status determination, and setting out the obligations and resource requirements for the authority. At Article 5(3), the proposal included an expansion of the obligation to receive and register applications to other authorities of the state, given that in practice they might be the first point of contact with the applicant. Four authorities are listed, with the proviso that the Member State may also extend the responsibility to others.

The Council General Approach introduces considerable amendments to Article 5, one of which should be highlighted: at Article 5(3aa.), Member States are allowed to limit in national law the authorities entrusted with receiving and registering the application. The General Approach states that, "These authorities shall include as a minimum [...] the police, border guards and authorities responsible for detention facilities [...]."

The amendment goes against the purpose of the original proposal which was to expand the range of authorities with responsibility for registering the application. More importantly, it will allow states to seek to deny access to the procedure when an authority other than the three listed receives the application, notably the armed forces are not mentioned but in an increasingly militarised border context, in practice, it may be the army that has the first contact with an applicant.

The Parliament's position introduces a useful general safeguard by outlining an amendment whereby, "Where the application is received by an authority without the power to register it, that authority shall inform the applicant where and how to apply for international protection. [Am. 64]"

## Recommendations:

- » The Council's proposal at Article 5(3aa) should not be accepted.
- » In all cases, Parliament's amendment introducing the requirement on an authority without the power to register an application to provide information to the applicant on where and how to apply for international protection should be accepted.

### **Articles 10 to 12: Reinstate the right to a personal interview**

Articles 10 and 11 of the proposal sought to strengthen the right to a personal interview, the importance of which is extensively recognised in international and EU law. Article 12 included two limited circumstances in which an interview could be omitted: when a positive decision can be taken on the basis of available evidence, and in a situation where the applicant is unfit to participate in the interview.

The General Approach seeks to significantly expand the circumstances in which the interview can be omitted, running counter to the jurisprudence of both European Courts. Allowing for the provision of information in writing is not sufficient to ensure the right to a hearing.

According to the General Approach, in the following new circumstances the interview may be omitted:

- » "[Article 12]5(aa) the determining authority [...] considers that the application is not inadmissible on the basis of evidence available; [...]"
- » "[Article 12]5(ba) in case of a subsequent application, the preliminary examination referred to in Article 42(3) is carried out on the basis of a written statement."
- » "[Article 12]5(c) the determining authority considers the application inadmissible pursuant to article 36(1aa)(b) or (c)."

A Member State would be able to declare an application as inadmissible without a personal interview, a highly risky situation.

In contrast, the European Parliament's amendments of Articles 10 to 12 introduce a large range of changes which build on and then go beyond the original proposal in strengthening the right to an interview.

**Priority: HIGH**

## Recommendations

- » Council additions Article 12(5)(aa), (5)(ba), and (5)(c) which remove the right to a personal interview for a wide range of applicants should not be accepted.
- » The European Parliament's amendments to Articles 10, 11 and 12 strengthening the right to an interview should be accepted.
- » A compromise would at least return to the original text of the Commission proposal.

### **Article 14 and 15: Maintain the right to free legal assistance**

The extension of the obligation to provide free legal assistance to the administrative procedure was one of the most important improvements in the 2016 APR proposal. Including:

- » "Applicants shall have the right to consult, in an effective manner, a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications at all stages of the procedure" (Article 14(1)) and that,
- » "an applicant may request free legal assistance and representation at all stages of the procedure in accordance with Articles 15 to 17. The applicant shall be informed of his or her right to request free legal assistance and representation at all stages of the procedure" (Article 14(2)).

A major change proposed in the Council's General Approach is the removal of free legal assistance in the



administrative procedure. This constitutes a significant risk to the rights of the applicant, and it is likely to undermine the right to a fair hearing and the quality of the procedure. Given the complexity of EU asylum law – and notably the provisions of the APR itself – the process is weighted against the applicant in the absence of legal assistance. Evidence also shows that free legal assistance can support certain outcomes that are prioritised by the Member States, such as increasing the return rate because more applicants opt for voluntary return when provided with solid legal advice during the first instance process.

According to the General Approach, while applicants have the “right” to legal assistance it is at their own cost (Article 14(1)) and the Member State “may” but is not required to provide free legal assistance (Article 14(2a)). Instead of free legal assistance or representation, in the administrative procedure, the applicant is only entitled to free information. As such, it replicates the right to information which exists as a separate guarantee.

The European Parliament’s position maintains and then expands on the right to free legal assistance. Its amendments underline that free legal assistance should be available “until a final decision on the application has been taken”. The Parliament position also specifies that the applicant must be informed about this right, at the latest at the point of registration.

The Parliament’s amendments limit exclusions from the right to legal assistance to situations where the applicant has sufficient resources or where the application is a “second or further” subsequent application. It thus proposes removing the possibility to exclude the right to free legal assistance in the situation where “the application is considered as not having any tangible prospect of success”.

ECRE’s analysis of asylum systems shows that access to legal assistance is essential in all processes to ensure both fairness and efficiency.

**Priority: HIGH**

#### Recommendation:

- » Preserve the right to free legal assistance in Article 14.
- » The European Parliament should staunchly defend its position on Article 14 and 15.
- » A compromise should at very least preserve the original text from the European Commission.

#### **Article 39: Limit the expansion of implicit withdrawal**

The APR proposal expands the circumstances which would be considered implicit withdrawal, including to cover cases where it is not necessarily the applicant’s intention to withdraw their application. According to Article 39(1) Member States have no other option than to reject an application as abandoned in the six cases listed, whereas under the APD Member States may simply opt for the discontinuation of its examination without rejecting the application. Second, resumption of the examination of the application is only possible if the applicant reports back within one month of written notice being sent informing them of the decision. Currently, nine months have to pass from decision to discontinue before the Member State can decide not to reopen the applicant’s case.

The consequences of a declaration of implicit withdrawal are significant as it would mean that the asylum application is ended without the consent of the applicant. Thus, ECRE recommended significant revision of the proposal, including a removal of the requirement to declare an application as implicitly withdrawn.

On the positive side, the General Approach reduces the circumstances which give rise to a decision on an application as implicitly withdrawn and adds references to the need for justified cause. It also removes the strict time limit within which the state is obliged to reject the application as implicitly withdrawn when no contact has been made by the applicant. It maintains the requirement that the authorities adopt a decision (or act) to reject (or declare) the application as implicitly withdrawn, however.

The Parliament introduces changes that largely improve the article from a protection perspective. Above all, it removes the requirement of rejecting the application, making it discretionary, and restores the use of discontinuation, as per the APD. The Parliament’s position also adds safeguards and limits the circumstances that lead to implicit withdrawal. The time limit is doubled to two months.

### Recommendations:

- » Reduce the circumstances that constitute implicit withdrawal, as per the Council position.
- » Remove the requirement to reject an application as implicitly withdrawn and maintain the use of discontinuation.
- » Accept the proposed safeguards from Council's and Parliament's amendments to ensure legal certainty.
- » Extend the time limit to two months.

## 2. Limit the Expanded and Mandatory use of Special Procedures

At the heart of the APR is the expanded use of special procedures, with the objective that more people would have their asylum applications heard in a special procedure or in a combination of special procedures, rather than in the regular procedure. The procedures in question are inadmissibility procedures, accelerated examination and border procedures (for asylum and return). ECRE generally opposes the use of most special procedures because of the risks they pose to fundamental rights and the administrative burden generated by the expanded and – in some circumstances – mandatory use of special procedures. Above all, the use of special procedures leads to a much higher rejection rate because a fair and rigorous examination of the need for international protection is near impossible in the conditions under which special procedures – and in particular border procedures – take place. The impact is exacerbated for vulnerable applicants.

### **Article 36: Remove mandatory use of inadmissibility procedures**

The 2016 APR proposal introduced an obligation on Member States to assess admissibility and reject applications as inadmissible in a range of circumstances. Of most concern was the mandatory use of first country of asylum and safe third country concepts as grounds for rejection on the basis of inadmissibility, meaning that the applicant would not have access to an in-merits examination when these concepts were applied. The 2020 amendments to the APR proposal removed the requirement to apply this assessment in the border procedure, although it remained in the regular procedure.

Both co-legislators amend Article 36 to remove the mandatory use of these concepts.

The proposal also stipulated that rejection as inadmissible is also mandatory in the case of a subsequent application. The General Approach maintains this provision (Article 36(1aa)(a)); the Parliament deletes it.

### Recommendation:

- » Remove all use of mandatory inadmissibility procedures in Article 36.

### **Article 40: Limit the use and extend the time limit for accelerated examination procedures**

Compared to the APD, the 2016 draft of Article 40 rendered it mandatory to fast track certain applications but reduced the number of possible grounds for acceleration to eight. It also introduced a maximum duration of two months (reduced to eight working days in one case) for concluding of the examination and explicitly allowed Member States to switch to the “regular” procedure where the complexity of the case so requires.

