PICUM Analysis

New Migration Pact Series

PICUM Analysis of the Asylum Procedure Regulation and Return Border Procedure Regulation

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PICUM

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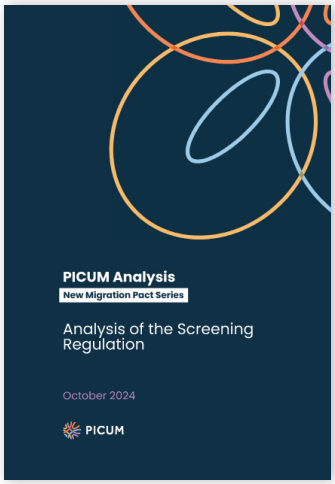
PICUM represents a network of 160 organisations across 30 countries working to ensure social justice and human rights for undocumented migrants.

PICUM has been following the EU Pact on Migration and Asylum in recent years through various consultations prior to its launch by the European Commission in September 2020, during the past four years of negotiations at the EU level, and now subsequent to its official adoption in May 2024. PICUM has published a broad range of analyses, statements, and recommendations, often jointly with civil society partners and with our members across EU.

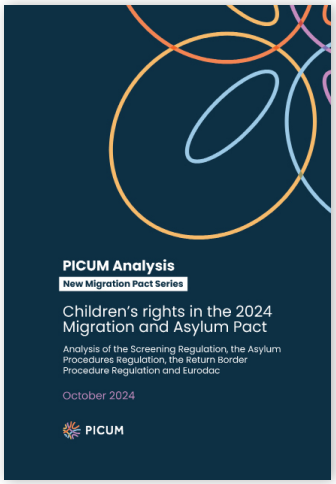
Despite our collective recommendations and warnings on the harmful impact of the proposed reforms on migrants' fundamental rights, the final text of the Pact will normalise the arbitrary use of immigration detention, including for children and families, increase racial profiling, use "crisis" procedures to enable pushbacks, and return individuals to so called "safe third countries" where they are at risk of violence, torture, and arbitrary imprisonment.

It also betrays the spirit of existing EU policies, such as the EU Action Plan on Integration and the EU Action Plan Against Racism which recognises the intersectional impacts of racism and the specific vulnerability of migrants and refugees. The Pact, as it stands, risks perpetuating discriminatory practices within the very structures meant to uphold justice and protection for all.

This briefing is part of a series of PICUM analyses of how several legislative measures in the Pact on Migration and Asylum impact undocumented migrants. The series includes an analysis of the Screening Regulation, of how the access to residence permits on grounds other than international protection is limited, and of child rights safeguards in the Screening, Asylum Procedures Regulation, Return Border Procedure Regulation and Eurodac regulation.



Analysis of the Screening Regulation



Children's rights in the 2024 Migration and Asylum Pact

Introduction

After an individual goes through the screening process at EU borders, and when they apply for international protection, the rules of the new Asylum Procedure Regulation (APR) come into effect. As compared to the previous Asylum Procedures Directive, the revised **Asylum Procedure Regulation (APR)** is particularly concerning as it fails to improve access to quality procedures to access protection. Instead the APR rules and particularly the new mandatory border procedures will lower standards and safeguards for many categories of applicants, often determined arbitrarily, and are designed in a way that will require widespread use of detention and de facto detention.

Additionally, the revision goes way beyond the field of international protection, as it strengthens the links between asylum and return procedures, with the risk to hinder people's access to residence permits on other grounds. In this briefing, the APR is analysed alongside its counterpart, the **Return Border Procedure Regulation (RBPR).** Originally proposed as part of the APR, the RBPR was later separated due to procedural reasons. Despite this separation, the two regulations share many complementary elements and are designed to be implemented in tandem. Finally, this briefing will examine some of the provisions of the new Regulation addressing situations of crisis and force majeure, limited to the exceptions it introduces to the APR and RBPR rules.

This briefing focuses on the areas of PICUM's expertise, which is ensuring and protecting human rights for undocumented migrants. Therefore, provisions solely affecting the right to asylum are outside of the scope of this analysis.[1]

Asylum procedures were previously regulated by an EU directive. With the entry into force of APR on 12 June 2026, asylum procedures in the EU will now be part of a regulation. The main difference is that the Regulation will be applied directly by member states and it harmonises the law, except where a margin of flexibility is explicitly foreseen. Albeit it will not be necessarily to transpose it into national legislation as it happens for directives, member states may still need to adjust their legislation and will have to introduce changes to their practices to comply with the new rules.

Note on geographical application: the APR is applicable to all EU member states, except for Denmark. Ireland, not bound by the previous Asylum Procedures directive, confirmed its decision to opt in.

The Return Border Procedure Regulation (RBPR), unlike the APR, may also apply to Schengen associated countries. Denmark can decide whether to implement it in its national law within six months of the Regulation's adoption. Ireland has not confirmed its participation to this Regulation.

1 For a complete analysis of the APR, please refer to ECRE's Comments on the Asylum Procedure Regulation.

1. Scope of application of the APR

Article 3

The APR applies to "all applications for international protection made in the territory of the Member States, including at the external border, on the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection."

Link with the screening procedure

APR applies to all people that undergo the screening procedure and apply for asylum. The Screening Regulation creates a new mandatory screening procedure, which will now have to be implemented by member states to people arriving or having arrived irregularly in the EU.

