



**RSA Comments on the Commission proposal for a  
Regulation on “instrumentalisation” in asylum and  
migration**

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## Introduction

The European Commission presented a legislative proposal on addressing so-called “instrumentalisation” in the area of asylum on 14 December 2021, two months after 12 Member States, including Greece, Cyprus, Hungary, Poland, Lithuania and Latvia, requested an “adaptation of EU law to new realities” and the European Council called on the Commission to take related legislative measures.<sup>1</sup>

Refugee Support Aegean (RSA) opposes the proposal in principle and in its entirety. The measures put forward by the Commission in invoking “instrumentalisation” contravene the EU *acquis* on the protection of human rights and the rule of law, as they introduce unacceptable discretion and derogations from provisions of absolute character such as the prohibition on *refoulement* and/or inhuman or degrading treatment or punishment in international instruments e.g. International Covenant on Civil and Political Rights, Charter of Fundamental Rights, European Convention on Human Rights and Convention against Torture. The proposal also adopts an unprecedented logic of dehumanisation which views human beings as ‘instruments’, i.e. ‘objects’ to be used for specific purposes and no longer as legal subjects and rights-bearers. The introduction of derogations from EU law provisions on asylum and from international law on human rights is solely based on the 1 December 2021 proposal for a Council Decision on provisional measures in favour of Poland, Lithuania and Latvia pursuant to Article 78(3) of the Treaty on the Functioning of the European Union (TFEU),<sup>2</sup> still under negotiation within the Council.

**For over four years, the European Commission has continued to disregard its legal obligation to present reports** to the Council and the European Parliament on the application of the Asylum Procedures Directive,<sup>3</sup> the Reception Conditions Directive<sup>4</sup> and the Return Directive.<sup>5</sup> Due to this, its claim as to the inadequacy of current legislation to address the identified challenges lacks any justification.

Furthermore, the Commission itself defended entirely different positions in Case C-808/18 *Commission v Hungary* before the Court of Justice of the European Union (CJEU) from those put forward in the present proposal:

“Furthermore, **the situation in which a large number of third-country nationals or stateless persons simultaneously request international protection was envisaged by the EU legislature**, in particular in Article 6(5), Article 14(1), Article

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<sup>1</sup> European Commission, *Proposal for a Regulation on “instrumentalisation”*, COM(2021) 890, 14 December 2021. See also RSA et al., *The right to asylum in the context of “instrumentalisation” – Lessons from Greece*, November 2021, available at: <https://bit.ly/321IUvJ>.

<sup>2</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 2.

<sup>3</sup> Article 50 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.

<sup>4</sup> Article 30 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

<sup>5</sup> Article 19 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

31(3)(b) and Article 43(3) of Directive 2013/32, in Article 10(1) and Article 18(9) of Directive 2013/33 and in Article 18 of Directive 2008/115. Those rules seek **to allow Member States to opt for flexible solutions in case of emergency and to depart, to a certain extent, from the generally applicable rules**. Consequently, the crisis caused by mass immigration on which Hungary relies can and must be resolved in the framework of EU law.”<sup>6</sup>

The Commission also contradicts its own recent position that “political crises” such as that unfolding at the Greek-Turkish borders in March 2020 are covered by the 23 September 2020 Crisis Regulation proposal,<sup>7</sup> as it notes in its new proposal that “The measures included in the 2020 crisis proposal were not designed to deal with situations where the Union’s integrity and security is under attack as a result of the instrumentalisation of migrants.”<sup>8</sup>

The direct result of the present proposal is an **unacceptable dismantling of the EU asylum acquis** without an evidence base or impact assessment,<sup>9</sup> through derogations from core protective EU legislative provisions. The proposal attempts to **‘legalise’ systematic and serious violations of EU law by Member States**, including Greece, with the aim of ‘whitewashing’ current unlawful national practices as desirable.

For these reasons, RSA urges co-legislators to reject the proposal in its entirety.

## Analysis of key provisions

### 1. Registration of asylum applications

#### Registration points

Under existing EU law and in particular **Article 6 of the Asylum Procedures Directive**, access to the asylum procedure entails three discrete stages:

- The **“making”** of an asylum application **requires no administrative formalities**. According to **Article 2(c) of the Directive**, the status of “applicant for international protection” **stems from the sole expression of the person’s intention** to receive an international protection status, regardless of the authority – competent or not – before which the application is made.<sup>10</sup> Greek legislation specifies that asylum seeker status is acquired upon the expression of the intention to lodge an application.<sup>11</sup>

<sup>6</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 137.