In 2020, the amendment to the proposal added a new ground to the list for when the use of the accelerated procedure is obligatory – for cases where the protection rate for the country is below 20%. This was justified “by the significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%, and hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded.”

The General Approach expands the situations in which an accelerated procedure is mandatory. Whereas the proposal states that acceleration must be applied if the applicant presented false information or withheld relevant information, this criterion is expanded to also cover withholding documents and destroying or disposing of an identity or travel document where this is to prevent the establishment of identity or nationality (Article 40(1)(c)). The clause applies even if when “the circumstances clearly give reason to believe that this is the

case". The same expanded scope then applies throughout the proposal, including as a widened ground for the use of the border procedure. There is a strong risk that states will claim that any person without documents fits within the scope of Article 40(1)(c) and should therefore be subject to an accelerated border procedure.

At Article 40(1)(h), the General Approach amendment entails that all inadmissible subsequent applications are subject to acceleration, not just those that are manifestly without substance or abusive, as per the proposal.

The European Parliament's position maintains the requirement to use accelerated procedures but qualifies and limits the circumstances giving rise to mandatory use. Notably, Parliament removes the mandatory use of accelerated procedure in the case of subsequent applications. The Parliament's position also includes an amendment to specify that the percentage applies to final decisions not first instance decisions. This is a small but important amendment, given the continued high percentage of cases where protection is granted at review or appeal stage or otherwise after the conclusion of the administrative stage of the process.

The General Approach increases the time limit for the accelerated procedure to three months, whereas the Parliament maintains the two-month time limit.

ECRE has always maintained that the only acceptable situation for the acceleration of the asylum procedure is for manifestly founded claims. If the co-legislators decide to allow for it in other circumstances, the following recommendations should be followed:

Priority: HIGH

#### Recommendations:

- » Reject the Council text expanding the scope of the category of people captured by Article 40, and thus subject to accelerated and border procedure, in particular remove the final clause, which allows a mere belief about the person's actions to bring them within the scope of the article.
- » Maintain the reference to "final" decisions rather than first instance decisions.

#### Recommendations:

- » Remove mandatory accelerated examination of subsequent applications as per the Parliament's position. At very least, a compromise would be the Commission's proposal.
- » Extend the time limit to 3 months as per the Council approach.

#### **Article 40(5): Ensure that unaccompanied children are not subject to accelerated examination procedures**

The 2016 proposal maintains the possibility of accelerated examination of applications of unaccompanied children, as is the case in the APD. ECRE insists that accelerated examination is not suitable for this highly vulnerable category of applicant. The two categories covered are children from safe countries of origin and cases where there are national security or public order considerations. The 2020 proposal increased its use by including children from countries for which the protection rate is 20% or lower.

The General Approach expands the cases in which the accelerated procedure may be applied to unaccompanied children to cover subsequent applications and the widened category of presenting false or misleading information or destroying or disposing of documents (Article 40(1)(c)), discussed above. This would lead to a large percentage of unaccompanied children facing an accelerated examination of their cases which is not able to take into account the specific needs of these children.

The European Parliament's position maintains the use of accelerated procedures for unaccompanied children, for the three categories of children (safe countries of origin, national security considerations and low protection rates). It amends the threshold however, to limit the new category to children from countries where the protection rate is 10% or lower.

## Recommendation:

- » Remove or strictly restrict the use of accelerated examination for unaccompanied children. A compromise would be the Commission's original proposal.
- » Compromise on the threshold protection rate for unaccompanied children at 15%.

### **Article 41: The use of border procedures**

Central to the 2020 amendments to the APR is the expanded use of the border procedure, including rendering it mandatory under certain circumstances. This was proposed as an alternative to the mandatory use of inadmissibility procedures applying first country of asylum and safe third country concepts which was at the heart of the 2016 proposal. The proposed asylum and return border procedures would last up to 12 weeks per procedure. The decision to have an asylum application processed in the border procedure cannot be appealed.

There are many elements to the border procedure so they are addressed one by one, below. For some elements, there is little difference between the co-legislators' positions, so strong recommendations cannot be provided.

#### **Article 41(1): Strictly limit when border procedures may be used**

The General Approach maintains the list of situations in which the border procedure can be used, including an application at the external border, following an "apprehension in connection with an unauthorised crossing of the external border", following disembarkation and following relocation.

The European Parliament maintains the same scope of application but proposes a small amendment to point (c) whereby the apprehension has to take place in "direct connection" with an irregular crossing.

ECRE strongly recommended limiting the situations in which the border procedure may be used, including removing reference to apprehension in connection with an unauthorised crossing and removing its use after relocation. Unfortunately, these changes have not been included in either of the co-legislator's position.

The European Parliament's position is a minor improvement on the original text.

#### **Article 41(3): Maintain the optional use of border procedures**

The 2020 amended Article 41(3) introduced three situations in which Member States are obliged to apply the border procedure. These are 1) the applicant poses a risk to national security or public order; 2) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision; and 3) the applicant is from a third country for which the protection rate is 20 percent or below.

The General Approach expands the scope of the mandatory use of the border procedure because it has amended Article 40(1)(c) to also include cases where applicants have destroyed or disposed of documents or when it is reasonable to believe they have done so. It also expands the use of the border procedure to all family members in the case that national security or public order concerns arise.

The European Parliament position deletes Article 41(3) and the mandatory use of the border procedure. ECRE supports this position.

Given the central importance of this provision and the potential impact on the right to asylum of border procedures, any concessions on Article 41(3) must be matched by sufficient and equivalent improvements in safeguards throughout the APR.

Priority: HIGH

**Recommendation:**

- » The border procedure should remain optional in the final compromise on Article 41(3) between co-legislators.
- » If Parliament concedes on this point, it must ensure adequate provisions are taken on other articles in the APR. The limited improvements to Article 41 are not sufficient to mitigate the risks attached to mandatory use of the border procedure.

**Article 41(4): Expand exemptions to the border procedure (applicants)**

The 2020 proposal listed categories of applicants exempt from the border procedure.

The General Approach maintains the exemptions to the border procedure largely as set out in the original proposal. It amends the reference to “medical reasons” as a ground for exemption to add “compelling” and removes the exemption that is activated when the guarantees for the use of detention are not present. It adds a useful reference stating that where special procedural needs cannot be met the exemption should apply (the original referred only to special reception needs).

The European Parliament adds the same reference to special procedural needs. It introduces a strong exemption of unaccompanied children and reinstates the exemption of vulnerable people that largely applies currently. It also maintains the original language on medical reasons and absence of detention-related guarantees as grounds for exemption.

**Recommendations:**

- » Maintain the exemption for those whose special procedural needs cannot be met, as per the Council and Parliament amendments.
- » Support the Parliament’s amendment on the wider exemption of vulnerable people.

**Article 41(4): Expand exemptions to the border procedure (cooperation with countries of origin)**

The proposal states that Member States may decide not to apply the border procedure for people from countries which are not cooperating on return and where the Member State has notified the Commission as per the Visa Code (from Article 25a(3) of Regulation (EC) No 810/2009).

The General Approach removes this exemption by deleting the full paragraph. The European Parliament makes it a requirement to not apply the border procedure in these cases. Similarly, the Parliament also renders the exemption mandatory where “the Commission considers that the third country concerned is not cooperating sufficiently.”

**Recommendation:**

- » Maintain the Parliament’s position that the border procedure should not be applied in cases where countries are not cooperating on return.
- » The Commission’s proposal would be an adequate compromise.

**Article 41(5): Remove all children from the border procedure**

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

Both co-legislators maintain this limited exemption. However, at the JHA Council on 8 June 2023, Germany,

Luxembourg, Portugal and Ireland issued a note for the protocol to state that the exemption of children (above the age of 12) from the border procedure remains a priority for them which they will support during the trilogues.

ECRE continues to advocate for the exemption of all children from the border procedure in line with the principle of the best interest of the child and the UN Convention on the Rights of the Child.

#### Recommendation:

- » Agree on exempting all children and their family members from the border procedure in Article 41(5) as stated in the Protocol declaration of Germany, Portugal, Luxembourg and Ireland.

#### **Article 41(6): Define conditions of applicants during the fiction of non-entry**

The proposal states that “Applicants subject to the border procedure shall not be authorised to enter the territory of the Member State.” The General Approach and the European Parliament maintain this fiction of non-entry. ECRE has consistently opposed the use of the fiction of non-entry but underlines that the fiction is not a legal fiction because in law it is clear that the applicant remains under the jurisdiction of the Member State in question and that legal protections apply.

The proposal allows for the use of detention in some circumstances. The General Approach maintains but moves the reference, stating that detention can only be imposed if Articles 8 to 11 of the recast RCD apply (Article 41e(2a)). It expressly allows for the detention of minors if these articles apply.

The European Parliament's position requires that the whole of the RCD should apply and that accordingly children should usually not be detained, as per Article 11(2) of that Directive. It also refers to the requirement of Article 13(2) of the EUAA regulation that guidelines be prepared on alternatives to detention and introduces an evaluation by the Commission.