Asylum and return are formally mentioned as the two possible outcomes of the new screening procedure, even though individuals should have access to a range of permits as regulated under EU and national law, including for humanitarian, family and health reasons, to protect the best interests of the child, or for work reasons (see paragraph 2).

2. Stronger link between asylum and return procedures

Art. 37 APR

The new APR mandates that member states shall issue a return decision as part or at the same time (or without undue delay) of the decision rejecting an application for international protection (Art. 37). It also requires that people who do not qualify for asylum in the context of the asylum border procedures should be directly channelled into return border procedures (see below).

While the decision to issue a return order should be 'in accordance with non-refoulement', it does not provide any additional information on how this will be assessed, nor does it explicitly provide for a separate assessment of other grounds for stay, including those based on children's rights and family unity. However, **recital 9** clarifies that international protection is not the only form of status that member states can grant. Member states 'may also grant other national humanitarian statuses under their national law to those who do not qualify for the refugee status or subsidiary protection status'. Furthermore, it is clarified that Member States may choose to assess eligibility for such permits within the same procedure as international protection.

The interpretation of 'humanitarian permits' under Recital 9 should be broad, encompassing humanitarian, family and health reasons, to protect the best interests of the child, for stateless people, victims of human trafficking or labour exploitation. This approach would acknowledge the reality that **most EU member states already have various pathways for individuals in irregular situations to obtain permanent or temporary legal status**. As of 2020, the European Migration Network identified 60 national protection statuses in 23 Member States, the UK and Norway.

Procedures to access to such permits are crucial. A clear precondition to ensure that people with barriers to return are protected is ensuring that everyone has access to an individual assessment. **Unless there is an ex-officio assessment of existing permits under national and EU law (or a concrete possibility to apply independently), the only way for the applicant**

to demonstrate their specific grounds for stay and/or the risk of refoulement, and apply for other permits, would be to lodge an appeal against a return decision. This presents substantial practical challenges. For instance, people falling under border procedures face very strict time limits for appealing against a return decision and, even in that case, they might not be granted the right to stay until the final judicial decision (see paragraph 5). Because of the short time, it can be very difficult, if not impossible, to access a lawyer and receive information from NGOs and other actors.

From these provisions, it should be inferred that **member states should maintain the possibility to continue assessing and issuing other permits under national and EU law**.

It is essential that in the national implementation plans for the APR member states clarify which steps they will undertake to ensure that existing national and EU level permits remain accessible. Failure to assess these permits could lead to violations of international and European law, including the principle of non-refoulement.

3. Border procedures

One of the significant changes introduced by the new Asylum Procedure Regulation is the expanded use of 'special procedures,' including accelerated procedures and especially **border procedures** for asylum and return. While border procedures were already part of the previous Asylum Procedure Directive, with the APR their use will become mandatory in a broad range of cases, and there will be numerical targets for their implementation at national level. Border procedures are expected to rely heavily on containment and detention, including for children, and provide applicants with fewer rights and safeguards.

Grounds for applying the border procedures

Arts. 43 and 45 APR

Border procedures may take place under certain conditions:

- The applicant, following the screening procedure, has not been authorized to enter the territory of the member state and does not fulfil the entry conditions set out in the Schengen Borders Code.
- If these conditions are met, the border procedure may take place in the following cases:
    - Application for asylum at an external border crossing point or in a transit zone;
    - Apprehension in connection with a crossing the external border without authorisation;
    - Disembarkation after a search and rescue operation;
    - Relocation from another member state.

Link with the screening procedure

A condition for the application of the border procedures is that the applicant is apprehended at the external borders, in transit zones (e.g. airports), after search and rescue (SAR) operations, or relocated.

Therefore, **people apprehended within the territory of a member state under Art. 7 of the Screening regulation** (see PICUM, Analysis of the Screening Regulation) who apply for international protection, **cannot be put in border procedures**.

When the grounds listed above are respected, member states will have the option to apply border procedures or not. However, border procedures will become **mandatory** in a wide range of circumstances (Art. 45):

- **Reasonable grounds to consider the applicant a danger for national security or public order**. Under these circumstances, even unaccompanied children or family members of a person considered a security risk can be held in border procedures.
- **Applicants from nationalities that don't meet a 20% international protection recognition rate;**
- **People considered to be intentionally 'misleading' authorities (e.g. by presenting false information, destroying their documents, etc.)**. Recital 75 clarifies that, the sole lack of documents or the use of forged documents for irregular entry should not justify by itself the automatic recourse to border or accelerate procedures.

Under the circumstances mentioned above, border procedures will be combined with the mandatory application of **accelerated examination procedures** (Art. 42).[2]

Discretionary application of border procedures

On paper, border procedures should only be applied to a limited number of cases, based not only on personal circumstances (protection rate, being considered a security case, or to have misled authorities), but also on criteria relating to where the person has been apprehended or applied for protection (mainly at the external borders and through SAR operations).

