



MIGRATION

POLICY OPTION
BRIEF

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**Addressing the systematic use of immigration
detention in the EU: recommendations
and policy options**



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:

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- 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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Policy Option Brief

Addressing the systematic use of immigration detention in the EU: recommendations and policy options

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1. INTRODUCTION

Detention has increasingly become a **systematic response to discourage irregular migration and influxes of asylum-seekers** (Detention Action, 2016; IDC, 2015). Researchers and stakeholders have identified numerous controversies concerning the use of administrative detention of irregular migrants and asylum seekers in the EU (Conte & Savazzi, 2019). Key issues are connected to the existing EU legal framework and detention practices across Member States. In particular, the potential legislative reform of the CEAS may bring about significant legal changes and extend the resort to detention under EU law. Therefore, NGOs and researchers have put forward different policy options and recommendations to address the increasing use of detention of irregular migrants and asylum seekers.

This ReSOMA Policy Option Brief gathers proposals of the main relevant stakeholders working on immigration detention such as Amnesty International, Caritas Europe, the Council of Europe, Detention Action, the European Council on Refugees and Exiles (ECRE), the European Network on Statelessness (ENS), the International Committee of the Red Cross (ICRC), the International Detention

Coalition (IDC), the International Organization for Migration (IOM), the Jesuit Refugee Service (JRS), Mental Health Europe (MHE), the Platform for International Cooperation on Undocumented Migrants (PICUM), the UN Refugee Agency (UNHCR) and the United Nations Children's Fund (UNICEF). Policy options advanced by researchers of the Odysseus Network have also been examined. In addition, this paper will briefly report the positions of the European Commission, the Council of the European Union and the European Parliament (EP) on the CEAS' reform, as well as the relevant judgments on immigration detention of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

Set out below are the **main policy options** proposed by academics and stakeholders **to fill the key gaps at EU and national level** and improve the quality of the responses to the evolving policy agenda. They revolve around the idea of the risk of absconding (Section 2.2), the length of detention (Section 2.3), the new ground for detention (Section 2.4), the limitation of the suspensive effect of legal remedies (Section 2.5), the impact of

detention on migrants' health and their social sphere (Section 2.6), child

detention (Section 2.7) and alternative measures to detention (Section 2.8).

2. POLICY OPTIONS AND RECOMMENDATIONS

2.1 General principles

Stakeholders and researchers provide some general recommendations to address the widespread practices of detention in the context of migration.

Firstly, many recommends that detention should be an **exceptional measure** or an *extrema ratio* measure (Council of Europe, 2017). Less coercive alternative measures to detention should therefore be preferred (ICRC, 2017; Amnesty International 2018; IDC, 2011; Council of Europe, 2017; ECRE 2017; IOM 2017). The idea of using detention as a measure of last resort, whether other less coercive measures cannot be effectively applied, is supported by the European Parliament, the European Commission and the Council. This principle is also enshrined in the most relevant pieces of EU asylum law (i.e. 2013 Dublin III Regulation; 2013 Reception Condition Directive and its recast; 2008 Return Directive and its recast).

Secondly, it is proposed that administrative detention and, in general, conditions and treatment within immigration facilities, should be **non-punitive and should not lead to a criminalisation of migrants** (ICRC, 2017; Council of Europe, 2017). Moreover, deprivation of liberty should avoid creating a mechanism to deter migration (ICRC, 2017) and should not prevent asylum seekers to pursue their protection claim (ECRE, 1996).

Lastly, the respect of three legal concepts is widely emphasised in the

context of immigration detention: the principles of **reasonableness, proportionality and necessity**, which are also deemed fundamental by the European Court of Justice (CJEU, 2016) and EU law (i.e. 2013 Dublin III Regulation; 2013 Reception Condition Directive and its recast; 2008 Return Directive and its recast).

2.2 The risk of absconding

The risk of absconding is one of the grounds allowing irregular migrants to be detained, as laid down in the Return Directive 2008/115/EC (Art. 6) and in the Dublin III Regulation No 604/2013 (Art. 28), in order to avoid any obstacles to the return or transfer procedure, and when alternative measures cannot be applied. The recast Return Directive expands this concept and introduces a list of at least '16 objective criteria' to assess the existence of a risk of absconding. Several stakeholders, among which Amnesty International and ECRE, oppose a broad definition of the risk of absconding and the proposed non-exhaustive list of objective criteria, as it may create a 'catch-all' provision whereby arbitrary detention would be excessively expanded (Amnesty International, 2018; ECRE, 2018).