While the EP's position is preferable, it also supports the fiction of non-entry.

#### Recommendation:

- » The whole of the RCD should be applicable where the fiction of non-entry is applied.

#### **Article 41(7): Make the responsibility check mandatory**

The proposal suggested that Member States may carry out a determination of responsibility when applying the border procedure. The General Approach maintains this possibility. The European Parliament renders it mandatory.

#### Recommendation:

- » The responsibility check should be mandatory to ensure that the hierarchy of criteria for determining responsibility is respected.

#### **Article 41(8): Ensure that border procedure after relocation is not mandatory**

The proposal allows for the possibility that the border procedure be applied after relocation if the conditions are in place in the country of arrival. The European Parliament requires that the conditions be in place in the country of arrival and relocation. The General Approach suggests that Member States may apply the border procedure but does not require the country of relocation to have the conditions in place.

#### **Article 41(10): Extend deadlines for registration**

The proposal sets a deadline of 5 days for lodging the application following registration.



The General Approach maintains the deadline of 5 days for the lodging of the application after registration. The Parliament maintains the 5 days but specifies that they should be working days, which is very slight improvement.

**Article 41(11): Limit the duration of the border procedure**

The co-legislators maintain the duration of the border procedure at 12 weeks, including the appeal. The proposal states that after 12 weeks, “the applicant shall be authorised to enter the Member State’s territory except when Article 41a(1) is applicable.”

The General Approach maintains the 12-week duration but allows an extension to 16 weeks in a wide set of circumstances, including when the determining authority decides that more time is required. The European Parliament maintains the 12 weeks and specifies that it also applies when a person is relocated.

**Article 41(13) and (14): Restrict the locations for the border procedure**

The proposal specifies that the border procedure should take place “at or in proximity to the external border or transit zones”. It further requires that the Member States inform the Commission of the locations and ensure that the capacity is sufficient. If the capacity is insufficient, the Member State may carry out the border procedure elsewhere “on a temporary basis and for the shortest time necessary”.

The General Approach would allow the border procedure to take place “in other designated locations” as a general rule (Article 41f). The Member State should notify the Commission of these locations. When residing at any of the locations where the border procedure takes place or when being transported to them, the fiction of non-entry will continue to apply.

The European Parliament maintains the Commission’s provision that the border procedure should usually take place at or in proximity to the external border, but that in the case of insufficient capacity, it may take place elsewhere. It includes references to the Reception Conditions Directive applying in Article 41(13) and (14).

ECRE’s strongly opposes provisions in the reform proposals that allowed for the use of border procedures in locations other than at the border.

**Article 41ba and bb Council General Approach: Remove numerical targets for border procedures (the “adequate capacity” concept).**

Next to the mandatory nature of the border procedures for certain groups of applicants, a major innovation in the General Approach is the agreement on numerical targets (labelled as “adequate capacity”) for the application of the border procedure. While the adequate capacity concept is presented as a way to ensure that Member States have the “capacity” – i.e. the infrastructure and the resources – in place for management of a certain number of applicants in border procedures, in fact, it serves to generate a rule setting the minimum numbers of applicants for whom border procedures must be used at any given time during the year.

*The calculation of adequate capacity*

The adequate capacity sets a minimum number of 30,000 for the use of border procedures for the EU as a whole per year, meaning that at least 30,000 people per year should have their applications processed in an asylum border or a return border procedure, to be divided among the states. A maximum number of applications to be processed in border procedures (“annual cap”), set at several times this number, was also introduced, and is set to increase over the first three years from the entry into force of the Regulation to reach 120,000.

Member States’ individual adequate capacity (minimum number or target for capacity for the border procedures) is calculated by taking the overall adequate capacity (30,000) multiplying it by the sum of irregular crossings of the external border, arrivals following search and rescue operations, and refusals of entry at the external border in the Member State in question, and then dividing the result by the number of arrivals and refusals of entry for the EU as a whole.

*Example of adequate capacity*

To give an approximate number, the formula is applied to the 2022 figures (according to the rules, the average annual number for the three previous years will be used), for the case of Italy.

*Generic formula: Adequate capacity for Member State AA =*

$$\frac{30,000 \times (\text{irregular crossings of external border} + \text{arrivals after SAR} + \text{refusals of entry by MS AA})}{(\text{irregular crossings of external border} + \text{arrivals after SAR} + \text{refusals of entry for the EU27+})}$$

*Example: Italy (using 2022 figures only) =*

$$30,000 \times 123,924 (105,129 (\text{maritime arrivals including following SAR}) + 13,000 (\text{estimate for land arrivals}) + 5795 (\text{refusals of entries})) = \underline{\underline{3,717,720,000}}$$

$$\text{----- divided by -----}$$

$$330,000 (\text{irregular arrivals including following SAR}) \times 141,060 (\text{refusals of entry}) = \underline{\underline{471,060}}$$

$$= \underline{\underline{7892}}$$

**Minimum number of people in border procedure at any point in time = 7892**

### *Concerns about the adequate capacity concept*

ECRE has raised its concerns that the formula for calculating adequate capacity will provide incentives for Member States at the external border to informally deny access to their territory because this will lead to a reduction in the number of people that they have to process in the border procedure in future years. While formal, registered refusals of entry will add to the adequate capacity, “pushbacks” and other informal, unlawful, and forcible preventions of entry will not. Thus, in the case of Greece, in 2022, there were 49,060 formal refusals of entry at the border. These cases would be included in the calculation, increasing Greece’s adequate capacity, whereas the 150,000 or more informal denials of entry would not.

Overall, ECRE is also concerned that, first, setting a numerical target is a different logic to the one in the Pact proposals, where the mandatory use of the border procedure was intended for people from places where the average protection rate is 20% or below, with the preamble explaining why this threshold had been chosen; setting a target is a different approach.

Second, setting a numerical target introduces a strong element of arbitrariness, including in the use of detention. Whether or not someone’s application is actually processed in a border procedure – and therefore probably in detention – will depend when and where they arrive. As the adequate capacity is a minimum, a country may decide or may be pressured to use this model on a far larger scale. The annual cap – the maximum number of cases to be processed in the border procedure – will be four times the annual capacity by two years after the entry into force of the Regulation, and may be further expanded, especially given the emerging interests of different stakeholders in the construction and management of detention facilities and the incentives and funding that may be provided to Member States.

Third, the description of adequate capacity is highly complex and the actual numbers of people to whom it will apply cannot be predicted.

These factors create uncertainty for potentially large numbers of people.

It should be noted that an apparent contradiction can be dismissed as unclear drafting. According to Article 41bc(2), when a Member State notifies the Commission that it has reached its adequate capacity, by way of derogation from Article 41b(1) it no longer has to use the border procedure for cases within the 20% threshold. It is not clear for how long this derogation applies as the two subsequent paragraphs appear to be contradictory.

Article 41bc(3) states that the Member State should restart the border procedure for the 20% threshold group as soon as the number of people subject to the border procedure is “at any given moment” lower than the adequate capacity. Article 41bc(4), on the contrary, states that the derogation allowing the Member State to cease applying the border procedure to this group applies “for the remainder of the calendar year” following the notification.

In fact, what seems to be meant is that when the Member State first hits its adequate capacity, the process of starting and stopping the application of the border procedures should take place for the rest of the year, such that from that day onwards it is always at its adequate capacity. Thus, who goes into the border procedure will



depend on whether other people have left it, as well as on whether arrivals are people who fit into the categories for whom the border procedure(s) is mandatory, and on whether circumstances of cases mean that people with rejections may or must be subject to a return border procedure.

Again, these rules contribute to a situation where the actual numbers of people who will be subject to a border procedure cannot be calculated; it depends on unknowable factors related to the speed of processing and the timing of arrivals. In the example above, the adequate capacity is 7892. When this number is reached, the country will then always have to have 7892 people in centres subject to border procedures (asylum and return) so long as there are people arriving or with rejection decisions who fit within the categories for whom a border procedure is mandatory. Thus, the border procedure centres will be filled up so that 7892 people are always present. As soon as cases are processed and people leave – either because their asylum procedure leads to a positive decision or because they are deported – then there will be fewer than 7892 people present. More people must be added if they arrive seeking asylum and fit into the categories in question (20% threshold etc). Every year, tens of thousands of people might therefore be subject to the mandatory border procedure.

The EP has no position on the proposed adequate capacity and annual cap concepts as this was not part of the European Commission's proposal for the APR.

#### Recommendation:

- » There should be no agreement on the newly introduced concept of “adequate capacity” (Article 41ba and Article 41bb of Council position) which serves as a minimum target of the number of people to be processed under the border procedure.
- » If the concept is maintained, uncertainty and arbitrariness should be removed, and the number of people targeted by these measures should be significantly reduced.

#### **Article 41: Agree on safeguards for the Return Border Procedure**

The new Article 41a from the 2020 proposal introduced a border procedure for carrying out return, which replaced the return border procedure included in the 2018 proposal for a recast Return Directive. ECRE reiterated its extensive concerns about the return border procedure.