However, in practice, these procedures risk creating biases between different categories of applicants, particularly based on their nationality or penalising a perceived intent to mislead authorities. Additionally, member states retain significant discretion in applying security exceptions, which are often viewed as a 'blanket' authorization to exclude individuals from protection.[3]

Duration of the border procedure

Art. 51 APR and Art. 4 RBPR

The maximum duration of the border procedure (Art. 51) should be of 12 weeks. [4] This deadline can be extended to a total of 16 weeks if the person is relocated from one member state to another and the receiving member state is applying the border procedure. In situations of crisis and force majeure, the asylum border procedure can be extended for six more weeks.[5]

People whose international protection application is rejected can be held in return border procedures for 12 additional weeks (or 18 in situations of crisis).

2 Other grounds for the accelerated examinations of applications are: safe third country of origin; people who have not made an application for protection immediately after irregular stay without good reasons); applications to delay a return; When the safe third country principle is applied and the application is declared inadmissible; Subsequent application (in this case MS may even derogate from the rule and provide that the applicant has no right to remain except in case of risk of refoulement). Withdrawal of international protection (danger to security, serious crime etc); Applicant is subject to accelerated procedure or border procedure except for unaccompanied children

3 See Hungarian Helsinki Committee (2024), The Right to Know in the European Union: Comparative Study on Access to Classified Data in National Security Related Immigration Cases.

4 These 12 weeks should be counted from when the asylum application is registered, until when the applicant no longer has a right to remain and is not allowed to remain. Within this time, member states will have to fit the examination procedure of the application (determine if it is admissible, examine the merits) and, where applicable, the examination of the request to remain and the appeal procedure.

5 As defined in Article 1(4) of Regulation (EU) 2024/1359.

	Screening	Asylum border	Relocated from another member state	Situation of crisis and force majeure	Return border	Situation of crisis and force majeure	Tot.
	7 days	12 weeks	+4 weeks	+6 weeks	12 weeks	+6 weeks	
Normal	X	X			X		25 weeks (almost 6 months)
Situation of crisis	X	X		X	X	X	37 weeks (8,5months)
If the person is relocated	X	X	X	X	X	X	41 weeks

Table 1. Maximum duration of the screening and border procedures (asylum and return)

It is important to note that these 12 weeks will have to cover administrative and judicial procedures (e.g. the appeal against a negative decision to grant asylum). For comparison, accelerated procedures also span three months but only address the administrative aspects. Given the widespread systemic delays in processing asylum cases and appeals in many member states,[6] it is hard to envision how these procedures could be effectively conducted within such a limited timeframe without resorting to cursory analysis and rapid case dismissals. However, this could also imply that once the 12-week period expires, individuals should be granted access to the territory and allowed to proceed with regular asylum procedures.

Detention and de facto detention in the border procedure

The text of the APR affirms that the border procedure can be applied without necessarily making recourse to detention (recital 69). However, during border procedures member states can justify the detention of applicants with the aim to 'prevent unauthorised entry' (Art. 43(2)). This is possible because, despite having physically entered EU territory, people are considered to not have formally entered the territory while the border procedure is ongoing. This concept, which also applies to the Screening Regulation, is informally referred to as **'fiction of non-entry'**.

Whenever detention is applied, it should always follow the grounds set in the Reception Conditions Directive (RCD), including the guarantees for detained applicants, conditions of detention, judicial control, and the fact that an individual assessment of each case is necessary. An effective remedy against a detention order should be provided with the applicants.

While detention can be applied under the fiction of non-entry, in principle it remains a last resort measure, which should only be applied when necessary and on the basis of an individual assessment, as foreseen by the RCD.

However, as a general rule, all applicants in border procedures are required to reside at or in proximity of the external border or in a transit zone or in other designated locations within their territory (Art. 54(1)). Therefore, it is highly likely that even in circumstances that are not formally recognised as detention, **restrictions of freedom of movement imposed to applicants may amount to de facto deprivation of liberty**.

6 As of the end of 2023, the European Union Asylum Agency (EUAA) reported the highest number of pending cases in the last 8 years, with around 883,000 cases were awaiting a decision at first instance at EU level. EUAA, Asylum Report 2024.

PICUM reiterates that even though the legal framework adopted with the Pact may allow for the use of immigration detention and de facto detention in specific circumstances, detention is always harmful, disproportionate and ineffective, and for this reason should be ended.

In the context of the Pact implementation, we are highly concerned that the use of detention will not be a matter of last resort. The border procedures are designed to facilitate the automatic (de facto) detention of large groups of people. Several provisions of the Pact are designed in a way that imply the disapplication of existing legal standards, such as individual assessments, the obligation to prioritise alternatives to detention, and judicial review.

We expect national and regional courts to play a key role in the years to come to define the application of the existing legal standards, and ensuring that all the exceptions contained in the EU regulations are applied as broadly as possible (see below).

What is 'de facto' detention?

De facto detention can be understood as a measure which in practice amounts to deprivation of liberty but which states do not formally qualify as such. When states decide to place a person in immigration detention, they need to comply with a number of requirements. To avoid these safeguards, states sometimes refuse to acknowledge that a person is detained. Rather, they argue that the measure is merely a restriction on the person's freedom of movement.

When is it "detention" and when is it "restriction of movement"?

In practice, there may be cases when it is unclear whether the person is subject to detention or a restriction on their freedom of movement. According to the European Court of Human Rights (ECtHR), there is no clear line between these two coercive measures[7]. **The difference lies in the intensity of the measure, rather than its nature.** The ECtHR analyses the specific facts of each case to determine whether a measure formally qualified by the state as restriction on freedom of movement amounts to detention in practice. To this end, different criteria are analysed in a cumulative manner: the type of measure, duration of measure, effects on the person concerned, and manner of implementation. This implies that a series of restrictions, which in themselves would not reach the threshold of detention, together may do so.