ECRE welcomes the requirement of a case-by-case assessment of the risk of absconding, but it recommends 'deleting the overly broad criteria and replacing them with a forward-looking risk

assessment of the individual's likely future conduct or stated intention not to comply' (ECRE, 2018: 3). It points out that, if the list will be maintained, it should avoid vagueness and contain criteria related to the individual's intention not to comply with specific obligations (ECRE, 2018). ECRE advocates for a list of 'criteria which should be conducive to a **risk assessment of the individual's future conduct** after return has been ordered, rather than his or her past conduct' (ECRE, 2018). ENS proposes to consider alternative and less coercive measures even in the event of an assessed risk of absconding (ENS, 2017).

The **burden of proof**, the obligation of the migrant to prove there is no intention to abscond, would also be disproportionate under the recast of the Return Directive. The intention to abscond is presumed, unless proven otherwise, when one of the objective criteria is fulfilled (European Commission, 2018). ECRE strongly emphasises that this *iuris tantum* presumption would significantly penalise migrants (ECRE, 2018).

As underlined in the ReSOMA Discussion Brief (Conte & Savazzi, 2019), the objective criteria to prove the risk of absconding are not always included in the asylum law of Member States. As a result, national judges face difficulties in interpreting and assessing the risk of applicant to abscond. In 2017, the CJEU ruled that Member States have the obligation to include objective criteria in their domestic law (CJEU, 2017). The Court's ruling sets out that that 'an administrative practice and consistent case law are not sufficient for the risk of absconding to be based on objective criteria, and that those criteria must definitely be defined by law, i.e. in

binding provisions of general application' (PICUM, 2017).

Contrary to the Commission's proposal including the list of criteria, the EP is in favour of a revision of the definition of the risk of absconding and the deletion of broad criteria (European Parliament, 2019b). The EP's amendments to the Return Directive propose the adoption of an 'exhaustive list of specific and objective criteria in their national law, in line with guidelines to be set up by the European Union Agency for Fundamental Rights, which may indicate that a risk of absconding exists' (European Parliament, 2019c:10). The EP opposes the vagueness of the criteria which may undermine key principles of proportionality and necessity (European Parliament, 2019c) and capture almost all irregularly staying third-country nationals (European Parliament, 2019b). The possibility for Member States to expand the list of criteria in their national law may lead to an extension of the notion of the risk of absconding and jeopardise legal harmonisation within the EU (European Parliament, 2019). The judicial authority should determine the risk of absconding on the basis of specific individual and/or family circumstances.

The Council instead agrees with the Commission's proposal to introduce a common and non-exhaustive list of objective criteria to determine the risk of absconding.

2.3 Length of detention

Contrary to the 2008 Return Directive (Art. 18), under which detention may not exceed 6 months, the recast requires national legislation to provide for not less than 3 months as an initial minimum period of detention, in order to successfully carry out return and readmission procedures with third countries. The **new maximum period of not less than 3 and not more than 6 months** could be possibly extended up to further 12 months (as in the Return Directive) or 18 months in total (European Commission, 2018).

In this regard, Amnesty International proposes closely monitoring Member States' detention practices to ensure that the new maximum periods of detention do not become the norm rather than the exception (Amnesty International, 2018). JRS also recommends, if **detention** cannot be avoided, that it **should be for as short a time as possible** (JRS, 2010). Similarly, ECRE expresses serious concerns about the length of detention and maintains its position that the maximum periods are excessive; it therefore resists any further extension of detention periods (ECRE, 2018).

In addition, ECRE advocates to **delete the proposed new Art. 22** of the recast which would 'ensure that a third-country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be maintained in detention for a maximum period of 4 months under the border procedure for return' (European Commission, 2018:8; ECRE 2018). ECRE generally **opposes the introduction of a section regarding Chapter V on border**

procedure. This would be problematic in terms of the effective respect for the human rights of migrants and would have the effect of applying border procedures automatically, without complying with the Reception Conditions Directive requirements: it recommends deleting this part of the proposal (ECRE, 2018).