The General Approach maintains the provisions of the original proposal. It allows the return border procedure to take place anywhere in the country with the fiction of non-entry applying. A period of 15 days when voluntary departure is possible is allowed but is not mandatory and needs to be requested.

The European Parliament's position also preserves the key elements of the return border procedure, including the fiction of non-entry. It proposes limited improvements, including that the RCD should apply (Article 41(2)), that the period of voluntary departure in the proposal should be mandatory and should be extended to 25 days (Article 41(4)), and that detention is only allowed if a reasonable prospect of return exists (Article 41(7)).

#### Recommendation:

- » Accept the albeit limited safeguards introduced by the Parliament's position to Article 41.

#### **Article 35: Remove combined asylum and return decisions**

Article 35(a) of the 2020 proposal states that the return decision shall be issued as part of the decision rejecting the application for international protection or in a separate act but one that is issued at the same time and together with the decision rejecting the application for international protection. ECRE raised its concerns because the return decision requires a wider examination than a decision on an application for international protection. For this reason, ECRE recommended that the examination also include an assessment of human rights implications and whether other statuses apply.

The General Approach largely preserves the original text, including just a minor positive revision whereby if the return decision is issued in a separate act it could be issued after the rejection decision but “without undue delay”.

The Parliament removes the option of issuing the return decision “as part of” the rejection decision. It maintains the provision that for accelerated and border procedures the return decision may be issued “at the same time and together with the rejection” but includes the same minor improvement as the Council, that the return decision could be issued after the rejection so long as that is “without undue delay”.

More importantly, it puts forward a useful substantive amendment of Article 35, which goes some way towards mitigating the risk of refoulement and other human rights violations, which is replicated here in full:

Where an application is rejected as inadmissible, unfounded or manifestly unfounded with regard to both refugee status and subsidiary protection status, or as implicitly or explicitly withdrawn, Member States shall issue a return decision that respects Directive XXX/XXX/EU [Return Directive], *provided that the applicant does not fulfil the conditions to apply for a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other grounds under the applicable national legal framework and that her or his return would not lead to risks of violations of the principle of non-refoulement and other fundamental rights under the Charter of Fundamental Rights and other EU and international obligations.* The return decision shall be issued as part of the decision rejecting the application for international protection or, in a separate act. ~~*In the case of an accelerated procedure or a border procedure, where the return decision is issued as a separate act, it shall be issued at the same time and together with the decision rejecting the application for international protection or without undue delay thereafter.*~~

Priority: HIGH

#### Recommendations:

- » Preserve the Parliament’s additional text to ensure that a full assessment of human rights risks, protection needs and applicable statuses is carried out.
- » Reject the issuing of the return decision “as part of” the rejection decision.

### 3. Limit Erosion of the Right to an Effective Remedy

#### **Article 53: No mandatory merging of asylum and return appeals**

Article 1 of the new Article 53 proposed in 2020 states that applicants shall have the right to an effective remedy before a court or tribunal against inadmissibility decisions, rejection decisions, decision on implicit withdrawal, decisions on withdrawal, and return decisions. A key element is the provision that return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as the other decisions listed.

The Council General Approach maintains the requirement that when the asylum decision and the return decision are taken jointly, the appeal must also take place jointly, meaning within the same judicial proceedings, before the same court, and within the same timelines.

The European Parliament’s position removes the obligation to merge the appeals against the asylum decision and return decision, it becomes a “may” clause, such that the return decision may be appealed before the same court but it does not have to be. This position is preferable.

#### **Article 53(1): What can be appealed – add a remedy for age assessment decisions**

The European Parliament adds the right to appeal against an age assessment decision (Article 53(1)). It also removes the possibility for Member States to dismiss an appeal by subsidiary protection holders against a decision that their application for refugee status is unfounded (“upgrade” appeals) in the case that the two statuses offer the same benefits and rights (which is in any case a rare circumstance). The General Approach maintains this possibility (Article 53(2)).

#### **Article 53(7): Provide a minimum of 30 days to appeal a decision**

The Commission proposal set strict time limits for the applicant to lodge an appeal, constituting a significant shift compared to the APD, according to which Member States need to provide “for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy.” The proposed time-

limits are: “(a) at least one week for decisions rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply.” (applicants subject to the accelerated examination). For all other cases, (b), the limits are between two weeks and two months. Drawing on case law and practical experience from asylum systems, ECRE strongly urged the co-legislators to provide a minimum 30-day time limit which is needed for an applicant to prepare properly. Varying treatment for different categories of applicants violate the rules and principles of good administration and the rule of law.

The General Approach reduces the time-limits to 5 days for cases in category (a) and between two weeks and one month (rather than two) for other cases. However, the Council’s proposed amendments to Article 40 also mean that more cases will fall under clause (a).

The European Parliament’s position does not significantly improve the article. It extends the time-limit in the first category to 7 working days from one week. For all other cases, it specifies a minimum of 15 working days (potentially 5 days more than the original) without an upper time-limit. In the following article it stipulates that when the applicant has requested legal advice, the time-limit will not start running until a legal advisor is appointed.

#### **Article 53(9): Retain more than one level of appeal**

The proposal required Member States to provide for only one level of appeal for decisions taken in the border procedure, a point of concern for ECRE which recommended removing the article completely as this may deprive applicants of an objective assessment of their claim and also because removing two levels of appeal may be unconstitutional in some Member States. Both co-legislators remove this requirement. The General Approach deletes the provision completely while the Parliament renders it non-obligatory.

#### **Article 53(9): Keep the right to a hearing as included in the original EC proposal**

The European Parliament introduces new text which would allow the court or tribunal to “hear” the applicant’s appeal through a written submission when the border procedure is used, without the requirement of an oral hearing.

Priority: HIGH

#### Recommendations:

- » Remove the requirement to merge appeals against asylum and return decisions, supporting Parliament’s amendments in Article 53(1).
- » Add an appeal against an age assessment decision as per the Parliament’s amendment to Article 53(1).
- » Delete the requirement to provide only one level of appeal, following the Council amendments to Article 53(9).
- » Reject the European Parliament amendment to remove the right to an oral hearing in Article 53(9).

#### **Article 54: Reinstating Automatic Suspensive Effect**

In the 2020 proposal, the new Article 54(1) clarified that the legal effects of a return decision issued together with a decision rejecting an application for international protection shall be suspended for as long as the applicant has a right to remain or is allowed to remain in accordance with the Regulation. However, at Article 54(3)(a) to (e), the proposal expands the categories of people who do not have the right to remain, which includes five categories which in some cases include further subcategories. These include appeals of decisions following accelerated examination as per Article 40(1)(list of grounds for acceleration) and (5) (unaccompanied children in accelerated examination procedures); on inadmissibility pursuant to Article 36 covering application of first country of asylum concepts and in subsequent applications with no new elements; rejections of implicit withdrawals; rejections of subsequent applications; certain withdrawal decisions. To note, the last clause of Article 54(3) stipulates that any negative decision taken in the border procedure shall not entail the right to remain for the applicant (although the wording is somewhat unclear).

ECRE considers that the right to remain pending the examination of the asylum application and until a final decision on such application is taken, is necessary for ensuring that the principle of non-refoulement is respected. The right to an effective remedy under Article 13 ECHR and Article 47 of the Charter requires the right to remain to extend to the appeals stage in the asylum procedure, as does the jurisprudence of the CJEU and ECtHR.

According to the 2020 proposal, where there is no automatic suspensive effect because the applicant is in a category which does not have the right to remain, a court or tribunal has the power to decide whether or not the applicant shall be allowed to remain on the territory pending the outcome of the remedy. The applicant has to request the right to remain in order to suspend the effect of the return decision pending the outcome of the appeal. As well as the risk of refoulement, extra administrative burden is created.

The General Approach preserves the original text with the list of categories where the applicant does not have the right to remain and where there is thus no automatic suspension of the effect of the return decision. It expands the list at Article 54(3)(b) where there is no right to remain when appealing an inadmissibility decision to include where inadmissibility was found due to the application being a subsequent application with no new elements.

The Parliament's position maintains the removal of automatic suspensive effect in the cases where the person does not have the right to remain, but it attempts to limit the categories of applicants who do not have the right to remain. First, the Parliament amends Article 54(3)(a) so that there is not a blanket removal of the right to remain for all decisions taken in the border procedure. It further amends the article to remove cases where the examination was accelerated based on the 20% threshold. Second, it removes cases of subsequent applications (both inadmissibility decisions and rejections) from the scope of the categories with no right to remain. Finally, it removes appeals against rejection based on implicit withdrawal from the scope and certain other withdrawal cases. Put differently, the Parliament's amendments reinstate the right to remain (and therefore the automatic suspension of the effect of the decision) for subsequent applications and rejections of implicitly withdrawn cases.