The Court of Justice of the EU took a similar approach in FMS v others, where it the considered that the obligation to remain in a closed transit zone, without the possibility to leave at will, amounted to deprivation of liberty.

For a further analysis of what de facto detention is, and the legal framework applicable to immigration detention in the EU, please see PICUM's briefing: "Immigration Detention and De Facto Detention: What Does the Law Say?"

7 See ECtHR, Guzzardi v. Italy, 7367/76, (November 6, 1980), para. 92-93; ECtHR, Austin and Others v. the United Kingdom, 39692/09, 40713/09 and 41008/09, GC, (March 12, 2012), para. 57.

The return border procedure (RBPR)[8]

Art. 1 RBPR, Arts. 4 and 5 RBPR

The return border procedure – set out in the Return Border Procedure Regulation - applies to all people for whom international protection has been rejected in the context of the asylum border procedure. In addition, member states also have the possibility to refuse entry on the territory to people whose asylum application has been rejected in the context of a border procedure.

- If the applicant is subject to a **return decision**, certain provisions of the Return Directive (RD) apply, in particular those on definitions, more favourable provisions, non-refoulement, the best interests of the child, family life and state of health, the risk of absconding, the obligation to cooperate, the period for voluntary departure, the return decision, removal, the postponement of removal, the return and removal of unaccompanied minors, entry bans, safeguards pending return, detention, the conditions of detention, the detention of minors and families, and emergency situations.[9]
- When the person is subject to a **refusal of entry** under Art. 14 Schengen Borders Code, they shall be subject to a procedure equivalent to the one set out by the Return Border Procedure Regulation (Art. 4(6) RBPR. However, not all the provisions of the RD apply in this case, but only those on the limitations on use of coercive measures, postponement of removal, emergency health care and needs of vulnerable persons, detention conditions and non-refoulement (Art. 4(4 RD). In practice, this could mean that people refused entry could be detained in the same centres and in equivalent conditions, while they have even lower safeguard, for example concerning the possibility to be granted a period for voluntary departure.[10].

The return border procedure is conducted in conditions which are similar to the asylum border procedure.[11] The legal fiction of non-entry continues to apply.

The RBPR also sets a **time for voluntary departure of 15 days**. However, this is only upon request of the applicant, who has to surrender any travel documents to the authorities until their date of departure. Moreover, member states retain a large margin of discretion, as voluntary departure can be refused on grounds that the applicant risks 'absconding', if their application is considered manifestly unfounded, and/or if they are considered a security risk.

The fact that a period for voluntary departure is not automatic is highly problematic. It **may mean that entry bans are issued more systematically than before, including to children**. In fact, article 11 of the Return Directive requires Member States to add entry bans to return decisions if no period of voluntary departure has been granted (or if the person did not comply with the obligation to return). That same article does allow Member States to "refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons", in individual cases or to certain categories of cases for other reasons.

Where the return decision cannot be enforced within 12 weeks, return procedures continue under the rules of the Return Directive (2008/115/EC). Detention can be used both for applicants who were already detained during the return border procedure and for applicants who were not detained if the grounds for detention apply.[12] In situations of crisis and forced majeure, detention under the return border procedure can be extended to a total of 18 weeks (Art. 6(1)a RBPR).

According to Article 5(4), when **consecutive detention** is imposed following the border procedure, that period of detention must be counted towards the maximum detention periods specified in the Return Directive (18 months). However, **the regulation lacks clarity on whether, in the event of a gap between the two**

8 The Return Border Procedure Regulation will apply to all EU Member States, including Denmark, and to Schengen associated countries.

9 Art. 4(3) RBPR.

10 A refusal of entry can be applied in reason of the fact that applicants in the asylum border procedure are under the 'legal fiction of non-entry', so the person is not considered as having enter the member state territory despite being physically present. In this case, states can apply simplified procedures, such as filling out a simple form, to return people to the country from which they have entered. In this procedure, there is no right to suspensive appeal.

11 When applying the return border procedure,

12 If there is a risk of absconding, if he or she avoids or hampers return, or if he or she poses a risk to public policy, public security or national security. Article 5 (2) and (3).

detention periods, the counting should restart. This ambiguity could lead to the detention periods under the border procedures and the Return Directive being combined, potentially extending the total duration of detention.

The RBPR tasks the European Asylum Agency with the development of guidelines on alternatives to detention that could be used in the context of the border procedures. The guidelines should be published in December 2024. PICUM's briefing: "Immigration Detention and De Facto Detention: What Does the Law Say?" has looked more in detail at the challenges in applying ATDs at the borders. Key findings are summarized in the box below:

Can alternatives to detention (ATDs) be applied in border procedures?

If there is a legal ground for detention, states should examine whether alternatives to detention can be applied instead of detaining the person. In fact, detention can only be applied if no alternative to detention can achieve the same ends. However, in the context of border procedures, both legal and practical consideration need to be made:

From a legal perspective, ATDs can only be applied if there is a legal ground for detention. However, whenever detention at borders is applied without basic safeguards (e.g., necessity, proportionality, individual decision), the person should be released (see FMS v others) – not subject to ATDs.