<sup>7</sup> European Commission, *Proposal for a [Crisis Regulation]*, COM(2020) 613, 23 September 2020, Explanatory Memorandum, 9.

<sup>8</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 3.

<sup>9</sup> European Commission, *Proposal amending the Schengen Borders Code – Impact Assessment*, SWD(2021) 463, 14 December 2021, 1.

<sup>10</sup> CJEU, C-36/20 *VL v Ministerio Fiscal*, 25 June 2020, paras 93-94; C-808/18 *Commission v Hungary*, 17 December 2020, para 97.

<sup>11</sup> Article 65(8) L 4636/2019 (IPA).

- ανεξαρτήτως της αρχής, αρμόδιας ή μη, στην οποία υποβάλλεται η αίτηση. Η ελληνική νομοθεσία διευκρινίζει ότι το καθεστώς του αιτούντος άσυλο αποκτάται με την έκφραση της επιθυμίας κατάθεσης αίτησης.
- The asylum application is **“registered” by Member State authorities**<sup>12</sup> within a deadline of three working days, as detailed below. Greek law transposes this term as “simple registration” or “partial registration” in domestic law.<sup>13</sup>
- The asylum application is **“lodged”** upon the receipt by competent authorities of a form submitted by the applicant. Member States may require the lodging of the application to be done in person and/or at a specific place. The Greek legislature has transposed this term as “full registration” in domestic law.<sup>14</sup>

The Court of Justice of the European Union (CJEU) notes that, whereas “Article 6(3) of that directive allows Member States to require that applications for international protection be lodged at a designated place, it must be noted that no provision of that directive establishes a similar rule regarding the making of applications for international protection.”<sup>15</sup>

**Article 6(1)** of the proposed Regulation provides that a Member State facing an “instrumentalisation” situation shall inform third-country nationals and stateless persons of the location of accessible registration points, including border-crossing points where applications for international protection may be registered. **Recital 5** adds that in such cases Member States may register claims and allow their lodging only at specific registration points. The Commission notes in the Explanatory Memorandum to the proposal that such a measure “ensures a genuine and effective access to the asylum procedure”.<sup>16</sup>

As stressed by the CJEU, “registration” of the asylum application is an administrative act incumbent on national authorities and not on the applicant. **The legal effect of acquisition of “applicant for international protection” status is produced by the act of “making” an application, not “registration”.** Any measure which would restrict the exercise of the right to make an application to a specific place or time would infringe the fundamental right to asylum enshrined in **Article 18 of the Charter of Fundamental Rights** and to effective access to the asylum procedure under **Article 6 of the Asylum Procedures Directive**. According to the CJEU, **“a Member State cannot, without undermining the effectiveness of Article 6 of that directive, unjustifiably delay the time at which the person concerned is given the opportunity to make his or her application for international protection.”**<sup>17</sup>

Besides, the Commission itself submitted in Case C-808/18 *Commission v Hungary* before the CJEU that “irrespective of the exact number of persons waiting, a system which makes the right to registration conferred by Article 6 of Directive 2013/32

<sup>12</sup> CJEU, C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, para 93.

<sup>13</sup> Article 65(2) IPA.

<sup>14</sup> Article 65(1) IPA.

<sup>15</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 96.

<sup>16</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 4.

<sup>17</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 103.

conditional upon the application being made at a specific place, access to which is limited for a long period, is not consistent with the requirement, set in the same article, that access to the procedure must be ensured in due time.”<sup>18</sup>

Based on the above, **the designation of specific registration points by Member States can only affect the organisation of competent administrative authorities and may in no way impose restrictions on the possibility to make an asylum application and to come under the protective status of “applicant for international protection”** and corollary rights to remain on the territory<sup>19</sup> and to access reception conditions until the completion of the asylum process.<sup>20</sup> Member States’ compliance with the aforementioned guarantees will *de facto* require additional actions under the responsibility of competent authorities such as transport of the applicant – not removal from the territory, on which they lawfully remain – to a specific registration point for the purpose of registration of their application.

