

## EU Council supports a quagmire of asylum procedures

The implications of the APR and AMMR mandates for Greece and the EU

June 2023

The adoption of the Council mandate on the Commission proposals for an Asylum Procedures Regulation (APR) and an Asylum and Migration Management Regulation (AMMR) on 8 June 2023 paves the way for legislative negotiations ("trilogues") thereon between Council and European Parliament, with the aim of concluding the reform of the Common European Asylum System (CEAS) launched in 2016 before the end of the parliamentary term in 2024.<sup>1</sup>

This note briefly outlines the main changes to EU asylum procedures envisioned by the Council, underpinned by a severe regression of CEAS standards, unclear and unnecessarily complex rules, wide discretion to domestic legal orders and further entrenchment of derogations in the *acquis*.

### Regression of CEAS standards: Selected proposed changes to the *acquis*

#### 1. Access to asylum procedures

##### 1.1. "Making" of the application

- Member States are no longer required to provide information and interpretation to facilitate access to asylum where there are "indications" of people wishing to apply for asylum at the border or in detention: **Art 30(3), Recital 27 APR**.
- An asylum application can be "made" only "in person" and to designated "competent authorities", which Member States can decide to limit to police, border guards and detention authorities: **Art 5(3aa), 25(1) APR**. This poses impermissible restrictions and "administrative formalities" on the making of asylum claims in clear contravention of **Art 18 Charter** and of CJEU case law in *C-36/20 PPU Ministerio Fiscal*, *C-808/18 Commission v Hungary* and *C-72/22 PPU Valstybės sienos apsaugos tarnyba*. It would thus be impossible to express the wish to apply for asylum e.g. to reception authorities or army officials. For Member States requiring refugees to book an online appointment for registration e.g. Greece, it would also mean that people are not deemed "asylum seekers" while awaiting their appointment for registration in person, contrary to case law.<sup>2</sup>
- Member States can declare inadmissible an asylum application made more than 7 working days after the issuance of a return decision without any new elements having arisen: **Art 36(1a)(g) APR**. These inadmissibility decisions shall be taken in 10 working days and appeals against them are non-suspensive: **Art 54(3)(b) APR**. This is particularly critical for countries such as Greece where police authorities systematically issue return decisions upon arrival.

##### 1.2. "Registration" of the application

- Deadlines for access to the procedure become significantly longer. Member States "register" the application 7 days after it is made or after the end of the screening process:

<sup>1</sup> Trilogues are already underway on the Screening Regulation and recast Eurodac Regulation, while political agreement has been reached on the recast Reception Conditions Directive, the Qualification Regulation and the Resettlement Framework Regulation.

<sup>2</sup> Administrative Court of Athens, AP741/2023, AP721/2023; Administrative Court of Kavala, AP421/2023, AP382/2023, AP379/2023, AP292/2023, AP164/2023; Administrative Court of Komotini, AP209/2023.

**Art 27(1), (5) APR.** Where the application is made to an authority non-competent to register, the deadline is 7 days and 3 working days: **Art 27(1b) APR.** The deadline may be extended to 21 days in case of a disproportionate number of applications: **Art 27(3) APR.**

- The Dublin procedure starts at the point of “registration” of the application, in line with [C-670/16 Mengesteab](#): **Art 28(1) AMMR.** A “take charge” request has to be sent within two months of registration, or one month if it stems from a Eurodac hit: **Art 29(1) AMMR.** “Take charge” requests concerning unaccompanied children may be sent after the expiry of the deadline.

### 1.3. “Lodging” of the application

- The lodging of the application shall be done in 21 days from registration, with a possibility of extension to 2 months in case of a disproportionate number of applications: **Art 28(1), (3) APR.** In the border procedure, a non-binding 5-day deadline is foreseen: **Art 41c(1) APR.**
- Member States may condition the lodging of the application upon verification of the person’s presence on the territory: **Art 28(1b) APR.**
- The applicant has to present all the necessary elements to substantiate their application as soon as possible and upon lodging the claim: **Art 7(2)(d), 28(4) APR.** However, free legal information is offered upon request only after the lodging of the claim: **Art 15(2) APR.**

### 1.4. Subsequent applications

- Member States may require subsequent applicants to translate the documents they submit in support of their fresh claim: **Art 33(4) APR.**
- The preliminary admissibility assessment explicitly extends to subsequent applications lodged after a previous inadmissibility decision: **Art 42(2)(b) APR,** as seen in Greece.