From a practical perspective, the elements of successful ATDs (community-based placement, access to services, possibility to meet one's basic needs, relationship of trust and case management) cannot be replicated at borders, due to the very nature of border procedures, their placement, the fiction of non-entry, the lack of access to services and the impossibility to access the territory.

How many people will end up in border procedures?

Articles 46-50 APR

While not all grounds for applying the border procedures are mandatory, member states have a large margin of flexibility to employ such procedures. The concept of **adequate capacity** has been introduced by the APR to further the containment potential of the border procedures. Concretely, it means that all member states should take the necessary measures to ensure that at least 30,000 people can be held in border procedures at EU level at any given time. This figure refers to the asylum and return border procedures combined.

The APR also sets a minimum quota that member states will have to process in border procedures at any given time. The calculation is based on various criteria, including irregular border crossings, arrivals via SAR and refusal of entry at the external borders.

For instance, ECRE has estimated that a country like Italy would have a minimum of 7,236 people in border procedures at any given time (based on 2021-2023 data).

The maximum number of applications to be assessed in border procedures on a yearly basis is progressively set to reach **120,000** as of mid-2028 (Art. 47(1)).

When the member state reaches its adequate capacity, upon notification to the European Commission, some exceptions can be applied (see table below). Border procedures continue being mandatory for people considered a risk for national security and public order (adults and children, including unaccompanied).

'Temporary' adequate capacity is reached[13]= the member state has temporarily filled its minimum adequate capacity quota (Art. 48 (2) and (3)).	Annual maximum number is reached = four times the 'regular' capacity (Art. 47 (3))
• The member state can cease to apply the border procedure to those nationalities who have less than 20% recognition rate. • The obligation resumes as soon as the number of places in the border procedure is lower than the adequate capacity.	• The member state can cease to apply the border procedure to those nationalities who have less than 20% recognition rate, or are believed to have misled authorities. • The obligation does not resume for the rest of the calendar year.
• The member state can 'prioritise' which applications should be examined in the border procedures (Art. 44(2)), with priority given to people who have a higher prospect of being returned, people who may pose a risk to national security or public order, and adult applicants.	
When they reach adequate capacity, Recital 67 clarifies that member states should not prioritise children and families unless considered a danger for national security).	

Table 2. Exceptions member states can apply when they reach their adequate capacity.

In practice, this will result in thousands of people being detained or held in detention-like conditions. It will also create an arbitrary distinction amongst people of different nationalities and different circumstances who are put in border procedures, with limited safeguards, according to the level of capacity of the member state in question at the time of their arrival.

Exceptions to the border procedure including for children[14] and persons with special needs

Exceptions based on reception conditions, Art. 53 APR

Border procedures cannot be applied or should cease to apply in the following cases:

- If there is insufficient support for people with special reception or procedural needs (including children) at the border procedure locations.
- For "relevant medical reasons for not applying the border procedures, including mental health reasons".
- If detention standards in accordance with the Reception Conditions Directive cannot be applied at the border, and the border procedure cannot be applied without detention.
- In addition, border procedures can never be applied to unaccompanied children, unless the state proves that they pose a risk for national security or public order.

If one of the grounds above applies, the person must be authorised the enter the territory and access regular asylum procedures.

Therefore, **the final text of the APR does not contain any general exclusion for children or for applicants with special needs.** Even unaccompanied children can be put in border procedures when considered a risk for national security or public order.

13 The maximum number will be increased progressively. It should be two times each member state's adequate capacity from June 2026 (when APR will be fully implemented); three times from 13 June 2027; and four times the number obtained by using the formula laid down in paragraph 4 from 13 June 2028.

14 The internationally recognized definition of a person under the age of 18 is a "child", according to the UN Convention on the Rights of the Child. Consequently, PICUM uses the term 'child' rather than 'minor'.

The APR is built on the assumption that it will be possible to ensure an adequate standard of living in procedures which are likely to take place in closed and isolated centres. While detention should, at least on paper, remain a measure of 'last resort', it is highly likely that the use of border procedures will lead to deprivation of liberty on a large scale. This violates international and regional standards that clearly consider child immigration detention as a violation of the rights of the child. Prohibiting child detention ensures consistence with international legal standards as well as medical evidence showing that even short periods of detention have long- term detrimental effects on children development and health.

PICUM emphasizes that the only effective safeguard for children – whether unaccompanied or with their families – and for persons with special needs is their exclusion from asylum and border procedures. The inherent nature and location of border procedures, coupled with the legal fiction of non-entry, make it highly unlikely that essential services will be accessible. Furthermore, even in settings not formally recognized as detention, the restrictions placed on applicants will often amount to a deprivation of liberty.

Exceptions based on adequate capacity, and in situations of crisis or force majeure

The APR presents several options for the prioritisation/deprioritisation of children and persons with special needs in border procedures, either when adequate capacity is reached or under the Crisis Regulation.

Deprioritisation, intended as the possibility for states to exclude groups of people from the border procedures and channel them into regular asylum procedures, entails access to the territory and additional procedural safeguards.

Prioritising or 'fast-tracking' applications under the border procedures is unlikely to ensure additional safeguards in terms of reception conditions and procedural rights, especially in situations of crisis, as shorter deadlines can potentially lead to more arbitrary and less informed decisions.