Yet, the series of serious human rights violations documented in March 2020 during the period of effect of the Greek emergency decree on suspension of the asylum procedure, notably as a result of mass issuance of deportation decisions contrary to the *non-refoulement* principle and of criminal charges for illegal entry contrary to Article 31(1) of the Refugee Convention, illustrates that **“applicant for international protection” status and the protections attached thereto are rendered illusory if the persons concerned lack official documents from the competent authorities to demonstrate that an asylum claim has been made.**<sup>21</sup>

The proposal therefore **undermines the objective of effective, simple and straightforward access to the asylum procedure,**<sup>22</sup> insofar as it encourages rather than prevents violations of asylum seekers’ rights guaranteed by EU law.

### Time limits for registration

Similar to the provision introduced in the 23 September 2020 Crisis Regulation proposal, **Article 2(1)(a)** of the present proposal allows Member States to derogate from Article 27 of the Asylum Procedures Regulation under negotiation and to register asylum applications within a four-week deadline.

The Commission justifies this measure by referring to the need to afford flexibility to Member States “to manage the unexpected caseload, given the nature and sudden character of the third country interference”.<sup>23</sup> This is an **incorrect assumption**, however. As highlighted in RSA’s detailed comments on the proposal amending the Schengen Borders Code, **the definition of “instrumentalisation of migrants” in the proposed Article 2(27) of the Schengen Borders Code in no way presupposes a sudden or unforeseen**

<sup>18</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 77.

<sup>19</sup> Article 9(1) Asylum Procedures Directive.

<sup>20</sup> Article 17(1) Reception Conditions Directive.

<sup>21</sup> RSA, *Rights denied during Greek asylum procedure suspension*, April 2020, available at: <https://bit.ly/3nBIELx>. See also ECRE, *Comments on the Commission proposal for a Council Decision on provisional emergency measures for Latvia, Lithuania and Poland*, December 2021, 12, available at: <https://bit.ly/3GOjMar>.

<sup>22</sup> CJEU, C-36/20 *VL v Ministerio Fiscal*, 25 June 2020, para 82.

<sup>23</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 5.

**character of arrivals, or even a large number of arrivals**, in order for the conditions for such a situation to be fulfilled.

At the same time, EU law already provides Member States with flexibility to manage large numbers of people simultaneously seeking asylum in **Article 6(5) of the Asylum Procedures Directive**, which allows for an extension of registration time limits from three to ten working days. Accordingly, the present proposal in no way fills a legislative gap. On the contrary, it permits Member States to delay the registration of asylum claims for without objective justification, even where they face low numbers of arrivals and applications. This undermines the objectives and the effectiveness of the Asylum Procedures Directive.<sup>24</sup>

As stressed above and in RSA's comments on the Crisis Regulation proposal, delayed registration of asylum applications **"only creates (a) barriers on applicants to provide proof of their status and to access their rights, with potentially critical consequences vis-à-vis protection from refoulement, and (b) confusion and ambiguity to asylum and reception authorities** as regards the necessary measures to be taken to discharge their obligations towards asylum seekers."<sup>25</sup>

## 2. Expansion of the border procedure

**Article 2(1)(b)** of the proposal permits Member States to apply the border procedure to all asylum claims registered during the period of effect of "instrumentalisation"-related measures, for a maximum of sixteen weeks (**Article 2(1)(c)**). According to **Recital 6**, the provision aims at preventing "instrumentalisation" of nationals of specific countries who would normally not be subject to the border procedure, and at granting the necessary flexibility to Member States to implement the "fiction of non-entry" for longer periods and to respond to the increased caseload.<sup>26</sup>

This measure in fact results in generalised application of lower procedural safeguards, extremely truncated timeframes and deprivation of liberty to the entire asylum caseload. The Commission thereby **codifies the systematic use of the exceptional border procedure set out in Article 60(4) L 4375/2016 and Article 90(3) IPA to all claims lodged on the Eastern Aegean islands from 2016 to present** and corollary long-term containment of refugees in inhuman living conditions,<sup>27</sup> **in direct contravention of Article 43(1) of the Asylum Procedures Directive**.

The Commission itself acknowledges the risk that large populations will be trapped at borders. **Recital 9** acknowledges that "the number of applicants under the border procedure will be higher than under normal circumstances" due to the broadened scope of the border procedure. In addition, **Recital 8** on alternatives to detention in

<sup>24</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 103.