## 2. Safe third country concept

### 2.1. Safety and connection criteria

- The concept can be applied based on an EU list, a national list or no list at all: **Art 45(2) APR.** Methodology rules are no longer required for designation at EU and national level and for the use of the concept: **Art 46, 50 APR.** This eliminates the requirement of methodology as highlighted by the CJEU in [C-564/18 LH](#), [C-924/19 PPU FMS](#) and [C-821/19 Commission v Hungary](#).<sup>3</sup> Contrast **Art 47(3) APR** on the safe country of origin concept which maintains reference to the elements that states have to take into account e.g. legal framework, observance of international conventions, redress systems.
- Safety criteria in the third country explicitly refer to “non-nationals”: **Art 45(1) APR.** This would allow for countries persecuting their own citizens to qualify as safe third countries.
- Safe third countries can be designated with exceptions on parts of the territory or specific groups of people: **Art 45(1a) APR.**
- Safe third countries need only ensure “effective protection”: **Art 43a(2), Recital 37b APR.** This is met even in the absence of access to a legal status, to full health care and to family reunification in the third country.
- The safety criteria are presumed to be met if the third country has an agreement with the EU and has offered a general assurance that migrants will be treated in accordance with international standards: **Art 45(3) APR.** This contravenes **Art 4 Charter** insofar as it falls far short of the [Othman v. United Kingdom](#) criteria set by the ECtHR for diplomatic assurances, and cannot in any way circumvent the duty to conduct a “thorough” assessment of the third country’s asylum system in accordance with [Ilias and Ahmed v. Hungary](#).
- The connection to a third country is established in particular if family members are present in the third country or if the applicant has settled or stayed there: **Art 45(2b)(b), Recital 37 APR.** It is clear from the CJEU case law in [C-564/18 LH](#), [C-924/19 PPU FMS](#) and [C-821/19 Commission v Hungary](#) that transit alone cannot suffice for such a connection.

<sup>3</sup> See also Greek Council of State, 177/2023, para 34.

## 2.2. (Re-)admission prospects

- An inadmissibility decision may not be taken if it is clear at the stage of the asylum procedure the applicant will not be (re-)admitted to the third country: **Art 36(1)(b), Recital 37d APR**. This issue is pending before the CJEU in *C-134/23 Elliniko Symvoulío gia tous Prosfyges*. For unaccompanied children, however, there have to be clear indications that (re-)admission will happen: **Art 45(2)(c) APR**.

## 2.3. Procedural rules

- Member States may make the interview report available to the applicant only upon taking a negative decision: **Art 13(6) APR**.
- Appeals against safe third country decisions seem to be suspensive but may be non-suspensive if the decision is taken in the border procedure: **Art 54(3)(a)-(b) APR**. The deadline to appeal may be as short as 5 days: **Art 53(7)(a) APR**.
- The Commission shall review the safe third country definition within 1 year of the entry into force of the APR: **Art 60 APR**.