Should any exception to the border procedure implemented under the Crisis and Force Majeure regulation, it should be extended to all children below 18, in line with international norms and the CJEU jurisprudence.

As the member states will have some pre-set targets regarding the minimum number of people to be put in border procedures (see section on adequate capacity above), they have the possibility to 'deprioritise' families with children if there is a sufficient number of people in border procedures or if they do not have sufficient places:

- **Families with children** (all ages) **not to be excluded but 'deprioritised'** if there is a sufficient number of people in border procedures/no sufficient space. In this case, member states may assign children and their families to the regular asylum procedure. This remains a partial safeguard, as it will depend on the state of the number of places available in the border procedure at the time of arrival of the applicants.

Moreover, in situations of crisis or forced majeure, member states may:

- **Prioritise applications from people with special needs[15], children and families who are already in border procedures Art. 11(5).** The rationale is that their asylum application would be evaluated as a matter of priority, allowing them (in principle) to leave the border procedure before 12 weeks. However, whether this will be a safeguard or not may very much depend on the quality of the procedures in place, as the outcome of the border procedure could be a return decision with limited possibility to appeal, rather than entering the 'regular' procedure and being admitted to the territory.
- In situations defined as 'instrumentalisation',[16] member states may adjudicate **all**

15 As defined in APR Arts 20-23.

16 As defined in Art. 1(4)b, "a situation of instrumentalisation where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security."

asylum applications for those subject to instrumentalization in the border procedure (Art. 11(6)). In this case, they can still decide to:

- Exclude from border procedures children below 12 years of age and people with special needs (Art. 11(7)a).
- Cease to apply the border procedure to children below 12 years of age and people with special needs if they consider their claim for international protection is well founded (Art. 11(7)b).

Setting an additional threshold at the age of 12 conflicts with the internationally recognised definition of children being every person until the age of eighteen. This distinction between children also appears to be contrary to the jurisprudence of the CJEU in TQ v Staatssecretaris van Justitie en Veiligheid, where the court found that EU Member States may not distinguish between children only on the basis of their age.

Monitoring mechanism

Art. 43(4) APR

The APR requires each member state provide for an independent fundamental rights monitoring, which should monitor compliance of the border procedure with EU and international law. The mechanism should follow the criteria set out in Art. 10 of the Screening Regulation (for more details, see PICUM's Analysis of the Screening Regulation).

Recital 67 APR also recalls that specific attention should be paid to the monitoring done by the European Union Agency for Asylum (EUAA) with respect to reception requirements for children and their family members. If a member state fails to meet reception requirements, the Commission should recommend suspending the border procedure for these groups. The member state must then inform the Commission of the corrective measures taken, and the recommendation should be made public.

! Does the monitoring also apply to the return border procedure?

The RBPR regulation does not explicitly mention the monitoring mechanism in relation to the return border procedure. However, the APR text states that monitoring should apply to the "border procedure," without limiting it to the asylum context (Art. 43(4)). Given that the return border procedure was initially part of the APR but was separated due to a last-minute change of legal basis, it remains unclear whether the legislators' intent was for the monitoring mechanism to cover both asylum and return border procedures.

In its Pact implementation guidelines, the European Commission specifies that member states are only required to extend their monitoring mechanisms to the screening and asylum border procedures. However, the application of such monitoring to the asylum border procedure, but not for the very same procedure in the return context, would lead to incoherent results, as both procedures will likely occur under similar conditions, under the fiction of non-entry and in conditions of detention or de facto detention, and therefore would entail equal monitoring needs.

Importantly, member states remain free to extend the scope of monitoring to the return border procedure, and doing so should be encouraged as a best practice in the implementation of the Pact.

4. Access to support organisations

The APR provides that organisations and persons providing advice and counselling shall have effective access to people in detention facilities or present at border crossing points, including transit zones, and at external borders (art. 30(3)). However, member states might require that access is subject to prior agreement with the authorities. The APR also allows states to impose limits under national law, if these are necessary for security, public order or administrative management of a border crossing point, including transit zones, or detention facility, "provided that access is not severely restricted or rendered impossible" (art. 30(3)). Art. 6(3) RBPR also provides for similar rules for people 'held in detention facilities or present at border crossing points' when there is a situation of crisis.

Under Art. 19 APR, NGOs – alongside other legal counsellors - can also be entrusted with the provision of legal counselling services if accredited under national law.

While access to people in the border procedure is not explicitly covered under Art. 30 APR, it is implied that access to people 'at external borders' should be guaranteed. As people in border procedures are considered to not have entered EU territory, this should also cover their specific situation, independently from where the border procedure might take place, or if there is any use of detention. Art. 6(3) RBPR also confirms that the right to access applicants should be upheld in situations of crisis.

As member states can impose access limits on NGOs' access to applicants for a broad list of reasons, there is a concrete risk that in practice they will deny them access to the areas in which detention or border procedures will take place. The functioning of accreditation procedures can also constitute a barrier for civil society organisations. This is particularly concerning because, as mentioned above, people may be held in situations of de facto detention, without the right to contact a lawyer and with likely very limited information about their rights.

Additionally, border procedures are likely to take place in locations with limited accessibility. The APR even requires member states to "ensure adequate access for staff working in such facilities" (recital 66), highlighting potential barriers for lawyers and civil society organizations to provide essential support to applicants.