Nonetheless, the EP maintains the removal of the right to remain for categories of applicant covered by Article 40(1)(a), (b), (c), (d), (e), and (f), and Article (5),(b), so long as Article 47 does not apply (safe country of origin). That covers raising irrelevant issues, inconsistent, false or similar representations, presenting misleading or false information, application to delay or frustrate enforcement of a decision, safe country of origin, and national security, and then unaccompanied children where national security concerns arise.

For the Parliament, the time-limit for requesting the right to remain remains just 5 days, but these should be working days, and the time-limit only applies where the decision was taken in a border procedure.

#### Recommendation:

- » Agree on the albeit limited reinstatement of the right to remain included in the Parliament's amendment to 54(3)(a).

## 4. Improve Conformity with International Human Rights Law, including International Refugee Law

### **Article 44: Include definitions of safe country concepts that conform with international law and EU primary law.**

Article 44 of the 2016 Commission proposal contained significant changes to the first country of asylum provision in the recast APD, with the standards required for a country to be considered a first country of asylum reduced. The concept of "sufficient protection" is defined in a way that set a low threshold. In addition, the APD requires that the applicant has been "recognised as a refugee", whereas the proposal stated that the applicant should have "enjoyed protection in accordance with the Geneva Convention in that country".

The General Approach replaces "sufficient protection" with a concept of "effective protection" which echoes UNHCR's language but sets a lower standard than that of the Refugee Convention. The General Approach allows effective protection as an alternative to Convention-level protection: as per Recitals 35a and 37, the country needs to have signed the Refugee Convention or to have in place "effective protection" in the restricted meaning of the term used.

Article 44 states that a third country may be considered a first country of asylum only where certain criteria apply (cumulatively). The first three criteria are that the applicant's life and liberty are not at risk and where they face no risk of serious harm and are protected against refoulement, which are maintained. The General Approach however has removed many criteria including those referring to family reunification and access to socio-economic rights such as the right to work. A new criterion is added which refers back to effective protection, specifying that the person should have enjoyed "effective protection" and be able to avail themselves of it again.

The Parliament's position also uses the term "effective protection" but defines it in relation to the Refugee Convention, stating that the concept can only apply provided that, "the applicant has been recognised as a refugee and has enjoyed effective protection in accordance with the Geneva Convention in that country before travelling to the Union and he or she can still avail himself or herself of that protection."

#### Recommendation :

- » Agree a definition of safe country that corresponds to international human rights law, including the Refugee Convention, as required by EU primary law.

#### **Article 45: Halt erosion of standards in the use of the safe third country concept**

As has been extensively debated, Article 45 in the 2016 proposal contained important changes compared to the APD, which would allow for a far broader application of the safe third country concept. The concept was made mandatory for Member States; however, the co-legislators have largely rejected its mandatory use (see above on Article 36).

The proposal also lowered the level of protection required for a country to be considered safe and reduced the required level of connection between the applicant and the country (the connection criterion) such that "mere transit" across the country could be considered sufficient connection. The Council ended up deleting the wording from the text, only referring to "stay" (albeit in the recitals) as a possible criterion to consider in assessing the fulfilment of the reasonable connection requirement. In contrast to Article 38(1)(e) of the APD, it is no longer required for the applicant to have the possibility to request and obtain refugee status in accordance with the Geneva Convention. A much weaker standard of "protection in accordance with the substantive standards of the Geneva Convention" was sufficient. ECRE criticised the unclear distinction between substantive and less substantive provisions of the Geneva Convention and the "pick-and-choose" approach to the Convention.<sup>1</sup> The proposed wording also appeared incompatible with the requirement in Article 78(1) TFEU for the EU's common policy on asylum to be "in accordance with" the Convention and "other relevant treaties" and with the right to asylum laid down in Article 18 of the EU Charter of Fundamental Rights.

As with the first country of asylum concept, the General Approach reduces the number of criteria for classification of the country as safe to the bare minimum. It also adds the reference to "effective protection" in place of the list of substantive requirements. The General Approach also allows for the designation of a country as safe with exceptions made for specific parts of its territory for certain categories of people.

A highly concerning paragraph in Article 45(3) allows the states to bypass all of the above requirements in the cases where an agreement has been made between the EU and a third country, as follows:

"[...] Where the EU and a third country have jointly come to an agreement that migrants admitted under this agreement will be protected in accordance with the relevant international standards and in full respect of the principle of non-refoulement, the conditions of this Article regarding safe third country status may be presumed fulfilled without prejudice to paragraph 2b."

On a straightforward reading of the article, the existence of the agreement generates the presumption that the third country is safe, however, the mere existence of an agreement in which a country commits to protect people in line with international standards does not indicate that it is safe in reality. Only rigorous assessment of the evidence of the actual situation in the country by expert, authoritative bodies, can demonstrate the safety or otherwise of the country for a particular person or group. In addition, the construction of the sentence renders the reference to paragraph 2b, supposedly introduced as a safeguard, largely meaningless. Recent experience, including the EU's and states' dealings with Rwanda, Turkey and Tunisia, demonstrates that third countries offered benefits by Europe may be willing to make claims – or indeed efforts – to be safe for asylum

1. According to Article 42 of the 1951 Geneva Convention, States can only make reservations at the time of signature ratification or accession to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46.

applicants, refugees or other people while objective evidence throws doubt on such claims.

As part of the agreement among Member States, the General Approach provides for a review of the concept one year after the Regulation enters into force as part of monitoring and evaluation provisions, to be carried out by the Commission which can propose “targeted amendments”.

The European Parliament’s position also replaced the concept of sufficient protection with effective protection; however, the latter is defined in accordance with UNHCR standards and the Refugee Convention remains the reference point. It adds criteria to the requirements. Thus, the level of protection must include inter alia the right to legal residence, access to the labour market, reception facilities, healthcare, and right to family reunification. It removes the provision that transit could create sufficient connection and expands further on the requirements that make up the connection, which must be assessed in light of the duration and nature of previous residence or stay in the country.

There are a number of other elements where the co-legislators pull in different directions, including on the application of the safe third country concept to unaccompanied children, where the Parliament specifies that it should not be used unless it is clearly demonstrated to be in the best interests of the child and the General Approach suggests that it can be used unless it is not in the best interests of the child.

Priority: HIGH

#### Recommendations:

- » Remove paragraph Article 45(3) that allows Member States to presume a country is safe on the basis of an agreement, bypassing EU and international law.
- » Maintain the Parliament’s definition of effective protection as per its amendments to Article 45.
- » Maintain the meaningful connection requirement as per the European Commission’s initial proposal for Article 45(3)a, but excluding the possibility of mere short transit constituting such connection.

#### **Article 57c: Strengthen fundamental rights oversight at the EU’s borders**

In reaction to the widespread and systematic human rights violations at the EU’s borders, the European Parliament has added a mechanism for monitoring respect for fundamental rights in the border procedure. It should be an independent mechanism which involves National Human Rights Institutions, ombudspersons and intergovernmental organisations and be complementary to the mechanism included in the Screening Regulation (see below). The Council does not have a position on this provision as it was not included in the initial European Commission proposal.

#### Recommendation:

- » The independent mechanism to monitor respect for respect for fundamental rights in border procedures in Article 57c of the EP’s position should be adopted in the final compromise.



## II. Regulation on Asylum and Migration Management (RAMM)

The European Commission's proposal for a reform of the Dublin system outlined in the RAMM did not foresee a substantive reform of the rules, including the first country of entry principle. Like Dublin IV before it, the overall approach of the RAMM to responsibility allocation is to maintain the status quo but add "corrective" solidarity mechanisms intended to compensate for the outcomes of the standard rules and make them fairer for the Member States at the external border of the EU. Although the RAMM proposal includes some positive elements, these are often outweighed by related negative changes – it gives with one hand and takes back with the other, for example by introducing further measures directed at discouraging onward movement. ECRE commented that a deeper overhaul of the criteria on sharing of responsibility is vital to address the system's dysfunctionalities.

The co-legislators have proposed amendments to the original proposal that generally pull in opposing directions.

The Council's General Approach reinforces responsibility rules for countries of first entry, inter alia by deleting the few provisions aimed at a fairer balance of the system, such as those expanding family reunification opportunities. It also proposes the concept of "mandatory but flexible" solidarity, such that Member States would be allowed to fulfil their solidarity obligations through financial contributions that could support a variety of projects in the areas of migration, border management and asylum, as well as projects in third countries, as an alternative to responsibility for asylum seekers under solidarity/relocation schemes.

While the European Parliament's proposal largely replicates the Commission proposal, it did introduce some small improvements to the responsibility sharing rules. It also maintains the focus of solidarity on relocation. These changes should be maintained if the system is to be fairer for applicants and Member States alike.

If the moderate changes to the distribution of responsibility for people seeking asylum in Europe are not agreed, disproportionate responsibility will continue to lie with the countries at the external border. In turn, it is likely that Member States at the external border will continue to have an incentive to deny access to their territory, to keep reception and integration measures limited, and to let people travel onwards to other Member States.