In general, EU Institutions agree on the principle that administrative detention of migrants should be for as short a period as possible (2013 Dublin III Regulation; 2008 Return Directive and recast; 2013 Reception Condition Directive). However, disagreement arises in relation to the minimum and maximum period of reclusion. In its amendments to the recast, the EP rejects the Commission's proposal on the duration of detention, by stating that the maximum detention period should be three months. The duration may be prolonged only if necessary and proportionate. Moreover, the EP opposes lengthy detention periods as they are counterproductive to government's objectives of achieving effective return decisions (European Parliament, 2019c). It recommends deleting the Commission's proposal on border procedure, as it raises concerns in terms of respect of fundamental rights.

2.4 A new ground for detention

The proposal on the Return Directive adds (Art. 18 in the recast) a **new ground for detaining migrants** in the context of the return procedure, namely the **risk to public policy, public security or national security**, which is already mentioned in the 2013 Reception Condition Directive and its recast (Art. 8).

ECRE is critical towards this proposal, as its introduction would lead to a further criminalisation of irregular migrants, and

suggests its deletion (ECRE, 2018). Amnesty International also opposes administrative detention on security grounds, because Member States could invoke it to circumvent the fair trial safeguards in criminal proceedings (Amnesty International, 2018). UNHCR underlines that determining what constitutes a national security threat is a prerogative of the Member State, but it recommends that any decision related to detention on security grounds must be necessary and proportionate to the threat and subject to judicial oversight. Even if UNHCR is not generally against the detention of asylum seekers on grounds of national security, it warns that its use should be in line with international law and remain an exception (UNHCR, 2012).

The **EP** supports the policy option proposed by most stakeholders to **delete Art. 18 of the recast Return Directive**. The Commission's proposal seems to not be in line with its own recommendations in 2017, when it stated that the legitimate aim to 'protect society' should be addressed by other pieces of legislation, as for instance criminal law, criminal administrative law and legislation covering the ending of legal stay for [reasons of] public order' (European Commission, 2017c). If this proposed new ground for detention is maintained, the EP suggests at least a narrow interpretation of the concepts of public order and national security in the context of migration, in compliance with relevant judgments of the CJEU and ECtHR (European Parliament, 2019d).

2.5 Limitation of the suspensive effect

Although the right to an effective remedy is fundamental to ensure the protection of migrants from the risk of *refoulement*, the proposed Return Directive opts for a lower degree of safeguards in terms of the suspensive effect of the appeal against return decisions.

ECRE criticises the proposal according to which the suspensive effect of legal remedies would be automatic only in case of an existing risk to breach the principle of non-refoulement (ECRE, 2018). Based on CJEU's jurisprudence, the automatic suspensive effect should always be granted before at least one judicial body. ECRE is in favour of a provision that guarantees individuals subject to a return decision access to an effective remedy with **automatic suspensive effect without any limitations** (ECRE, 2018). With reference to the recast Return Directive, PICUM also argues that the lack of an automatic suspensive effect would allow the deportation of migrants before they could effectively access justice and claim remedies or compensation (PICUM, 2015).

On the one hand, the European Commission proposes that the automatic suspensive effect of appeals against a return decision is granted only when it is necessary, for instance when the principle of *non-refoulement* could be at stake (European Commission, 2017a). The EP's amendments instead stress that 'an appeal against a return decision should have an automatic suspensive effect when there are pending cases before a criminal court, in order to ensure access to justice for both victims and suspects' (2019c:17).

2.6 Impact on health and social sphere

Medical professionals and psychologists agree that the experience of **detention can have severe effects on the individual and their well-being** (Steel et al., 2008), which may be exacerbated by substandard conditions and previous atrocious experiences in the context of migration (Bloomfield, 2016).

ICRC urges Member States to consider the negative impacts of administrative detention on migrants, especially on their health status. The fear and uncertainty arising from the administrative process, combined with traumas related to their personal history, may create challenging experiences for migrants (ICRC, 2017). Mental Health Europe recommends that the EU and its Member States should ensure access to quality mental health services and support for migrants and refugees put in detention, regardless of their status, and encourages the introduction of mental health training and systemic access to information regarding health issues of migrants (MHE, 2016).