5. Right to an effective remedy and right to remain

Safeguards around the right to effective remedy is another central change in the APR. The first change concerns the duration of the period granted to applicants to lodge an appeal against a negative decision. Differently from the previous Asylum Procedure Directive, which provided for "reasonable" time limits, for the first time the APR sets specific deadlines, which will vary depending on the procedure. In addition, **not all types of appeal will have a suspensive effect, which means that a person could be deported to a third country before a court or tribunal could take a final decision on their appeal.**

Right to an effective remedy

Art. 67 APR

Article 67 APR clarifies that international protection applicants have the right to an effective remedy before a court or tribunal against the following decisions:

Type of decision	Deadlines for lodging an appeal[17]
If the accelerated procedure applies (Art. 42(1)*, including to unaccompanied children(Art. 42 (3)): • decision rejecting an application as inadmissible; • decision rejecting an application as unfounded or manifestly unfounded; • decision rejecting an application as implicitly withdrawn *NB: Three categories also correspond to those that will be automatically processed in border procedures: applicants believed to have misled the authorities; national security/public order cases; applicants from countries with less than 20% recognition rate.	Min 5 to max 10 days
All the other cases	Min 2 weeks to max 1 month

Table 3. Deadlines for lodging an appeal.

When a **return decision is issued contextually with the rejection of international protection under (Art. 37 APR), the two decisions must be appealed together in the same court proceedings.** If the return decision is issued separately, it can be appealed separately, but within the same time limits.

17 Weekends and official holidays also count towards these days, even if when the time limit ends on a weekend or a holiday, the next working day shall be counted as the last day of the time limit (Art. 73(c)).

Setting a very short minimum and maximum time for the appeal hinders applicants' right to access an effective remedy. PICUM has previously recommended that at least one month should be granted to people to be able to find a legal representative and prepare their case. Moreover, the shorter timeframes for people in accelerated procedures (5 to 10 days) will be applied large categories of applicants, including those groups for whom border procedures are mandatory, and even unaccompanied children.[18]

Even if the APR requires states to grant applicants free legal assistance at the appeal stage, that has to be requested too (art 68(5) c). As a result, it is likely that, in situations where applicants have specific needs, are in detention and/hold held in border procedures, they might not have effective access to representation, legal aid nor NGOs before the time limits for appeal expire.

Exceptions to the right to remain

Art. 68 APR

Applicants subject to the following types of procedures and/or decisions will not have a right to remain and, as a consequence, no automatic suspensive effect of the appeal. This means that they could be deported before there is a final decision on the effects of their appeal. In all of these cases, **the right to remain can be requested to a Court or tribunal**, but **within a timeline of 5 days only**. Courts or tribunals will also have the power to conduct such assessment *ex officio*.

Type of decision	Exceptions
Application rejected as unfounded or manifestly unfounded if the applicant is in accelerated or border procedures	Unaccompanied children
Decision rejecting application as inadmissible	Unaccompanied children when subject to the border procedure
Implicit withdrawal of application	No
Rejection a subsequent application as unfounded or manifestly unfounded	No
Decision to withdraw international protection	No

Table 4. List of decisions which do not grant applicants a right to remain.

In all of the cases in the table above, applicants cannot be removed until the 5 days to request the right to remain have expired, and pending the decision of the court or tribunal on whether to grant suspensive effect.

However, member states may derogate to this if the applicant is considered to have lodged a subsequent application only "to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal from the Member State" (Art. 68 (6)). In this case, people can be deported immediately after the issuance of a return order, without even the time to apply for an order granting suspensive effect during the appeal.

18 Under Art. 42(3) accelerated procedures can also be applied to unaccompanied children when they come from a safe third country; for security and public order cases; applicants believed to have misled the authorities; applicants from countries with less than 20% recognition rate.

Being able to remain in the country is an essential part of the right to effective remedy. If applicants were to be sent back to third countries, this would clearly hinder their right to be heard, to legal assistance and to information. Moreover, while these exceptions should be without prejudice to non-refoulement, there are risks that the lack of automatic suspensive effect would lead to irreparable harm, e.g. if the return leads to violations of the principle of non-refoulement, to serious breaches of the right to health or to violation of the right to family life. This is also in line with CJEU jurisprudence (see Sadikou Gnandi v État belge).

As noted by ECRE, the need to request the right to stay is also problematic as it burdens the applicant with the responsibility to: request to be allowed to remain, appeal the negative international protection decision and, when this is issued jointly with a return decision under Art. 37, they must appeal the return decision as well.

Other safeguards at the appeal stage

Arts. 67/68 APR

Applicants have the right to be provided with interpretation for the purpose of a hearing before the competent court or tribunal. This is also valid when applicants request the right to remain in the territory pending an appeal.

At the appeal stage, translation of documents can be requested by the court or tribunal when the latter deems it necessary. Alternatively, it can be provided by the applicant (but the Court can decide not to take them into account if not submitted in due time).

7. Legal counselling and legal assistance

Arts. 16-17 APR

One of the main novelties of APR is the introduction of **'free legal counselling'** in the administrative procedure for people requesting international protection. Legal counselling should be provided after their application for protection is registered, 'upon request' of the applicant. Legal counselling should include:

- guidance on and an explanation of the administrative procedure including information on rights and obligations during that procedure;
- assistance on the lodging of the application and guidance on the different procedures under which the application may be examined (e.g. accelerated or border procedure) and the reasons for the application of those procedures; the rules related to the admissibility of an application; legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application.