The Council's General Approach can be found [here](#). The European Parliament's position can be found [here](#).

### 1. Maintain Safeguards for Applicants in a Country other than the one Responsible

#### **Articles 9 and 10: Limit sanctions imposed on applicants as a consequence of onward movements**

The Commission's proposal established that an applicant would lose the right to reception conditions in any Member State other than the one in which they are required to be present from the moment that they receive notification of a transfer decision, a measure directed at discouraging onward movement. The Council's General Approach remains in line with the Commission's proposal.

While maintaining that applicants present in a different Member State to the one responsible for their application would lose the right to access reception conditions, the Parliament introduced some positive changes to the provision (Article 10), indicating that the measure does not apply in cases in which the applicant's presence in the Member State is due to reasons beyond their control, and the need to take into account the individual circumstances of the applicant, including the real risk of violations of fundamental rights.

**Priority: HIGH**

#### Recommendation:

- » Maintain the elements introduced by the EP in Article 10, that would allow applicants to access reception conditions even if present in a MS other than the one responsible for their application in some circumstances.

### **Article 33: Defend the right to an effective remedy**

The Commission's proposal restricted the scope of appeals against a transfer decision to an assessment of the existence of a real risk of inhuman or degrading treatment for the person concerned within the meaning of Article 4 of the Charter of Fundamental Rights. It further established that, while the applicant would have the right to request the suspension of the transfer decision pending the outcome, the appeal – to be lodged within two weeks from the notification of the transfer decision – would not have automatic suspensive effect.

The General Approach largely maintains the Commission's proposal. On the contrary, the EP expanded the scope of the remedy to entail (at least) the assessment of the risk of violations of all fundamental rights enshrined in the Charter and added the suspensive effect of the appeal. It also expanded the possibility to access legal assistance and removed restrictions introduced in the Commission's proposal.

One negative element in the EP proposal was the reduction of the deadline set for the exercise of the right to an effective remedy, from two to just one week. The Council instead established that the Member State shall provide for a period of at least one week but no more than three weeks after the notification of a transfer decision within which the person concerned may exercise his or her right to an effective remedy.

**Priority: HIGH**

#### **Recommendation:**

- » Maintain the EP position on remedies in Article 33, as it expands safeguards for applicants subjected to the provision of the Regulation.

#### **Recommendation:**

- » Support the Council amendments to Article 33 such that MS can establish a period of a maximum of three weeks after the notification of the transfer decision for the applicant to exercise their right to an effective remedy.

## **2. Support a Fairer Balance in Responsibility Allocation Rules**

### **Articles 2, 14, 15, 25, 25a, 30: Support the – albeit limited – improvements to standard rules on allocation of responsibility**

The Commission's proposal on RAMM largely maintained the same rules as the current Dublin Regulation, but positively expanded the family member definition to cover siblings. The General Approach removes this change.

The Parliament has maintained the extension of the family member definition present in the EC proposal and then further widened the scope in Article 2 to include beneficiaries of protection and adult dependent children in addition to siblings. It also maintained the positive changes included in the EC proposal related to evidence required and when it can be submitted (Article 30).

The Parliament has also included the concept of a "meaningful link" with another Member State as a new criterion for allocating responsibility (Article 14 and 25) and has introduced a fast track procedure for family reunification (Article 25a). Through Article 15, it established that the criterion of family unity should also be applied to children accompanied by one of their parents when the other is in another Member State. The EP's positions are more likely to improve solidarity in the EU and support the right to family life, and are thus preferable.



Priority: HIGH

## Recommendations

- » Maintain the “meaningful link” with a Member State as a criterion for establishing responsibility in the Parliament’s amendments to Article 14 and 25.
- » Maintain the improvements to responsibility rules in relation to expanded possibilities for family reunification, the fast track procedure for family reunification and proposed changes to evidential requirements in the Parliament’s position on Articles 2, 15, 25, 25a and 30.

### **Articles 21 and 27: Prevent increased time limits for shifting of responsibility**

The Commission proposal largely maintains the Dublin rules for the allocation of responsibility. It did however extend the duration of responsibility of the countries of first entry. Although not going as far as the “permanent responsibility” set out in the Dublin IV proposal, the period before the responsibility of a Member State ceases has been extended.

The General Approach further extends the period of responsibility of the country of arrival for an applicant to two years for people who enter at the external border. It is reduced to 15 months after a rejection in the border procedure (intended to incentivise the use of the border procedure) and to 12 months for those rescued at sea (at the insistence of Italy). The improvements to the rules on responsibility (compared to Dublin) proposed by the Commission have been rejected by Member States, including removing the wider family definition to allow family unification with siblings.

The Parliament’s amendment states that responsibility of the Member State of first entry should cease after 12 months (instead of the 3 years initially proposed by the Commission), which was the time period suggested in ECRE’s recommendations. Additionally, for the Parliament responsibility ceases after a person has been absent from the Member State’s territory for three months, as under the current Dublin rules.

## Recommendation:

- » Agree positions on cessation of responsibility as per Articles 21 and 27, according to which responsibility of the MS of first entry should cease after 12 months.

## 3. Make the Most of the Solidarity Mechanism

### **Articles 45 and 45b: Maintain the focus on solidarity through relocation**

The European Commission proposed corrective solidarity mechanisms for two situations 1) disembarkation following Search and Rescue (SAR) and 2) migratory pressure.

The Council has agreed for the first time on a solidarity mechanism, to be activated if countries face migratory pressure, a situation which is determined by the Commission. In such situations, solidarity contributions from Member States are mandatory but will be flexible, meaning that the states can choose between relocation, capacity building or a financial contribution. The annual target for relocations throughout the EU is set at 30,000. While the introduction of “responsibility offsets” and of the minimum annual target of 30,000 relocations to be carried out at the EU level are aimed at ensuring that financial contributions are not the only form of solidarity contribution provided, the target appears insufficient to address the needs of MS at the external borders. The risk that only a few Member States will decide to carry out relocations also remains. The majority may choose to pay the equivalent of EUR 20,000 to a facility managed by the Commission or support activities that aim at preventing migration outside the EU.

The separate mechanism for SAR has been rejected by the Council.

The Parliament has also deleted reference to the solidarity mechanism for disembarkation after SAR. Instead, one solidarity mechanism applies to all situations of migratory pressure, which also covers migratory pressure due to sea arrivals following disembarkation. Reduction to a single solidarity mechanism simplifies the solidarity process, which was extremely complicated. However, the concept of migratory pressure can be applied

extensively and, given the role of the Commission in the assessment, much would be left to its discretion, which could in turn lead to inconsistency in the determination of solidarity needs.

A positive element of the Parliament's position is the focus on relocations as the form of solidarity to be prioritised. According to Article 45b(3), "At least 80% of pledges in the solidarity pool shall be made up of relocation".

Overall, ECRE welcomed the introduction of a solidarity mechanism in the Commission's proposal, as well as the creation of a dedicated SAR mechanism. While the latter has been rejected by both co-legislators, the need to ensure that the solidarity is mainly provided through relocation remains a relevant priority.

#### **Article 57: Give priority to meaningful links for the purpose of relocation**

The Commission had already expressly set out in its proposal that "meaningful links" between the person and countries of relocation should be taken into account, without, however, granting applicants the possibility to indicate their preference for a country of relocation or requesting their consent to relocation.

This provision is also included in the Council's General Approach. The Council version differs from the Parliament's in the sense that it sets out that the Member States will establish whether meaningful links (such as those based on family or cultural considerations) exist, without mentioning the applicant's role in the process, and explicitly establishes that the person concerned shall not have the right to request to be relocated to a specific Member State.

The EP gives instead more relevance to the interests of the applicant, by establishing the obligation for the Member State to fully inform and consult the applicant in the procedure of determination of the meaningful links, and the right for the applicant to present relevant information and documentation to determine links to a specific Member State.

ECRE welcomed the introduction in the Commission text of the "meaningful links" between the person and countries of relocation that should be taken into account, but stresses the necessity to ensure that the applicant's interests are considered in the evaluation.

Priority: HIGH

#### Recommendation:

- » Maintain the focus on solidarity through relocation present in the EP position Article 45b.

#### Recommendation:

- » The provisions introduced in Article 57 by the EP establishing the obligation for the Member State to fully inform and consult the applicant in the procedure of determination of the meaningful links, and the right for the applicant to present relevant information and documentation to determine links to a specific Member State should be reflected in the final agreement.

#### **Article 55a: Limit the scope of support of financial contributions and capacity building measures, and include references to fundamental rights**

The Council position on which solidarity measures could be provided through the Solidarity Pool differs from that of the EP. It establishes that, in addition to relocation, the Solidarity Pool may also consist of financial contributions provided by Member States and alternative solidarity measures focusing on capacity building, services, staff support, facilities and technical equipment.

