

DISCUSSION
BRIEF

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MIGRATION

The increasing use of detention of asylum seekers and irregular migrants in the EU





The **ReSOMA Discussion Policy Briefs** aim to address key topics of the European migration and integration debate in a timely manner. They bring together the expertise of stakeholder organisations and academic research institutes to identify policy trends, along with unmet needs that merit higher priority. Representing the second phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced covering the following topics:

- Secondary movements within the EU
- Implementation of the Global Compacts on Refugees (GCR)
- SAR and Dublin: Ad hoc responses to refusals to disembarkation
- Funding a long-term comprehensive approach to integration at the local level
- Public opinion on migrants: the effect of information and disinformation about EU policies
- Integration outcomes of recent sponsorship and humanitarian visa arrivals
- Strategic litigation of criminalisation cases
- Implementation of the Global Compacts on Migration (GCM)
- The increasing use of detention of asylum seekers and irregular migrants in the EU

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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Discussion Policy Brief

The increasing use of detention of asylum seekers and irregular migrants in the EU

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1. Introduction

In the last few years, the emergence of the so-called 'refugee' crisis outlined the European Union's (EU) political priority to reduce the number of migrant arrivals and increase return rates of foreign nationals on its territory (Cortinovis, 2018). The EU and its Member States mainly aimed to prevent secondary movements and enhance border controls, but also to restore public confidence in the EU asylum system. Against this context, NGOs and researchers emphasised the increasing level of detention of asylum seekers and irregular migrants in the EU in order to achieve these different political goals.

Immigration detention is not a legal, but rather a policy term, which can be defined as 'the detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory (front-end detention) or pending deportation, removal or return (backend detention) from a territory. It refers primarily to detention that is administratively authorised, but it also covers judicially sanctioned detention' (UNHCR, 2006).

International human rights law clarifies that immigration detention should be

used only as a measure of last resort, in exceptional cases and after all other options have been shown to be inadequate (IDC, 2016). In addition, the European Court of Justice (CJEU, 2016) and EU law require the respect of the legal principles of reasonableness, proportionality and necessity to justify the use of detention by showing that there is not less intrusive means of achieving the same objective (EASO, 2019).

Irregular stays are not considered *per se* as a criminal offence under EU law (CJEU, 2012), but the deprivation of liberty of foreign nationals in an irregular situation is allowed under certain circumstances by the EU legal framework, and thus regularly applies at national level. In particular, migration detention is used to enforce decisions to return irregular migrants to their country of origin, carry out Dublin transfers or as part of reception procedures for individuals seeking international protection, to which the *de facto* detention of asylum seekers in hotspots can be added (PICUM, 2017).

Detention is envisaged for a wide range of categories and is not only limited to irregular migrants waiting for a return procedure, but also applies to individuals in need of international protection, who may have fled from situations of conflict or persecution. The wide margin of



discretion left to Member States in the implementation of the European Common Asylum System (CEAS) risks increasing the systematic use of this practice (Duskova, 2017). The broad resort to migration detention suggests that the punitive logic underlying criminal law has been now extended to the branch of administrative law dealing with migration (ECRE, 2017). Some academics have described this conflation between criminal and administrative law as 'cimmigration' (Stumpf, 2006).

The increasing use of migrant detention in the Member States raised criticisms among relevant stakeholders and researchers, who highlight a sort of 'normalisation' in the use of this practice (Duskova, 2017). Concerns mainly revolve around the 'automatic' use of detention and its potential impact on migrants' integration outcomes and well-being. In particular, the human and social consequences resulting from the deprivation of liberty, both in the short and long run, are considered as major issues by NGOs and academics. It is also pointed out that migration detention, being used as a deterrent or even a punitive measure, undermines the scope of 'administrative' detention, which should be non-punitive in nature (ICRC, 2017).

Stakeholders further argue that detention does not always deter people from coming to Europe and also fails to increase return rates (PICUM, 2017), making it a counterproductive and coercive practice. By contrast, it may serve as a political tool to manage popular anxiety of undesirable foreigners (Leerkes & Broeders, 2010) or represent a

legitimate response for the protection of national interests and national security (Bloomfield, 2016).

The dearth of accurate statistical data on migrant detention represents an obstacle hampering the possibility to provide a comprehensive overview of the current situation in the EU and to numerically assess the cases of detention. ECRE describes figures on this topic as 'inexistent data' (ECRE, 2017). Some accessible information and statistics concerning the use of immigration and asylum detention in the Member States are instead provided by country-specific studies of stakeholders (ECRE 2018; PICUM 2017, ECRE, 2016).