## 3. Border procedure

### 3.1. Scope

- The border procedure applies to applications made at the border or “following apprehension in connection with an unauthorised crossing”, disembarkation after search and rescue or relocation: **Art 41(1)APR**. The notion of “in connection with an unauthorised crossing” is subject to strict spatial and temporal constraints as per CJEU case law in *C-47/15 Affum* and *C-444/17 Arib*. However, countries such as Greece routinely disregard those.
- The border procedure can be conducted in “other designated locations” on the territory, even in the facilities used for the regular procedure: **Art 41g(1), Recital 40c APR**.
- The border procedure is mandatory for in-merit processing where the following acceleration grounds apply, subject to varying degrees of obligation: **Art 41b(1) APR**
  - i. **Art 40(1)(i) APR** on nationals of countries with an EU-wide recognition rate below 20%. Member States can forgo the border procedure on this ground where their adequate capacity is reached: **Art 41bc(2) APR**;
  - ii. **Art 40(1)(c) APR** on the broadened ground of use of false documents or destruction or disposing thereof, no longer based on bad faith and applicable even “if the circumstances clearly given reason to believe that this is the case”. The border procedure on this ground remains mandatory even where adequate capacity is reached but Member States may forgo its application where the maximum number of applications in the border procedure is reached: **Art 41bc(2), 41be APR**.
  - iii. **Art 40(1)(f) APR** on threat to public order or national security, including the person’s family members: **Art 41b(1a) APR**. Security-related cases are always processed in the border procedure, even if adequate capacity and/or the maximum number of cases in the border procedure are reached: **Art 41bb(2), 41be APR**.
- The border procedure remains optional for the remaining acceleration grounds and for all inadmissibility grounds: **Art 41a APR**.

### 3.2. Non-entry fiction and procedural rules

- The “fiction of non-entry” applies throughout the entirety of the border procedure, meaning that people are not deemed to have entered EU soil and that measures including detention have to be taken to prevent their entry: **Art 41(2), 41h(1), Recital 40e APR**. The preamble erroneously implies that detention is a last resort measure only for children. This would have substantial implications for Greece which currently does not apply such a fiction. It would inevitably lead to prolonged mass deprivation of liberty within the RIC and CCAC.
- Travel of applicants to the determining authority, court or health care facilities does not constitute entry into the territory: **Art 41g(3) APR**.
- Member States can forgo the issuance of documents to asylum seekers in the border procedure: **Art 29(2a) APR**.

- The duration of the border procedure is 12 weeks and may be extended to 16 weeks “where additional time is needed”: **Art 41c(2) APR**.
- Appeals in the border procedure are non-suspensive: **Art 54(3)(a) APR**.

#### 4. Procedural consequences of movement between Member States

##### 4.1. (Rejected) asylum seekers in another Member State

- Asylum seekers have no right to remain in a Member State other than that responsible for their application: **Art 9(1) APR**.
- Responsibility under the first country of entry criterion lasts for 2 years – only in disembarkation following search and rescue is it maintained at 12 months: **Art 21 AMMR**. However, responsibility ceases in 15 months if the Member State has applied the border procedure: **Art 27(1aa) AMMR**.
- “Take back” notifications must be submitted within two weeks, yet failure to meet the deadline does not affect the receiving Member State’s responsibility to take back: **Art 31(1) AMMR**.
- Appeals against Dublin decisions are only permissible for challenges relating to the family unity provisions and to risks of inhuman or degrading treatment in the receiving Member State: **Art 33(1) AMMR**. This runs counter to **Art 47 Charter** and seeks to overturn CJEU case law in *C-63/15 Ghezelbash*, *C-155/15 Karim*, *C-490/16 A.S.*, *C-670/16 Mengesteab*, *C-201/16 Shiri* and *C-163/17 Jawo*.
- Absconding of the applicant leads to an extension of the transfer deadline to 3 years: **Art 35(2) AMMR**. It also bars the applicant from the possibility to remain in the Member State if that country applies “responsibility offsets” as a form of solidarity: **Art 44h(6)(d) AMMR**.
- In case of “responsibility offsets”, it is the Member State offering solidarity which decides the cases for which it shall undertake responsibility: **Art 58a(3) AMMR**.
- Member States are not required to fulfil their solidarity pledges or “responsibility offsets” towards a Member State facing “systemic shortcomings” in the implementation of the Dublin system according to a Commission assessment: **Art 44e(3), Recital 31 AMMR**.

##### 4.2. Beneficiaries of international protection in another Member State

- Protection in another country is a mandatory inadmissibility ground: **Art 36(1aa)(b) APR**.
- Member States may dismiss the case as inadmissible without interviewing the applicant: **Art 12(5)(c) APR**, in an attempt to overturn CJEU case law in *C-297/17 Ibrahim*, *C-540/17 Hamed & Omar* and *C-517/17 Addis*. Where they conduct an interview, they may make the report available only upon taking the negative decision: **Art 13(6) APR**.
- Appeals against inadmissibility decisions are suspensive: **Art 54(3)(b) APR**.
- Where a beneficiary of international protection is granted protection in a second Member State, the first Member State may “conclude” their case i.e. revoke status without taking a decision: **Art 52(5) APR**. Should Member States opt for taking decisions in such cases, they can prohibit appeals against them: **Art 53(1) APR**.