The provisions on financial contributions were not part of the General Approach of 8 June, and are still under negotiation. The proposal from the outgoing Swedish Presidency provides that the contributing Member States should transfer a set amount to the Union budget in the form of external revenues for the

purpose of financing projects under the Solidarity Pool. The benefitting Member State would present a list of projects that could be financed, over which the European Commission would have a monitoring role.

Financial contributions could be used to support projects related to “the area of migration, border management and asylum”, and also projects in third countries “that may have a direct impact on the flows at the external borders or may improve the asylum, reception and migration systems of the third country concerned, including assisted voluntary return and reintegration programmes and anti-trafficking or anti-smuggling programmes” (Article 44a(2)(b) of the Council text).

Regarding “alternative solidarity measures”, the Council position notes that they should be based on the request of the benefitting Member State and does not specify the types of projects that can be financed, beyond “capacity building, services, staff support, facilities and technical equipment”. ECRE finds these provisions concerning as they would allow Member States to provide solidarity contributions in the form of support to projects that would increase border control, and possibly further limit the possibility to access asylum for people in need.

The Parliament position refers to “capacity building measures” rather than to financial contributions, but the two concepts are similar. The text sets out limitations on the areas that could be supported by a contributing Member State as an alternative to relocation. Article 55a(1) establishes that capacity building measures can be related to “the field of asylum, reception and pre-departure reintegration and operational support”, while Article 55a (4,5,6) includes positive safeguards on monitoring by the EUAA and Parliament itself. While including the possibility to support projects in third countries, the EP text (Article 55 a(3); Recital 15b) restricts the projects to certain activities, and requires that they be compliant with fundamental rights and implement the Union’s values.

#### Recommendations:

- » The scope of financial contributions and/or capacity building measures should be limited. Projects focusing on border management should not be supported through solidarity measures.
- » Support to projects in third countries should be conditional on their compliance with fundamental rights.

### III. Screening Regulation

The Screening Regulation establishes a pre-entry screening process for (almost) anyone arriving at an EU border irregularly, including following disembarkation after Search and Rescue (SAR). It aims to strengthen control of people entering the Schengen area and refer them to an appropriate procedure. Instead of amending the existing Schengen Borders Code, a whole new five-day process or procedure (up to ten days in exceptional circumstances) has been proposed to check ID and security threats, register biometrics, and verify health and vulnerabilities.

While certain health and vulnerability checks are essential, ECRE holds that the proposal generates more risks than it provides benefits. Notably, there is significant uncertainty about the rights of those who undergo the screening process covering key elements including: use of detention; reception conditions; legal assistance; the thoroughness of health and vulnerability checks; implications of the decision they receive; whether and how the decision can be challenged; the grounds for refusal of entry; and the use of the data collected.

The Council's General Approach further weakens rights compared to the original proposal and introduced new obligations on third country nationals with penalties for individuals who abscond, and a weaker fundamental rights mechanism. The positive developments include that it has been clarified that reception conditions standards in the RCD should be applicable from when individuals apply for asylum and a strengthened approach to vulnerability as Member States have to report any vulnerability observed or reported to them.

Parliament introduced a number of positive changes to safeguard fundamental rights during the screening process and is pulling in different directions to the Council decision on various points. If the potential positive impact of the Screening Regulation is to be realised, those positions will need to be defended.

The Council's General Approach can be found [here](#). The European Parliament's position can be found [here](#).

#### **Article 3a: Ensure application of Reception Conditions Directive in the screening process for anybody who has applied for asylum**

The Commission's proposal was not clear on when and whether the RCD would apply to applicants of international protection who undergo the screening process.

In its position, the Council has deleted reference to standards in the RCD being applicable "at the end of the screening" which should mean they are applicable from when individuals apply for asylum.

The EP spells this out in detail in its position in that it introduced Article 3a to clarify that in case of an asylum application both APR and RCD apply.

ECRE holds that the explicit reference to the application of the RCD is essential to ensure that applicants have access to rights, including to material reception conditions and to avoid any ambiguity. It will also mean that RCD standards on detention will apply.

#### **Recommendation:**

- » Agree on the explicit reference to the applicability of the RCD from the moment a person has applied for asylum in Article 3a of the EP's position.

#### **Article 4: Remove the mandatory application of the fiction of non-entry during the screening process**

The Commission proposal suggested that persons undergoing screening are not authorised to enter the territory of the Member State. ECRE opposes the use of fiction of non-entry because states typically rely on it to deny jurisdiction or to otherwise deny the applicability of safeguards for the people affected.

This mandatory application of the fiction of non-entry has also been adopted by the Council.

The European Parliament has turned it into a may clause, meaning that Member States may, but do not have to apply, the fiction of non-entry (Article 4), apart from cases where a Member State is implementing a border procedure that a person would fall under (Article 4(2)(a) of the EP position).

#### Recommendation:

- » [Reject the mandatory application of the fiction of non-entry for people undergoing screening in Article 4.](#)

#### **Article 5: No screening on territory**

The Commission proposed the possibility of screening on the territory where there is no indication that the person has crossed an external border to enter the territory of the Member States in an authorised manner.

The Council has adopted this as its position as well. The European Parliament has deleted the option for Member States to conduct screening within the territory.

ECRE holds that such a screening would encourage proactive measures to extend the use of screening processes on the part of Member State authorities and may encourage discriminatory policing. In addition, it is unclear how a person would be able to prove upon apprehension that they had crossed external borders in an authorised manner, especially if that had occurred long time beforehand.

Priority: HIGH

#### Recommendation:

- » [Reject the screening process on the territory of Member States and delete Article 5.](#)

#### **Article 7: Strengthen the border monitoring mechanism**

The Commission proposed an independent monitoring mechanism to be introduced at Member State level to monitor compliance with fundamental rights during the screening process. This was a welcome initiative, albeit the initial proposal's limitation regarding scope, independence, accountability and consequences as argued [here](#).

In its position, the Council's General Approach has further weakened the Commission's proposal in terms of the independence and effectiveness of the mechanism.

The Parliament, in turn, has strengthened the mechanism by expanding its scope to monitor compliance with Union and international law, to apply during border surveillance and the screening procedure, and to include reference to access to asylum, the principle of non-refoulement, the best interests of the child, the right to health care and reception conditions, and the relevant rules on detention and procedural safeguards. It has also added clarity to the applicable rules relating to independence and accountability.

ECRE's position is that only a robust and effective monitoring mechanism with a broad scope will be able to function efficiently and to address the widespread violations of rights at the EU's border. An agreement on weak and ineffective mechanisms will likely do more harm than good.

Priority: HIGH

#### Recommendation:

- » [Agree on a strengthened monitoring mechanism as per the EP's position on Article 7.](#)

#### **Article 13: Ensure that the person undergoing screening received a copy of the debriefing form and has the possibility to check whether the information about him/her is correct**

Upon completion of the screening process, the authorities in charge fill out a debriefing form and refer the person to a procedure (asylum, return, or refusal of entry). The debriefing form is the only document issued at

the end of the screening and it contains information which may be crucial in both the referral and the procedure that follows. The European Commission's proposal did not include the obligation to provide the debriefing form to the person concerned or to provide the person with the possibility to appeal, as should be the case with an administrative act as ECRE has argued.

The General Approach largely supports the Commission proposal.

The Parliament's position introduced the obligation on the authorities to provide people with a copy of the form and the right to check that the information therein is correct. This does not include the possibility to appeal the outcome of the screening process, however.

**Priority: HIGH**

**Recommendation:**

- » Agree to the EP's position on Article 13 and ensure that the person concerned has access to the debriefing form and can check the information contained therein is correct.

**Article 9a: Guarantees for children**

The EP added important safeguards for children (new Article 9a) including: for a representative to be appointed as soon as possible for unaccompanied children, and preferably the same representative as would be appointed under the RCD; the representative will act in the best interests of the child and will have the necessary expertise to do so; anyone with a potential conflict of interest with the best interests of the child will not be able to be a representative; and each representative shall be in charge of a proportionate and limited number of children, which will usually be less than 30.

The EP also included amendments for support to minors to be given in a child-friendly manner, in addition to its being provided by personnel properly trained and qualified to deal with children, and in cooperation with child protection authorities (Article 9). It also introduced mandatory vulnerability and health checks and provisions that individuals should be referred to adequate facilities for support (Article 9). Finally, parents of children, or representatives of unaccompanied children, will receive a copy of the screening form to enable children to access their rights under GDPR (new in Article 14).

**Recommendation:**

- » Maintain important additional safeguards introduced by the EP, including on the appointment of guardians.

## IV. Eurodac Regulation

ECRE has commissioned and published a detailed analysis of the Council's and the Parliament's positions on the Eurodac proposal which can be found [here](#). The following section provides a summary of the content of the proposal and the issues that remain to be decided.

