

# PICUM RECOMMENDATIONS ON THE **CRISIS REGULATION**

## PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADDRESSING SITUATIONS OF CRISIS AND FORCE MAJEURE IN THE FIELD OF MIGRATION AND ASYLUM 2013/32/EU

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*PICUM is a network of more than 160 organisations working in more than 30 countries, mostly in the EU, to ensure social justice and human rights for undocumented migrants. The following amendments focus on the area of PICUM's expertise, which is ensuring and protecting human rights for undocumented migrants. Therefore, provisions affecting the right to asylum are outside of the scope of the following analysis.*

*For a Pact-wide overview of our concerns, read [More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations](#).*

### **Ensuring democratic accountability:**

Declaring a situation of crisis or force majeure has heavy implications on fundamental rights, including the right to liberty and to asylum. As such, it is important to ensure that the European Parliament, as democratic basis of the European Union, is adequately involved in the procedures.

#### **We recommend:**

- Amending article 3 to ensure that the European Parliament is adequately consulted in the procedure leading to the application of the rules laid down in Articles 4, 5 and 6.
- Amending article 7 to ensure that both the European Commission and the European Parliament are adequately involved in the process of validation of a situation of *force majeure*.

## Preserving safeguards with regard to detention:

The proposed screening and asylum and return border procedures would lead to the automatic detention of individuals, even in circumstances in which this is not openly defined as detention. In [FMS v. Others](#), the CJEU considered that the conditions of border centres with a closed perimeter and no right to leave amount to detention (para. 231)<sup>1</sup>. Moreover, the proposed text of the Screening and Asylum Procedures Regulation also apply to children above 12 if they are with their families, as well as younger children or unaccompanied children for national security reasons. EuroMed Rights estimated that in Italy, the implementation of the Crisis regulation would require multiplying the number of places in detention facilities by [50 times](#) in situations of crisis.

This goes against the objective of effectiveness, as the costs involved with such a multiplication of detention centres are incredibly high, and infringes on the principle of proportionality, which requires that detention should always be applied for the shortest time possible (c.f., among others, [Revised Deliberation](#) of the Working Group on Arbitrary Detention, [CoE](#) Guideline 8).

We propose these amendments to reduce detention periods in situations of crisis.

### We recommend:

- Deleting art. 4(1)(b) and 5(1)(a) which extend the duration of the asylum and return border procedures by 8 additional weeks, thus leading to a total of 40 weeks for both procedures. This, added to the 10 days pre-entry screening, would amount to almost 10 months of detention under the border procedures.
- Deleting recital 15 extending the pre-entry screening phase of 5 additional days.
- Delete art. 5(1)(c) which introduces new grounds for detention.
- Reducing the maximum time limits for the application of the special rules under articles 4, 5 and 6 and under the force majeure regime.

<sup>1</sup> “It follows from all of the foregoing considerations that the answer to Question 3(b) and Question 4(a) is that Directives 2008/115 and 2013/33 must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national’s movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterised by ‘detention’ within the meaning of those directives.” (emphasis added). This matches the long-standing case law of the ECtHR ([Amuur v France](#), para.49).

## Deleting article 257 on return sponsorship:

The proposed “return sponsorship” scheme raises more questions than answers.

Firstly, the multiplication of actors involved in the return process will risk **creating legal gaps in accountability**. In particular, the “threat” of transfer if returns are not carried out within 4 months risks to act as a perverse incentive towards **speeding up returns at all costs, with little consideration for human rights**. On the one hand, the “benefitting” state will have no incentive in assessing whether there might be human rights impediments to return, and, if applicable, provide opportunities for status resolution<sup>2</sup>, as it will be known that the person would ultimately be transferred to another country after four months. On the other hand, the “sponsoring” state will be pushed to speed up return at all costs within the first 4 months – potentially overlooking human rights concerns – to avoid transferring the undocumented person to their territory.

Secondly, it is unclear what will be the situation of people who will be transferred to the sponsoring country. **Will they be detained, potentially in violation of EU and international law principles stating that detention should only be possible if there is a reasonable prospect of removal? Or will they be left in a legal limbo? Will they be subject to a new return procedure?**

Thirdly, If the return sponsorship scheme also applies to individuals who have been living in the country for years, there are further concerns that **their forced transferral would uproot them from social and family networks, to another Member State where they do not speak the language and they have no social network, while at the same time forcing them to remain in a situation of legal limbo**. As the procedure would also apply to children, entire families would have to leave the country where they have been living, where they went to school, where they speak the language to a country in which they have no ties – and no documents either. Any return should only happen if it is in the [best interest of the child](#). Uprooting children, especially those who have developed ties with their community, [harms them](#) and it is hard to see how intra-European transfers ahead of a voluntary or forced return safeguard children’s well-being.

### We recommend:

- Deleting recital 10 and article 257 which shorten the timeframe for transfer of undocumented people under the return sponsorship scheme from eight to four months.

<sup>2</sup> It is generally unclear how, in this procedure (and in the Pact in general), access to residence permits which are not regulated at national level – including possibilities for the regularisation of children and young people, which are present in at least [eight](#) European countries, would be accessible.

## Excluding children:

Well-established [evidence](#) shows that even short periods of detention have a long-lasting impact on children's [physical and mental health](#) and their development. This can [include](#) behavioural dysregulation, post-traumatic stress, depression and suicidal thoughts, as well as physical symptoms (e.g. headaches, pains, new onset of bed wetting, coughing or wheezing) linked to the stress in the child, family and environment. Detention of family also contributes to impairing child development and creating a stressful situation for children and their families, with [findings](#) from medical research in the UK highlighting that all interviewed parents had symptoms of anxiety, and most had symptoms of depression with suicidal ideation. For this reason, UN [experts](#) agree that detaining children based on the children's or their parents' migration status is a human rights violation and is never in the best interest of a child.

As the proposed screening phase and asylum and return border procedure would entail de facto child detention, and the Crisis Regulation would extend the maximum period of detention under these instruments, we suggest excluding children from the application of the Crisis Regulation.

### We recommend:

- Inserting an additional article excluding all children from the different timelines set by the Crisis regulation.

## Avoiding a “crisis” narrative:

While the Pact is characterised, compared to previous years, by a shift to a more balanced narrative, the numerous [references](#) to data from 2015 strengthen the impression that the next five years of strategic direction on migration have not been developed based on a long-term vision of migration but rather prolong a “crisis” approach.

### We recommend:

- Refraining from using a narrative built on the concept of “crisis” which risks legitimising xenophobic and anti-migrant stances.

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