2. Scoping the debate at EU level

Migration detention is regulated by several pieces of EU legislation, namely the Reception Condition Directive 2013/33/EU, the Dublin Regulation EU No 604/2013, the Asylum Procedure Directive 2013/32/EU, and the Return Directive 2008/115/EC. In addition, the ongoing reform of the CEAS can further extend the resort to restriction on migrants and the possibilities to deprive asylum seekers of their liberty (ECRE, 2018). However, the reform of the CEAS is very uncertain given the political difficulties to find an agreement in the Council, especially in relation to the recast of the Dublin system.

As regards the recast of the Reception Directive, on 14 June 2018, the European Parliament (EP) and the Council reached a partial provisional agreement on the



recast regulation (European Parliament, 2019a). Nonetheless, the Council failed to endorse the final agreement and the Austrian presidency returned the file to the negotiations at the technical level (European Parliament, 2019a).

The new Commission's proposal on the Return Directive also entered the ordinary legislative procedure. The rapporteur for the proposal at the LIBE Committee presented a draft report on 16 January 2019 including 120 amendments. At the Council, the Justice and Home Affairs configuration welcomed the proposal on 12 October 2018 and the text is now being discussed at technical level (European Parliament, 2019b).

In order to better assess potential developments and future implications on detention of migrants, this paper will briefly examine the 2016 European Commission proposals for the Return Directive (recast) and the Reception Conditions Directive (recast). It will also refer to the 2017 Commission's Recommendation on making returns more effective.

Against this evolving regulatory framework, NGOs and researchers highlighted some crucial issues concerning the use of detention:

- i) the interference with liberty;
- ii) the new grounds for detention;
- iii) the 'risk of absconding';
- iv) the length of detention
- v) the alternative measures as a gateway to detention;

- vi) the limitation of the suspensive effect of legal remedies.

Along with these discussion points, this policy brief identifies other key controversies such as the adverse impacts of detention on the health and social sphere of migrants and the detention of children.

A further layer of complexity is also represented by existing practices implemented at the national level, which pose a wide range of issues in terms of their compatibility with the EU *acquis* (PICUM, 2017). Some Member States' practices will be illustrated in the following section as examples of the heterogeneous and controversial use of detention across the Union.

3. Key issues and controversies

3.1 EU legislative framework

Interference with liberty

Under the Reception Conditions Directive (recast), States would be *de facto* able to lay down restrictions on asylum seekers' freedom of movement without a formal legally challengeable decision (Art. 6a). This is linked to Member States' prerogative to allocate applicants to certain geographical areas without issuing individualised decisions, which could be burdensome for reception authorities (ECRE, 2018).

In addition, detention would be permitted 'in order to ensure compliance with legal obligations imposed on the asylum seeker', where a risk of absconding exists (Art.7). In other words, applicants would



be ordered to stay in specific places to avoid they can abscond and then be subject to detention in case of failure to comply with the residential obligations. The logic of this measure lies in the fact that the deprivation of liberty is considered as a legitimate continuation of those restrictions on the movements of asylum seekers who do not comply with the law (ECRE, 2018).

Grounds for detention

The proposed Commission's recast of the Return Directive would add third ground for detaining irregular migrants (Amnesty International, 2018). The first ground is the 'risk of absconding' while the second concerns the migrant who 'avoids or hampers the preparation of return or the removal process' (Art.18). Detention would be now possible also when the person 'poses a risk to public policy, public security or national security' (Art. 18). This new ground seems to reflect one of the existing grounds to detain asylum seekers included under the Reception Directive, which the CJEU has already interpreted narrowly (Amnesty International, 2018). The EP instead recommended to 'delete the new ground for detention of returnees proposed by the Commission' (European Parliament 2019b).

Risk of absconding

The concept of risk of absconding was already present in both the old 2008 Return Directive and the Dublin III Regulation as a ground for detaining irregular migrants waiting for removal.

According to the Return Directive, risk of absconding 'means the existence of reasons in an individual case which are

based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'(Art.3.7). It aims to avoid any obstacles to the return or transfer procedure (PICUM, 2017). Member States may opt for detention when there is a risk of absconding, 'unless other sufficient but less coercive measures can be applied effectively' (Art.15).