On 4 May 2016, the Commission adopted a recast Eurodac proposal within the framework of revising CEAS-related legal instruments. The proposal essentially detached Eurodac from its asylum framework and re-packaged it as a system pursuing "wider immigration purposes", particularly in relation to supporting returns of irregular migrants. The negotiations on that proposal led to a (secret) interinstitutional agreement in mid-2018 between the co-legislators. The main changes to Eurodac, in line with the proposal as accorded in the Interinstitutional Agreement, could be summarized as follows: expansion of its scope by lowering the threshold for storing personal data in the system to the age of six; and storage of records on persons found to be irregularly staying on national territory and records on resettled individuals. Although Eurodac is primarily a fingerprint database, additional categories of personal data will be stored in the system, including individuals' facial images and copies of travel and identity documents.

On 23 September 2020, the Commission proposed further amendments to the Eurodac regime within the framework of the New Pact on Migration and Asylum. The amended proposal calls for several additional amendments to how Eurodac operates, both within the framework of CEAS and migration control, and within an interoperable environment, whilst taking into account the interinstitutional agreement between the Council and the European Parliament. In a nutshell, the 2020 Commission proposal calls for the following amendments:

- » Counting applicants for international protection in addition to counting applications;
- » Creation by eu-LISA of cross-system statistics using data from Eurodac, EES, ETIAS and VIS;
- » Creation of a new category for persons disembarked following a search and rescue (SAR) operation and consistency with the proposal for a Regulation on Asylum and Migration;
- » Consistency with the Proposal for a Screening Regulation regarding the collecting of biometric and alphanumeric data;
- » Addition of new categories of personal data, namely: where an application for international protection has been rejected; where the applicant has no right to remain and has not been allowed to remain in a member state, recording whether voluntary return and reintegration assistance (AVRR) has been granted to a third-country national; whether it appears that the person could pose a threat to internal security following a screening process; where there are indications that a visa was issued to the applicant, the member state which issued or extended the visa or on behalf of which the visa has been issued and the visa application number; mention of the responsible member state, the shift of responsibility to another member state and the cessation of responsibility, as well as the relocation of international protection beneficiaries.
- » Consequential amendments relating to the forthcoming interoperability of large-scale IT systems.

The Council's General Approach can be found [here](#). The European Parliament's position can be found [here](#).

ECRE puts forward the following recommendations based on previously published analysis of the Council's general approach and the European Parliament's updated negotiating mandate.

## Recommendations:

- » Remove the separate category of persons disembarked following a SAR operation (Article 14a);
- » Do not include beneficiaries of temporary protection as a separate category within the scope of Eurodac (Article 14c) as to do so does not meet necessity and proportionality tests;
- » Include in Eurodac's objectives the protection of child victims of human trafficking and the identification and protection of missing children (Article 1);
- » Include additional safeguards, particularly on law enforcement's access to children's data (Article 1 paras 2a-2d);
- » Clarify which categories of personal data on resettled persons will be collected in a clear, exhaustive and proportionate manner, along with the modalities for processing such data (retention and marking) (Articles 12a, 17 and 19);
- » Introduce clearer rules on access to Eurodac by Frontex and the EUAA for the purposes of collecting and transmitting Eurodac data (Article 8c(a));
- » Add safeguards on the drawing up of statistical data in line with the European Parliament mandate (Article 9);
- » Consider to whether the references to relocation should be maintained. (The RAMM negotiations will be completed by February 2024). (Article 14b).

## Priority: HIGH

## Recommendations:

- » Remove the category of personal data on individuals posing a threat to internal security data, given the impact on the fundamental rights of privacy, data protection and asylum for the persons concerned, and given the lack of relevant safeguards (Articles 12(v), 13(r), 14(s), 14a(r)).

If this category is included, then the following should apply, as per the second compromise option of the European Parliament's negotiating position:

- » Add rules on the information to be included, the criteria to be implemented for inclusion, and safeguards on the treatment of persons with an internal security flag.



## V. Crisis and Force Majeure and Instrumentalisation Regulations and the revised Schengen Borders Code

In contrast to the proposals analysed above, the Crisis and Force Majeure Regulation, the Instrumentalisation Regulation, and the amended Schengen Borders Code (SBC) have not yet reached trilogue stage. This is because on each of the files, one or both of the co-legislators have yet to adopt a position. Specifically, the Council does not have a position on either the Crisis and Force Majeure Regulation or the Instrumentalisation Regulation and the Parliament does not have a position on the Instrumentalisation Regulation or on the SBC reform.

Both the Crisis and Force Majeure Regulation and the Instrumentalisation Regulation are based on allowing Member States to derogate from standards under the APR, rRCD and the recast Return Directive, respectively in situations of crisis, “force majeure” or “instrumentalisation”. The SBC reform is linked to these proposals because it includes the definition of instrumentalisation.

ECRE’s analysis of the Crisis Regulation can be found in its [detailed Comments](#) and [shorter Policy Note](#). ECRE does not support the proposed Crisis Regulation, with the exception of immediate protection status. On the SBC proposal, ECRE’s [detailed Comments](#) and [Policy Note](#) set out its concerns. Finally, ECRE strongly opposes the “Instrumentalisation Regulation” because it provides for the expanded use of concepts and practices which undermine the right to asylum in Europe and global protection. The analysis is provided in [detailed Comments here](#), a [shorter Policy Note here](#), and a [joint civil society statement here](#), which is available in eleven languages.

The Council’s position on the Schengen Borders Code can be found [here](#). The EP’s position on the Crisis and Force Majeure Regulation can be found [here](#).

### 1. Reject the proposed merged Crisis, Force Majeure and Instrumentalisation Regulation

While the Council agreed on a definition of instrumentalisation of migration in its position on the amended Schengen Borders Code, it has not yet agreed on the mechanism for derogation and the types of derogation to be included in the Instrumentalisation Regulation. During the Czech Presidency, an attempt was made to reach a Council position on the Instrumentalisation Regulation but it failed, due to in part concerns related to the impact on fundamental rights and the proportionality of the proposal.

Although not part of the Pact, instrumentalisation featured prominently in Council negotiations on both the APR and RAMM, and the Swedish Presidency, in cooperation with the European Commission, proposed merging the Instrumentalisation Regulation with the Crisis and Force Majeure Regulation. This proposal for a merged instrument is currently the basis for discussion in the Council.

If the Council adopts this “one stop” legislation for derogations, it would open the door for three derogatory regimes that would be available to Member States at any given time. Civil society across Europe has voiced [strong opposition](#) to this merged Regulation.

The European Parliament has not yet discussed the Instrumentalisation Regulation. Due to the lack of a proper impact assessment by the Commission, the Parliament commissioned a Substitute Impact Assessment which, in addition to an overall assessment including on fundamental rights, focuses on the impact of the proposed measures in several Member States. Only once this is submitted in September 2023 will the work on the file start. There is broad resistance in the Parliament to the concept of instrumentalisation and to its codification in EU law, including in the Schengen Borders Code.

Priority HIGH

#### Recommendations:

- » (to Member States) Reject the merged Crisis, Force Majeure and Instrumentalisation proposal.
- » (to co-legislators) Reject the codification of instrumentalisation in EU law via the Schengen Borders Code or other legislative proposals.

## 2. Make an agreement on a Crisis Regulation conditional on maintaining the positive elements of the European Parliament's position

The EP's position on the Crisis Regulation has significantly improved the European Commission's proposal from a rights-based perspective.

This includes among other elements:

- » All references to force majeure have been removed, including use of situations of "force majeure" as justification for derogations and related derogations on registration (Article 7), time limits for transfers (Article 8), and solidarity provisions (Article 9) under RAMM;
- » A clear definition of crisis has been added (new Articles 1a);
- » Quantitative indicators to assess whether a situation of crisis is taking place have been proposed (new Articles 1b);
- » The process of designating, monitoring and ending a situation of crisis has been set out (new Articles 1c);
- » The solidarity mechanism (new Articles 2a, 2b, 2c) in times of crisis focuses on mandatory relocation as well as postponement of transfers procedures (New Article 8a) and exemption of obligations as regards relocation in a situation of crisis (New Article 9a);
- » Prima facie recognition has been introduced instead of immediate protection (Article 10);
- » Repeal of the Temporary Protection Directive (TPD) has been deleted (Article 14);
- » Additional provisions – not part of the original EC proposal – on crisis preparedness have been added including: EU relocation coordinator; operational coordination; support from EU agencies and financial support (new Articles 1e; 2d; 2g; 2h; 2i).

The EP's progressive position on this problematic file is welcome and should be applauded. However, it should not lead to the EP accepting the Crisis Regulation at any cost. It is better not to have the Regulation if it includes extensive derogations, if it incorporates provisions on instrumentalisation, and if the misuse of force majeure is maintained as is currently foreseen in the proposal discussed by the Council.

### Recommendation:

- » The European Parliament should only conclude trilogue negotiations on the Crisis Regulation if most of its amendments are agreed. If the Council agrees on the merged Crisis, Force Majeure and Instrumentalisation Regulation, it is very difficult to see how the positive elements of the EP's position can be maintained.



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