At the administrative stage, legal counselling can be provided by a single person to 'several applicants at the same time'.

Free legal counselling in the administrative procedure may be denied if the application is a first subsequent one aimed at delaying removal following a return decision, if the application is a second or further subsequent application, or if the applicant is already being assisted and represented by a legal adviser.

The APR requires that member states provide **free legal assistance and representation** only at the **appeal stage**. While during negotiations it was proposed to extend free provision of legal assistance also to the administrative procedures, this was not retained in the final text. However, it remains possible for member states to provide for free legal assistance and representation during the administrative procedure in accordance with national law.

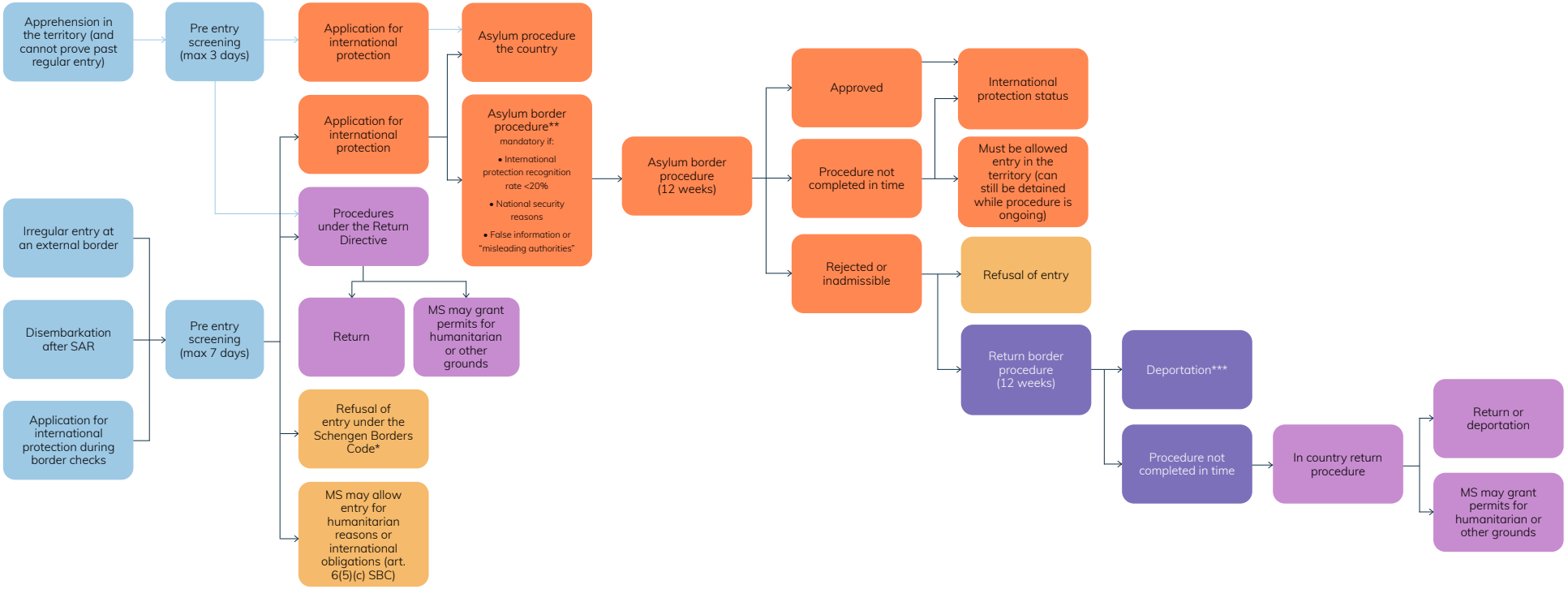
This assistance includes preparing required procedural documents, preparing the appeal, and participating in hearings. However, member states may deny free legal assistance if the applicant has sufficient resources, if the appeal is at a second or higher level, if the applicant is already represented by a legal adviser, or if the appeal is considered having 'no realistic chance of success' or is 'abusive' (which leaves national authorities with a large margin of discretion).

If denied on grounds of the appeal's prospects, the applicant can seek a remedy before a court- in this case they will have the right to request free legal assistance for this purpose.

In the implementation of the Pact at national level, member states should extend the application of free legal assistance to all applicants, including at the administrative stage. Ensuring proper assistance and representation would contribute to quality decisions, improve the fairness and efficiency of the system.

Moreover, it is crucial that information and counselling provided to applicants does not cover only international protection, but also provides information on residence permits available on other grounds under national law (for more information see PICUM, Barriers to return: Protection in international, EU and national frameworks).

Annex: Schematic overview of the screening and border procedures set in place by the Migration and Asylum Pact



- Screening Regulation
- Asylum Procedures Regulation
- 2008 Return Directive
- Return Border Procedures Regulation
- Schengen Borders Code (SBC)

**The provisions of the Screening Regulation, the Asylum Procedures Regulation and Eurodac are contradictory on this point.*

***Children with families are included in border procedures. Unaccompanied children are excluded, except if flagged as a security risk.*

****In the return border procedure, individuals can request a voluntary departure period of 15 days.*

PICUM

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for social justice.

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