Several organisations, through the EU Health Policy Platform, demand **more attention to the health status and needs of migrants** placed in detention. They stress the importance of properly funding NGOs and organisations that provide health-care assistance to migrants (EU Health Policy Platform, 2018). Similarly, JRS also calls for ensuring regular access to medical care for migrants 'behind bars', including mental health care (JRS, 2010). The Council of Europe endorses the introduction of comprehensive medical screenings of newly arrived detainees and their access to psychological

assistance and psychiatric care (Council of Europe, 2017).

In addition, PICUM suggests ensuring health care services, housing, education and other fundamental rights to detained migrants (PICUM, 2015). IOM advocates for **building 'capacity of health facilities in and outside immigration detention centres** and establish referrals between centres and health facilities to ensure timely access of migrants to quality health services' (IOM, 2017).

To address the impact of detention on the social sphere of migrants, JRS proposes to **grant regular access to visitors from outside** (family members, friends, civil society organisations etc) (JRS, 2010). ICRC similarly recommends not to prevent detained migrants from having meaningful ties and relations with the outside world and to provide concrete means to facilitate them (ICRC, 2017). ECRE underlines that detention can produce detrimental effects on the societal inclusion of migrants in the community, who risk otherwise being isolated from the wider society once released (ECRE, 2018b).

The proposal of taking care of migrants' physical and mental health conditions, especially in the case of individuals in vulnerable conditions, is enshrined in the main instruments of EU asylum law (2013 Reception Condition Directive and its recast; 2008 Return Directive and recast). However, the Commission expresses concern over a potential abuse of the medical care system, highlighting the necessity to avoid that 'measures are taken to prevent behaviour aimed at hampering or preventing return, such as false new medical claims' (European Commission, 2017a).

2.7 Child detention

Child detention is not expressly forbidden by EU law (European Commission, 2013). 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.

The majority of NGOs disapproves the use of detention for asylum seeking children, as it 'can never be in the best interest of the child' (ECRE, CIR Rifugiati, ILPA, Forum Réfugiés - Cosi, Vluchtelingenwerk Vlaanderen, Hungarian Helsinki Committee 2015; UNHCR, 2014). They therefore urge EU legislators to refrain from adopting any pieces of legislation that could lead to an increased use of detention for minors. At the same time, they advocate for the introduction of an obligation to carry out a formal best interest assessment for every child deprived of their liberty.

The same view is also shared by ICRC, which underlines the need to consider the child best interest in any decision to initiate or continue their detention (ICRC, 2017; UN 2014). ENS further supports these positions, while also suggesting the use of alternatives for children, especially when unaccompanied (ENS, 2017; UNHCR, 2014). The Council of Europe recommends avoiding the deprivation of liberty for a migrant child in an irregular situation (Council of Europe, 2017), while the IDC proposes an absolute ban on child detention (IDC, 2011).

Additionally, the United Nations Child Rights Committee (CRC), with the support of UNICEF, Caritas International, CIRE, Plate-forme Mineurs en Exil and Vluchtelingenwerk Vlaanderen and

PICUM, in its recommended urgent actions, adopts a critical stance towards this practice and calls for a EU-wide ban on child immigration detention (UN CRC, 2018; PICUM, 2017). **A global call for the introduction of a ban on child detention** also echoed in the context of the Global Compact for Migration. Some States emphasised to move away from the practice of child detention for immigration reasons and opt for non-custodial solutions (UN General Assembly, 2018). To the same extent, UNICEF recommends developing action plans at the national level to end immigration detention of children and their families (UNICEF, 2019). In addition, the UN General Assembly recommends that detention before trial shall be avoided and limited to exceptional circumstances for juveniles (UN, 1990).

The EU Health Policy Platform asks DG HOME to adopt a clear strategy against the placement of children in institutional settings, in particular as regards children put in detention facilities (EU Health Policy Platform, 2018). Furthermore, among medical practitioners and researchers, many urge to cease administrative immigration detention for children as early as possible, as it 'causes unnecessary harm and further blights already disturbed young lives' (Royal College of General Practitioners, Royal College of Paediatrics and Child Health, Royal College of Psychiatrists, UK Faculty of Public Health, 2009).