<sup>25</sup> RSA, *Comments on the Commission proposal for a Crisis Regulation*, October 2020, 4, available at: <https://bit.ly/3GIqorx>.

<sup>26</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 4-6.

<sup>27</sup> RSA & Stiftung PRO ASYL, *EU-Turkey deal: 5 Years of Shame – Rule of law capture by a Statement*, March 2021, 3-4, available at: <https://bit.ly/32eczSh>.

the border procedure disregards the fact that **the “fiction of non-entry” has never been applied to date without blanket – and therefore arbitrary – deprivation of liberty.**<sup>28</sup>

The Commission also fails to justify why it promotes the generalised application of the border procedure to persons in need of special procedural guarantees and cannot benefit from adequate support. This is contrary to **Article 24(3) of the Asylum Procedures Directive** which is not cited at all in the proposal. **Recital 7** only recommends Member States to exempt “medical cases” from the scope of the border procedure. Through this provision, the **Commission attempts to reverse the CJEU position it had itself defended** in Case C-808/18 *Commission v Hungary* on the incompatibility of blanket application of the border procedures to those in need of special procedural guarantees without individual examination.<sup>29</sup>

### 3. Derogation from reception standards

**Article 3** of the proposal grants Member States the possibility to derogate from the Reception Conditions Directive provisions on the provision of material reception conditions to asylum seekers, upon condition that they cover their basic needs, in particular access to food, water, clothing, adequate medical care and temporary shelter adapted to seasonal weather conditions, in full compliance with human dignity. Although the Commission solely refers to recent interim measures orders from the European Court of Human Rights (ECtHR),<sup>30</sup> **Article 1 of the Charter** requires in all cases **Member States guarantee a dignified standard of living be guaranteed to persons concerned “continuously and without interruption”**, in order to avoid situations of a person “finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity”.<sup>31</sup>

Furthermore, the Commission's justification of the measure in **Recital 11** and in the Explanatory Memorandum notes that a “Member State's capacities might be overstretched” due to the “instrumentalisation” situation.<sup>32</sup> **This assumption is again incorrect, however, since “instrumentalisation” under Article 2(27) of the Schengen Borders Code may arise without a large number of arrivals in a Member State liable to jeopardise the functioning of its reception system.** Conversely, as put forward by the Commission itself in Case C-808/18 *Commission v Hungary*, **Article 18(9) of the Reception Conditions Directive** already affords Member States the possibility to set different modalities for material reception conditions than those of the Directive where “housing capacities normally available are temporarily exhausted”.

In light of the above, **the Directive currently in force already offers sufficient flexibility to Member States whose reception systems have “overstretched capacities”.**

<sup>28</sup> RSA, *Comments on the Commission proposal for a Screening Regulation*, October 2020, 6, available at: <https://bit.ly/32e4CNh>.

<sup>29</sup> CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 199.

<sup>30</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 6.

<sup>31</sup> CJEU, C-233/18 *Haqbin*, 12 November 2019, paras 46 kai 50.

<sup>32</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 6.

Accordingly, the proposed measure undermines EU law by introducing derogations from existing instruments which already address the aim invoked by the Commission.

#### 4. Civil society access to applicants

The proposal introduces more restrictive standards on asylum seekers' access to civil society organisations compared the existing *acquis*. In **Article 8(2)**, the Commission provides for close cooperation of states with the United Nations High Commissioner for Refugees (UNHCR) and "relevant partner organisations", while **Recital 11** refers to "the provision of humanitarian assistance by the humanitarian organisations" and **Recital 20** cites "UN agencies and other relevant partner organisations, in particular the International Organization for Migration and the International Federation of Red Cross and Red Crescent Societies".