This notion is also central in the recast Return Directive, which enshrines a new list of at least 16 'objective criteria' under Article 6 that Member States can use to determine the risk of absconding (ECRE, 2018). ECRE underlines that this list is non-exhaustive, and the criteria are highly vague. Article 6 may be used as a 'catch all' provision, as there are only a few asylum seekers who would not fall under at least one of the criteria of the recast Return Directive (ECRE, 2018). According to Amnesty International, a broad definition of the risk of absconding may excessively expand arbitrary detentions and would lead to the introduction of a *de facto* automatic detention regime (Amnesty International, 2018). Should the list be maintained, ECRE stresses the importance of having an exhaustive list of objective criteria and restricting them to circumstances related to the individual's intention not to comply with their obligations (ECRE, 2018). In this regard, the EP's amendment to the recast of the Return Directive proposes to revise the 'definition of the risk of absconding and the deletion of the criteria listed by the Commission's proposal to assess whether such a risk exist' (European Parliament, 2019b).

Moreover, the recast Directive sets out that the risk of absconding shall be



presumed by Member States in individual cases, unless proven otherwise (Art.6.2). This automatic presumption may create a disproportionate burden of proof on migrants and their possible penalisation (ECRE, 2018).

The Commission's Recommendation for more effective returns also contains a list of objective circumstances which should constitute a rebuttable presumption of absconding (Commission, 2017a). Among them, the Commission identifies five different criteria such as the refusal to cooperate with the identification process, the use of false or forged identity documents, the non-compliance with measures aimed at preventing absconding or with an existing entry ban and the unauthorised secondary movements to another Member States.

Moreover, the implementation of the Dublin III Regulation as regards the risk of absconding is often not accompanied by a definition of 'objective criteria' in domestic laws. As a result, the evaluation of the real risk of an applicant to abscond may result highly difficult for national judges. Despite in 2017 the CJEU (case C-528/15) ruled that Member States are required to adopt objective criteria in the law to assess the 'risk of absconding', several national legislations lack to provide any clear requirements. This legal gap makes the detention of asylum seekers on this ground unlawful (CJEU, 2017).

Length of detention

Under the 2008 Return Directive, any detention shall be for as short a period as possible, and only maintained if removal arrangements are in progress and

executed with diligence (Art.15). This piece of legislation establishes that Member States shall set a limited period of detention, which may not exceed 6 months – with the possibility of a further extension not exceeding 12 months in case of the applicant's lack of cooperation or the third country's failure to provide necessary documentation (Art.15).

The recast Return Directive instead sets a 'maximum' period for detention between 3 and 6 months (Art.18) that Member States can provide for in their national legislation (thus replacing the limited amount of time specified in the 'old' text). The proposed provision may increase current detention periods at national level as the length of detention would have to be at least of three months (ECRE, 2018). The Commission justifies the inclusion of a maximum period of detention by underlying the impossibility in some Member States to ensure an effective implementation of the return policy under the current framework (ECRE, 2018). In contrast, the EP's amendments to the recast Return Directive seek to introduce a 'limitation of the detention period of returnees to a maximum of three months, that could be extended for six months more under certain circumstances' (European Parliament, 2019b).



Limitation of suspensive effect of remedies

Applicants' right to an effective remedy against a return decision is a fundamental safeguard to ensure protection from the risk of *refoulement* (ECRE, 2018). In the Return Directive (recast) proposed by the Commission, the effective remedy against return decisions presents a lower degree of safeguards in terms of suspensive effect and time limits of the appeal.

Under the recast, third country nationals would be allowed to make an appeal against a decision related to return exclusively in front of a judicial authority who has the power to temporarily suspend their enforcement (Art.16). Amnesty International welcomes the choice of opting for a judicial authority, rather than an administrative one (Amnesty International, 2018). However, the suspensive effect of the remedy is automatic only if there is a risk to breach the principle of *non-refoulement* (ECRE, 2018).

This provision seems to not be in line with the CJEU's jurisprudence (case C-180/17), which underlines the necessity to ensure an automatic suspensory effect before at least one judicial body to allow the enjoyment of the protection inherent to the right of effective remedy. The EP also proposed the adoption of 'measures granting automatic suspensive effect to appeals against return decisions' (European Parliament, 2019b). The Commission stresses in its Recommendation the need for Member States to ensure that the automatic suspensive effect of the appeal is

granted only when necessary (European Commission, 2017a).

Furthermore, the Return Directive (recast) would set stricter time limits to exercise the right to an effective remedy that should not exceed five days, despite the reference to 'reasonable time' limits to lodge an appeal (Art.16). A similar approach has been adopted by the Commission, which requires that countries provide for the shortest possible deadline for lodging appeals against return decisions (European Commission, 2017a). On the contrary, the EP's amendments aim at 'deleting the five days' time limit proposed by the Commission to lodge appeals against return decisions when the person had already been denied international protection' (European Parliament, 2019b). As emphasised by ECRE, it would be of the utmost importance for Member States to have the flexibility to extend such periods on the basis of the circumstances of each individual case (ECRE, 2018).