#### 5. Implicit withdrawal of asylum applications

- Its application is mandatory for Member States: **Art 39(1) APR**.
- Suspension of the proceedings to allow the applicant to provide justifications is only optional and no deadline is foreseen for continuation of the procedure: **Art 39(2) APR**.
- Appeals against implicit withdrawal decisions are non-suspensive and may be subject to deadlines as short as 5 days: **Art 53(7)(a), 54(3)(c) APR**. This raises serious risks of *refoulement* since the applicant’s protection needs have never been assessed at first instance.<sup>4</sup>
- Subsequent applications are admissible if the previous application has been rejected as implicitly withdrawn, even if the submitted elements are not new: **Art 42(3a) APR**.

<sup>4</sup> Administrative Court of Athens, 127/2020.

## 6. Quality of procedures

- Free legal information is offered upon request only after the lodging of the claim: **Art 15(2) APR**. However, the applicant has to present all the necessary elements to substantiate their application as soon as possible and upon lodging the claim: **Art 7(2)(d), 28(4) APR**.
- Access rights granted to UNHCR are no longer extended to its implementing partners: **Art 5b APR**.
- Member States can require applicants to respond to questions in writing before their interview: **Art 12(1) APR**.
- Remote interviews are introduced "by derogation" with no justification: **Art 12(5a) APR**.
- Possibilities for requesting a caseworker of the same sex are restricted: **Art 12(8a) APR**. Those safeguards are even weaker in the Dublin interview: **Art 12(4) AMMR**.
- Member States can deny legal information and omit the interview or forbid the applicant from commenting thereon if they deem that the applicant will be granted refugee status or subsidiary protection with equivalent rights: **Art 12(5)(a), 13(4a)(b), 15(3)(e) APR**.
- The determining authority may obtain an oral translation by an interpreter to assess which of the applicant's documents should be translated: **Art 33(4) APR**. However, the wording would allow for such oral translations to take place without the applicant being present. The authority may require the applicant to bear the costs of translation of non-essential documents.
- Documents can be disregarded in the appeal process if they are not submitted "in due time as determined by the court or tribunal": **Art 53(6) APR**.
- Deadlines for deciding on the admissibility of the asylum application are not binding: **Art 34(1) APR**.
- A stricter "merits test" is applied for free legal assistance in appeals, as the appeal has to have "sufficient" prospects of success. It is unclear who assesses those prospects: **Art 15a(2)(b) APR**.

## 7. Special procedural guarantees

- "Necessary support" to applicants in need of special procedural guarantees no longer refers to "sufficient time" in **Recital 15 APR**.
- The benefit of the doubt principle for unaccompanied children is restricted to cases where age assessment is "not sufficiently conclusive": **Art 24(1) APR**. Physical, dental and X-ray examinations are listed as least invasive: **Recital 29a APR**.
- Age assessments or declarations of adulthood in other Member States can be taken into account: **Art 24(6) APR**.
- The presumption of minority pending the age assessment is called into question since the age assessment is to be done in the border procedure: **Art 41e(1) APR**.

## 8. Threat to public order and national security

- If no security check has been carried out in the screening procedure, it is applied before the Dublin procedure: **Art 8(4) AMMR**.
- Member States may withdraw the applicant's right to remain on the territory: **Art 9(3)(bb) APR**.
- These asylum applications are always processed in the border procedure: **Art 40(1)(f), 41b(1), 41bc(2), 41be APR**.
- There is no applicability of the Dublin procedure or of relocation: **Art 8(4), 57(2) AMMR**.
- Member States can conduct their own security interview before accepting relocation: **Art 57(6) AMMR**.