These provisions seem to ignore the fact that, particularly in situations of crisis, civil society is called to fill present and important gaps, as has been the case in the past and until now. The provisions also refer to access of only certain categories of civil society organisations to applicants, even though the existing *acquis* does not limit such access to humanitarian organisations or UN agencies' partners. More specifically:

- **Article 8(2) of the Asylum Procedures Directive** foresees the right of "organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones".
- **Article 12(1)(c) and Recital 25 of the Asylum Procedures Directive** provide the applicant with the possibility to come into contact with "any other organisation providing legal advice or other counselling to applicants".
- **Article 10(4) of the Reception Conditions Directive** requires that "family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants".
- **Article 18(2)(b) of the Reception Conditions Directive** guarantees the rights of asylum seekers to come into contact with "other relevant national, international and non-governmental organisations and bodies".
- **Article 16(4) of the Return Directive** provides "relevant and competent national, international and non-governmental organisations and bodies" with the possibility to visit detention facilities and to come into contact with detainees.

It is worth recalling that the European Commission itself had emphasised in Case C-821/19 *Commission v Hungary* that the current **Article 8(2) of the Asylum Procedures Directive** already permits Member States "to determine who may enter the transit zones to provide legal advice to asylum seekers. However, it is possible to impose such restrictions only if they are objectively necessary for the security, public order or

administrative management of the crossing points concerned, provided that access is not severely restricted or rendered impossible."<sup>33</sup>

Bearing in mind the above observations, introducing more restrictive conditions on civil society access to the border in the context of "instrumentalisation" **without justification or explicit reference to the provisions of the *acquis* in force is a flagrant breach of better law-making principles.**

## 5. Derogation from return procedures

Under **Article 2(2) of the Return Directive**, "Member States may decide not to apply this Directive to third-country nationals who (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State..." The provision has been transposed into Greek law through **Article 17(2) L 3907/2011**, while **Article 34** of the same law and **Article 1 L 4825/2021** specify that persons exempt from the Return Directive framework are immediately subject to readmission procedures and the relevant provisions of **L 3386/2005**.<sup>34</sup>

The aforementioned EU law provision allows Member States to derogate from the procedures of the Directive in strict and exhaustively listed circumstances,<sup>35</sup> subject to complying with only some of its guarantees.<sup>36</sup> Due to this, CJEU case law requires a **narrow interpretation of the derogations from the Return Directive safeguards** set out in Article 2(2)(a) of the Directive, taking into account the context of the provision and the consistent reading of the Schengen Borders Code.<sup>37</sup> The cases falling within the scope of the aforementioned derogation are described by the European Commission's Return Handbook as "border cases" in which the person concerned has not been granted authorisation to remain on the territory.<sup>38</sup> Accordingly, **cases of "irregular entrants who have been apprehended at the external border and subsequently obtained a right to remain as asylum seeker" are not excluded from the scope of the Directive as "border cases"**.<sup>39</sup>

Both the letter and spirit of **Article 6(4) of the Return Directive** prohibit the issuance of a return decision simultaneously with the submission of an asylum application, given that applicants enjoy the right to remain on the country's territory until the completion of the asylum procedure.<sup>40</sup>

### Circumvention of the Directive on the Eastern Aegean islands

<sup>33</sup> CJEU, C-821/19 *Commission v Hungary*, 16 November 2021, para 56.

<sup>34</sup> See in particular Articles 76 et seq. L 3386/2005.

<sup>35</sup> CJEU, Case C-61/11 PPU *El Dridi*, 28 April 2011, para 32.

<sup>36</sup> Article 4(4) Return Directive; Article 19(2) L 3907/2011.

<sup>37</sup> CJEU, C-444/17 *Préfet des Pyrénées-Orientales v Arib*, 19 March 2019, para 60.

<sup>38</sup> Recommendation (EU) 2017/2338 of the European Commission on a common Return Handbook [2017] OJ L339/83, point 2.1.

<sup>39</sup> *Ibid*, point 2.1.

<sup>40</sup> Article 9(1) Asylum Procedures Directive.

For the reasons outlined above, the **constant practice of the Lesvos, Chios, Samos and Dodecanese Police Directorates from 2016 to present is manifestly incompatible with the Return Directive**.<sup>41</sup> Such practice entails systematic and indiscriminate issuance of “deportation decisions based on readmission procedures” accompanied by detention pursuant to **Articles 17(2), 27(3) and 34 L 3907/2011** and on **L 3386/2005** against persons who already hold “applicant for international protection” status following the making of an asylum application, have been previously subject to reception and identification procedures under **Article 39 IPA** and have been referred by the Reception and Identification Service (RIS) to the Asylum Service for their application to be lodged. These deportation decisions are issued *after* the RIS issues a decision referring the persons concerned to the asylum procedure, and the competent Police Directorate expressly cites the fact that the deportee “has been subjected to the applicable first reception procedures”. They omit, however, references to the registration of the asylum claim and to the Asylum Intention Number already issued.<sup>42</sup>