Alternative measures and their risks

Civil society and governmental actors are increasingly interested in identifying effective alternatives to detention that could better impact migrants' health and wellbeing (Lesińska, 2019).

The Reception Condition Directive (recast) codifies an open-ended list of alternatives to detention for asylum seekers which Member States should introduce in their national law. Among these, the Directive mentions the possibility to reside in an assigned place, to regularly report to the authorities or provide the deposit of a financial guarantee. By contrast, in the Return



Directive (recast), no reference to possible alternatives is made, although the concept of detention as a measure of last resort is again stressed. Alternatives to detention are thus allowed under EU asylum law, but the UNHCR warns that they 'should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers' (UNHCR, 2012). Researchers also outline that 'alternatives to detention could entail obligations involving different levels of coerciveness' (De Bruycker & al., 2016).

At the international level, there is neither a single legal definition of what constitutes an 'alternative to detention', nor a common understanding of this concept. Generally speaking, 'alternatives to detention' refers to a range of different practices which allow the asylum seeker to reside in the community subject to a number of conditions or restrictions on their freedom of movement (UNHCR, 2015). Solutions based on alternatives to detention seek to shift the focus from security and restrictions to engagement (IDC, 2015). According to available data, adopting alternatives to detention would promote a 'more pragmatic approach with regards to the relationship between decisive factors such as the length and effectiveness of procedures, the risk of the migrant absconding, cost-effectiveness and the human rights impact' (Duskova, 2017).

It is worth noting that the automatic recourse to alternative measures can be problematic if used as a gateway to detention (ECRE, 2017). It is commonly recognised that the implementation of

alternative measures reduces the overall number of asylum seekers in detention, but their systematic use risks creating a mechanism to control migrants which undermines the main goal to provide less coercive means over detention (ECRE, 2017). When implemented, it is not clear if alternatives to detention have led to a real humanisation of migration policies or to an increased criminalisation of migrants (Bloomfield, 2016). In fact, most of the existing alternatives rely on the experiences of the criminal framework (i.e. electronic tagging), which can potentially produce stigmatising effects on migrants, psychological distress and social exclusion (Bloomfield, 2016).

3.2 Controversial use of detention at the national level

Member States seem to increasingly resort to detention to deal with new arrivals of asylum seekers and irregular migrants. Recent, though limited, data shows some controversial trends in the Member States concerning the use of detention. In this regard, stakeholders have reported crucial examples of restrictive migration policies and policies at national level (PICUM, 2017; ECRE, 2018).

In **Bulgaria**, according to Bulgaria's Foreigners in the Republic of Bulgaria Act, detention is possible under three circumstances: when migrants' identity is unknown, when there is a risk of absconding or a refusal to comply with a return decision. These three vague and broad criteria may lead to detention on a massive scale (PICUM, 2017). Furthermore, legal aid in detention seems to be absent, which results in very few



appeals against the decision to detain. The Foreigners Act has been further amended in 2016 in order to introduce detention for the 'shortest possible time'. This means that asylum seekers can also be placed in detention for the purpose of verifying their identity, nationality and the truthfulness of the information provided in the asylum application (PICUM, 2017).

In 2017, **Hungary** adopted a new law to deal with the increased number of people attempting to enter the country from Serbia. The law authorises the systematic, yet unlawful, detention of anybody over the age of 14 in the transit zones to examine their asylum applications. The decision to hold people in transit zones constitutes detention and it is neither ordered nor reviewed by a judge (PICUM, 2017). The ECtHR in the case of *Ilias and Ahmed v. Hungary* (no. 47287/15) found that the applicants' confinement in a guarded compound not accessible from the outside amounted to a *de facto* deprivation of their liberty (EDAL, 2017).

As regards **Italy**, in the last few years, hotspots in the South of the country allowed an easier and faster identification of undocumented migrants, by means of systematic detention and forced fingerprinting (PICUM, 2017). The Reception Decree however does not provide a clear framework for managing the hotspots. Consequently, asylum seekers have been unlawfully deprived of their liberty and held in conditions detrimental to their personal dignity (AIDA & ASGI, 2018). In addition, the new provisions adopted by Decree Law 113/2018 set out that detention should take place in suitable facilities set up in

hotspots, first reception centres or in pre-removal centres for the purpose of establishing migrants' identity or nationality (CIR & ECRE, 2018). This new provision raises concerns in terms of its compatibility with the prohibition under the Reception Decree to detain asylum seekers for the sole purpose of examining their asylum application. Data also confirm a systematic use of detention. For instance, in 2018 in Italy, a total number of 4.092 migrants were detained in pre-removal centres (CPR), while 13.777 were hosted in hotspots. The number of CPR also increased from five in 2017 to nine in 2018, thus expanding the infrastructural capacity to detain migrants (CIR & ECRE, 2018).

