



# IMMIGRATION DETENTION AND DE FACTO DETENTION: WHAT DOES THE LAW SAY?

IN FOCUS

How is detention considered in the  
EU Pact on Migration and Asylum?

This document is part of [this full briefing](#) that was written by Izabella Majcher (PhD, Consultant and Visiting Fellow at the Global Migration Centre at the IHEID) and Marta Gionco (Advocacy Officer, PICUM), and edited by Michele LeVoy, Director of PICUM, the Platform for International Cooperation on Undocumented Migrants.

The purpose of [this briefing](#) is to reply to frequently asked questions on the existing legal framework and case law on immigration detention and *de facto* detention. This briefing draws from the evolving and recent jurisprudence from EU and international bodies. It is addressed to policy-makers working on legal reforms as well as civil society organisations advocating for migrants' rights.

Even though the current legal framework and jurisprudence may allow for the use of immigration detention in specific circumstances and as measure of last resort, detention is always harmful, disproportionate and ineffective.<sup>1</sup> For this reason, an increasing number of international bodies have stated that detention for immigration control purposes should be progressively ended.<sup>2</sup>

**PICUM is against the use of immigration detention in all circumstances, and calls on Member States and the European Union to put an end to it.**

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## IN FOCUS

### How is detention considered in the EU Pact on Migration and Asylum?

Released by the European Commission in September 2020, the EU Pact on Migration and Asylum is a multi-annual EU strategy in the area of asylum and migration.<sup>3</sup> Among its five legislative proposals and four recommendations, there are at least two instruments which, if approved, would have an impact on detention:<sup>4</sup>

#### Proposal for a Screening Regulation<sup>5</sup>

This proposal introduces a mandatory screening procedure to be carried out at the EU external borders towards persons who do not fulfil the entry conditions under the Schengen Borders Code. The procedure is to be completed within five days, extendable to ten days in exceptional circumstances where a “disproportionate number” of persons needs to be processed. Screening is to take place “at locations situated at or in proximity to the external borders” and persons undergoing screening will not be permitted to enter the territory of the state.<sup>6</sup>

States will thus be bound to prevent the persons’ entry inside their territory. In practice, this will imply detaining the person, or at least restricting their freedom of movement.<sup>7</sup>

The implications of the screening procedure at the external borders can be inferred from the hotspot procedure implemented at the Greek Aegean islands, which the screening procedure resembles.<sup>8</sup> In practice, people placed at Greek hotspots are either deprived of their liberty or have their freedom of movement restricted, although domestic law refers only to restriction of liberty. The functioning of the hotspots blurs the lines between the restriction on and deprivation of liberty and leads to de facto detention practices. Similar concerns have been expressed with regard to the Multi-Purpose Reception and Identification Centre intended to replace the Lesbos hotspot and operationalise the screening procedure.<sup>9</sup>

The proposal also provides for the mandatory screening of persons found within state’s territory if there is no indication that they have crossed the external border in an authorised manner. Unlike the screening at external borders, screening in this context will be conducted

at any “appropriate location” within the territory of a state and should last maximum three days from the apprehension.<sup>10</sup>

Despite the risk of deprivation of liberty entailed by the screening procedure, the operational part of the proposal does not mention detention. Detention is only mentioned in the preamble, which provides that in individual cases, where required, measures preventing entry may include detention, subject to domestic law of the country. However, in light of previous ECtHR jurisprudence, which found that holding migrants at an identification and registration centre and on ships for nine days amounted to de facto deprivation of liberty because the persons’ freedom of movement was limited inside the facilities and they were not allowed to leave the premises<sup>11</sup>, it is very likely that these measures will amount to detention. The mandatory nature of the screening at external borders and the obligation on states to prevent persons’ entry inside their territory - combined with lack of regulation on the circumstances in which this will be possible and the lack of safeguards such as those mentioned in [Questions 4](#) and 5 - will likely trigger an increase in de facto detention at the EU external borders.

### Revised proposal for the Asylum Procedures Regulation<sup>12</sup>

This proposal provides for wide circumstances in which asylum procedures can be conducted at EU borders, including three cases in which the border asylum procedure becomes mandatory.<sup>13</sup> If the claim for international protection is rejected in the border asylum procedure, the person is to be channelled to the border return procedure. Each of the procedures should be completed within 12 weeks, extendable to 20 weeks in a “crisis situation.”<sup>14</sup> During this period, the persons are not permitted to enter the territory of the states and should be kept in “locations at or in proximity to the external border or transit zones.”<sup>15</sup>