The Greek administration incorrectly relies on **Article 2(2)(a) of the Directive** and **Article 17(2) L 3907/2011** and fully circumvents the Return Directive in these cases, given that it applies deportation procedures against asylum seekers, i.e. persons who have a right to remain and are *not* irregularly staying.<sup>43</sup> As a result of the practice, people are deprived of crucial safeguards laid down in the Directive.<sup>44</sup> In direct breach of the principle of legality, subsequently issued decisions which “revive” the readmission decision taken by Police Directorates upon the final rejection of an asylum claim contain the following passage:

“... administrative deportation decision number..., as well as a detention order to secure his transfer abroad were issued against him pursuant to Article 76 of L 3386/2005. Subsequently, however, the aforementioned alien lawfully submitted an application to receive international protection before the competent Asylum Service and after that, the execution of our aforementioned decision for the administrative deportation of said alien was suspended by a new decision... until the completion of the administrative examination of his application.”

It should be noted that administrative courts repeat the erroneous reference to the submission of an asylum claim after the issuance of a deportation order, in the context of judicial review of deportation decisions.<sup>45</sup>

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<sup>41</sup> Directorate of the Hellenic Police, Circular 1604/16/1195968, 18 June 2016, available at: <https://bit.ly/3qa9H0G>.

<sup>42</sup> Note the specific reference to registration of “intention” from police authorities in the Hellenic Police Circular 1604/16/1195968 of 18 June 2016.

<sup>43</sup> Return Handbook, para 1.2.

<sup>44</sup> For instance, Administrative Court of Mytilene, Decision 42/2020, 4 December 2020 on the absence of the obligation to translate deportation decisions.

<sup>45</sup> See e.g. Administrative Court of Mytilene, Decision 21/2020, 30 September 2020, para 3: “the execution of the aforementioned deportation decision was temporarily suspended until the issuance of a negative (second instance) decision on the subsequently filed application of the applicant for the granting of international protection.”

At the same time, the administration unlawfully suspends the – unlawful – deportation decision subject to alternatives to detention after an asylum application has been lodged, since there are no grounds for detaining the asylum seeker for the purpose of removal to justify less coercive alternatives. According to the CJEU, administrative detention and alternatives thereto may only be ordered against an asylum seeker based on the exhaustive grounds of **Article 8(3) of the Reception Conditions Directive**,<sup>46</sup> transposed into Greek law by **Article 46(2)-(3) IPA**.

#### Proposed retreat of EU law

**Article 4** of the proposal allows Member States facing situations of “instrumentalisation” to derogate from the Return Directive when ordering removal of persons whose asylum claims are rejected in the border procedure, and to abide only by the minimum standards corresponding to **Article 4(4) of the Return Directive**. The Commission’s justification is limited to a short reference to the “necessary flexibility to carry out return procedures” in **Recital 12** and to the need to “equip the Member State concerned with the necessary legal tools to ensure a swift return of those who do not qualify for international protection” in the Explanatory Memorandum.<sup>47</sup>

This provision **circumvents the legal framework set out by the Return Directive for common standards and procedures for removal from Member States in an attempt to codify an unacceptable retreat of EU law in favour of national discretion and initiatives**.<sup>48</sup> It also lacks evidence base, as the Commission fails to substantiate why the objective of swift return of people who do not qualify for international protection cannot be achieved within the framework of the Directive. In this regard, RSA recalls that the **Commission insists on not submitting the implementation report on the Directive to the co-legislators**, in direct violation of its duties under **Article 19 of the Return Directive**.<sup>49</sup>

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<sup>46</sup> CJEU, C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, paras 99-100.

<sup>47</sup> Proposal for an Instrumentalisation Regulation, Explanatory Memorandum, 6.

<sup>48</sup> CJEU, C-61/11 PPU *El Dridi*, 28 April 2011, para 32.

<sup>49</sup> Isabella Majcher & Tineke Strik, ‘Legislating without Evidence: The Recast of the EU Return Directive’ (2021) 23:2 *European Journal of Migration and Law* 103.



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