A considerable increase in the number of detentions has been registered also in **Greece** in 2018, where 31.126 asylum seekers were issued a detention order, compared to 25.810 issued in 2017 (GCR & ECRE, 2018). The actual number of asylum seekers who ended up in a detention facility was respectively 8,204 in 2018 and 9.534 in 2017. It is worth saying that the increasing level of detention in Greece does not correspond to a parallel scaling up of the numbers of forced returns (GCR & ECRE, 2018). Against this background, national authorities tend to often use public order grounds in an unjustified and excessive manner, both in the case of pre-removal detention and detention of asylum seekers (GCR & ECRE, 2018).



3.3 Adverse impacts of detention on health and on the social sphere

According to the Reception Condition Directive (recast), applicants for international protection who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs.

However, the criminalisation of irregular entry or stay may prevent migrants from accessing specialised services and support, especially in case of previous exposure to violence or abuse (ICRC, 2017). Moreover, detention should be carefully considered or avoided for some vulnerable categories of individuals such as children, migrants with mental disabilities, victims of trafficking and elderly people that may be negatively affected by coercive measures (ICRC, 2017). Medical and sociological studies have shown that experiences of detentions have a serious impact on the physical health and the psychological well-being of the individual (Steel & al, 2008). Migrants are highly vulnerable in presence of sub-standard conditions of detention (overcrowding or lack of basic services) and previous traumatic experiences (Bloomfield, 2016).

Furthermore, the 'confrontational approach' characterising detention can jeopardise the willingness of migrants to actively collaborate with authorities, as well as their integration potential (Bloomfield, 2016). In addition, deprivation of liberty often creates a strong feeling of injustice and alienation, which may impact migrants after their release. The ICRC further indicates that

the extensive use of detention can produce adverse effects on both the judicial and the penitentiary systems, often overwhelmed by heavy caseloads and overcrowded facilities (ICRC, 2017).

3.4 Lack of ban for children detention

The 1989 UN Convention on the Rights of the Child deems child detention a last resort measure, only permissible if less coercive alternatives are not suitable for the individual case. Furthermore, by signing the New York Declaration for Refugees and Migrants (2016), as well as the Global Compact on Migration (2018), most EU Member States committed to ending child detention and using non-custodial alternatives to replace it. Due to its potential to cause long-lasting negative effects on child development, the ECtHR found a violation of Article 3 which prohibits torture in respect of the administrative detention of the children (ECtHR, 2012). In addition, the Court recalled in several cases that children's vulnerability should always take precedence over their immigration status (ECtHR, 2010).

By contrast, detention of children is not expressly forbidden under EU law (European Commission, 2013) and may also affect minors in migration-related contexts. In the framework of the EU asylum law system, both the current Return Directive (Art. 17) and the Reception Directive (Art.11) acknowledge child detention as a measure of last resort and for the shortest possible period. It is also underlined the need to consider their best interest when opting for the deprivation of liberty. In 2017, the Commission, in its



Communication on the protection of children in migration, pointed out that administrative detention of children should be used exclusively in exceptional circumstances and never in prison accommodation (Commission, 2017b).

The ban on children detention represented a crucial topic in the ongoing negotiation of the CEAS. One of the main points agreed by the EP and the Council on the recast of the Reception Directive concerns the prohibition of children detention and the possibility to detain children only for family unity and protection purposes (European Parliament, 2019a). To the same extent, the EP proposed an amendment to reform the Return Directive and introduce 'the ban on detention of children and families with children and several additional safeguards to be respected by Member

States when deciding on the possible return of unaccompanied children and families with children' (European Parliament, 2019b).

As of now, most of EU Member States still enshrine in their national law the possibility to detain migrant children by providing different regimes in relation to unaccompanied and accompanied minors. According to the last Commission's evaluation on the topic, detention of minor is a widely used practice across EU countries (European Commission, 2013). Also, when Member States implement alternatives to detention for migrant children such as residence restrictions, release on bail with restrictions, regular reporting or seizure of travel documents, each measure must ensure the child's best interest and the right to liberty and family life (QCEA, 2018).



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ReSOMA

RESEARCH SOCIAL
PLATFORM ON MIGRATION
AND ASYLUM

ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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