## Cross-cutting issues of concern

The Council mandates on APR and AMMR defeat the legal certainty, simplicity and harmonisation objectives of the Commission proposals, formally intended to “streamline, simplify and harmonise the procedural arrangements of the Member States” as per **Art 1, Recital 1 APR**.

- ❖ **Rules are unnecessarily complex and render asylum procedures unworkable** for asylum authorities, while **severely undermining foreseeability and legal certainty** for applicants required to participate in the process. Legal drafting is particularly ambiguous as regards provisions such as: (i) the apparent distinction between “right to remain and allowed to remain”, especially in the border procedure where applicants are deemed not to have entered the territory: **Art 41c(2), 41g(2), 41h(1), 54(4), 54(5), Recital 40d APR**; (ii) the notion of “high probability of return” for the purpose of prioritisation of cases in the border procedure: **Art 41a APR**, as well as the acceleration ground in **Art 40(1)(i) APR**; (iii) the interplay between “disproportionate numbers” of applications in **Art 27(2), 28(3) APR**, “migratory pressure” in **Art 2(w) AMMR**, “significant migratory situation” in **Art 2(wa) APR**, reaching of “adequate capacity” in **Art 41bc APR** etc; (iv) the terms “specificities of the structural phenomenon of disembarkations after search and rescue and unauthorised movements... between the Member States” in **Art 6a(5) AMMR** and “possible identified vulnerabilities in the area of responsibility, preparedness or resilience” in **Art 44d(2)(d) AMMR**. Similar concerns relate to the institutional structure and processes foreseen in the two texts as regards the assessment of “adequate capacity”, “migratory pressure” and “significant migratory situation” in **Art 7 et seq. AMMR** and **Art 41bb et seq. APR**.
- ❖ **No harmonisation is achieved:** Member States retain ample discretion to design their asylum procedures as regards the use of special procedures, inadmissibility and safe country concepts, as well as aspects such as: the definition of “final decision” in **Art 3(l), Recital 66a APR**; the authorities in charge of receiving and registering applications and performing the Dublin procedure and other tasks under **Art 5(3) et seq. APR**; the principle of confidentiality under **Art 6(1) APR**; notifications and communication with applicants under **Art 7(4) APR**; derogations from the right to remain under **Art 9(3) APR**; authorities assessing special procedural guarantees in **Art 20(3) APR**; information to reception facilities of the making of an asylum claim under **Art 25(1a) APR**; lodging of an asylum claim only subject to verification of the applicant’s presence on the territory, as well as lodging of the claim via a form under **Art 28(1b) APR**; suspension of proceedings prior to rejection of an application as implicitly withdrawn under **Art 39(2) APR**; conduct of the Dublin procedure in the context of the border procedure as per **Art 41d(1) APR**; consideration of further representations in the appeal procedure under **Art 42(1) APR**; “conclusion” of cases of beneficiaries of international protection granted status in a second Member State without taking a decision, or by taking a non-appealable decision: **Art 52(5), 53(1) APR**; duration of the appeal procedure in **Art 55 APR**; definition of objective criteria for the determination of a risk of absconding: **Art 2(q) AMMR**.
- ❖ **Derogations are further built into the rules:** The Council explicitly views derogations as part of the EU Migration Support Toolbox in **Art 6a(c) AMMR** and cites “instrumentalisation of migrants” in **Art 7b(2)(c), Recital 25 AMMR**. Disproportionate numbers of applications allow for derogations in relation to: competent authorities in **Art 5a(2) APR**; deadlines for appointing representatives to unaccompanied children under **Art 22(1aa) APR**; registration and lodging of applications under **Art 27(3), 28(3) APR**; duration of the admissibility procedure in **Art 34(1b)(a) APR**; deadlines for responding to relocation requests in **Art 57(7) AMMR**. However, further derogations are permitted for: remote interviews in **Art 12(5a) APR**, subject to no specific grounds; appointment of representatives to unaccompanied children in “other exceptional situations” under **Art 22(1aa) APR**; duration of processing where “complex issues” arise under **Art 34(1b), (3) APR** and **Art 57(7) AMMR**; and duration of the border procedure where “additional time is needed” under **Art 41c(2) APR**.