As during the screening, this implies that states will be bound to prevent the person’s entry inside their territory during these asylum and return border procedures, which will typically entail detention.<sup>16</sup> Indeed, as research shows, border procedures tend to involve deprivation of liberty.<sup>17</sup> In contrast to the proposal for the Screening Regulation, the proposal for the Asylum Procedures Regulation does refer to detention. As regards border asylum procedure, detention grounds spelled out in the Reception Conditions Directive are to apply. Concerning the border return procedure, the proposal provides for broad grounds for detention for persons who have been detained during border asylum procedures and refers to the Return Directive for those who have not been previously detained. Overall, the mandatory border procedures risk leading to systematic detention at the EU external borders for up to nine months, which is at odds with the requirement under Art. 8 of the Reception Conditions Directive not to detain a person for the sole reason that they are asylum applicants. As mentioned in the [Question 2](#), according to the CJEU, holding asylum seekers in a transit zone will amount to deprivation of liberty if the persons are required to remain permanently within a restricted and closed perimeter and thereby are deprived of their freedom of movement and isolated from the rest of the population.<sup>18</sup>



## What legal standards should apply to detention at borders?

In order not to be arbitrary, detention at the EU's external borders during the screening, border asylum and border return procedures will have to comply with the international framework regulating immigration detention. In particular, the principles discussed in [Questions 4 and 5](#) should apply, such as:

- **Lawfulness:** precise legal basis in domestic law, including grounds for detention which are clearly and exhaustively enumerated.
- **Necessity and proportionality:** detention used as an exceptional measure of last resort, based on an individual assessment and verification whether alternatives to detention can reach the objective of detention.
- **Vulnerable persons and children:** no detention of vulnerable persons and children, and adequate vulnerability screening and age assessment procedures provided.
- **Detention time period:** detention maintained for the shortest time possible.
- **Notification of detention:** notification of legal and factual grounds for detention and appeal channels at the time of the arrest in language the person understands and accessible manner.
- **Review of detention:** speedy judicial review of the lawfulness of detention and if immigration detention extends in time, automatic and periodic review.
- **Legal and linguistic assistance:** access to legal representation and advice and interpreters, if necessary, free of charge.

## What legal standards should apply to restriction on freedom of movement at borders?

In cases where the measure to prevent the person's entry inside the state's territory during the screening, border asylum or border return procedure will not amount to detention, it will have to comply with the requirements on restriction on freedom of movement discussed in [Question 3](#). The restriction will have to have a basis in domestic law, serve one of the legitimate purposes and be necessary for achieving them.

# Endnotes

1. See PICUM, [Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies](#), 2021, p. 11-12.
2. WGAD, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, A/HRC/39/45, (July 2, 2018); SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants*, François Crépeau: *Detention of Migrants in an Irregular Situation*, A/HRC/20/24, (April 2, 2012), para. 72.
3. European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609, (September 23, 2020).
4. PICUM, [“More Detention, Fewer Safeguards: How the New EU Pact on Migration and Asylum Creates New Loopholes to Ignore Human Rights Obligations,”](#) October 14, 2020; ECRE, *Reception, Detention and Restriction of Movement at EU External Borders* (Heinrich-Böll-Stiftung EU, 2021); International Commission of Jurists (ICJ), *Detention in the EU Pact Proposals*, 2021; EPRS, *The European Commission’s New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment*, PE 694.210, (August 2021), p. 95-99.
5. European Commission, *Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817*, COM(2020) 612, (September 23, 2020).
6. The relevant provisions of the proposal are Art. 1, 3, 4, and 6.
7. European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, The European Commission’s legislative proposals in the New Pact on Migration and Asylum, 2021, p. 59.
8. RSA, HIAS, GCR, LCL, DRC, Fenix, ActionAid, Mobile Info Team, *The Workings of the Screening Regulation*, 2021, p. 2.
9. ECRE, *Reception, detention and restriction of movement at EU external borders*, p. 34-38.
10. The relevant provisions of the proposal are Art. 5 and 6.
11. ECtHR, *Khlaifia and Others v. Italy*, para. 65-72.
12. European Commission, *Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU*, COM(2020) 611, (September 23, 2020).
13. These circumstances are if the person 1) poses a risk to national security or public order, 2) has misled the authorities by presenting false information or documents, or by withholding relevant information or documents with respect to their identity or nationality, or 3) is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 per cent (Art.41(3)).
14. The crisis situation is understood as an exceptional situation (or an imminent risk of such a situation) of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Asylum and Migration Management Regulation, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum*, COM(2020) 613, (September 23, 2020), Art. 1(2).
15. The relevant provisions are Art. 41 and 41a.
16. European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, The European Commission’s legislative proposals in the New Pact on Migration

and Asylum, 2021, p. 76.

17. EPRS, *Asylum procedures at the border: European Implementation Assessment*, p. 76; ECRE, *Reception, detention and restriction of movement at EU external borders*, p. 23-24.

18. CJEU, *FMS*, para. 216, 223 and 225.



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