Case law of the ECtHR establishes that child detention, owing to its potential to cause long-lasting adverse effects on children's development, 'is never in the best interests of the child, exceeds the requirement of necessity, is grossly disproportionate and, even in case of

short term detention, may amount to cruel, inhuman or degrading treatment' (ECtHR, 2012).

On the other hand, the policy option to ban children detention does not find fully support in the European Commission, which points out that the use of detention for children is allowed insofar as it takes place under exceptional circumstances and never in prison accommodation (European Commission, 2017b). In the recast of the Return Directive, it establishes that the best interest of the child should always be considered (European Commission, 2018). The EP instead, in its amendments to the recast Return Directive, advocates for a complete ban of child detention that would protect minors and ensure the respect of the principle of the best interest of the child. Furthermore, the EP outlines that family unity should never be used to justify the decision to detain accompanied minors (European Parliament, 2019c).

2.8 Alternative measures to detention

Along with the idea of detention as a measure of last resort, one of the most strongly proposed recommendations among stakeholders is the use of **less coercive and non-custodial alternatives** (Detention Action, 2016; ECRE, 1996; ENS, 2017; ICRC, 2017; IOM, 2017). Alternative measures to detention would better ensure the respect of fundamental rights and human dignity (JRS, 2010). However, NGOs underline that these **alternatives measures should not represent a gateway to detention or a general, systematic control mechanism** limiting migrants' liberty (ECRE, 2017). Overall, existing alternatives can be divided into practices that involve a reduced degree

of coercion and those that focus on active engagement with migrants.

UNHCR recommends that alternatives 'should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers' (UNHCR, 2012). Amnesty International proposes that alternative non-custodial measures should be considered first and given preference before resorting to detention (Amnesty International, 2009).

Detention Action proposes developing alternatives **in consultation with civil society and migrant communities**. Alternative measures should receive more investments and they would allow saving resources compared to detention as showed by the IDC's Community Assessment and Placement (CAP) model (Detention Action, 2016; IDC, 2011). Odysseus Network's researchers emphasise the importance of adopting alternatives which are based on the evaluation of existing schemes and solutions, as well as of considering the 'lessons learnt' from past pilot projects (De Bruycker, et al., 2015). Engagement based, rather than enforcement-based alternatives, are also advocated by the Council of Europe and by Detention Action (Council of Europe, 2017; Detention Action, 2016).

IOM urges States to explore and pilot alternatives to detention, for instance using **open or semi-open facilities, bails, centres for special support to vulnerable migrants and community-based alternatives** (IOM, 2017). UNHCR invites governments to promote dialogues, round tables and projects on alternatives to detention, supports the development of pilot programs, raise awareness on the

use of alternatives and engage with relevant stakeholders for their development (UNHCR, 2014).

Among the existing and mostly used alternatives are the **registration and documentation requirements, reporting requirements, bail, bond and surety, open and semi-open centres, directed residence and electronic monitoring** (De Bruycker, et al., 2015). However, it is underlined that these measures should not prevent migrants from accessing rights and services. Alternative measures should not excessively restrict liberty or privacy and create unreasonable financial burden on migrants (Amnesty International, 2009; De Bruycker et al., 2015).

Odysseus Network recommends the use of **housing arrangements** for families with

children and separated children and the establishment of strategies supporting the migrant to comply with administrative obligations (De Bruycker et al., 2015).

The policy option to implement alternative measures to detention is included in EU law. The Dublin Regulation 604/2013 (Art. 28) and the Reception Condition Directive (2013 version and recast) requires Member States to consider less coercive alternative measures. Some measures mentioned under EU asylum law are the regular reporting to the authorities, the deposit of a financial guarantee and an obligation to stay at an assigned place (Art. 8 Reception Condition Directive, 2013 and its recast).

3. CONCLUSION AND SUMMARY OF POLICY OPTIONS

Most NGOs agrees that some core principles should 'guide' detention in the context of migration. Resort to migrant detention is a measure of last resort and Member States should always consider the applicability of less coercive and non-custodial measures.

It may be said that the EP tends to support most of the policy options proposed by civil society organisations such as the deletion of Art. 18 (Return Directive, recast) introducing a new ground for detaining migrants in the context of the return procedure, namely the risk to public policy, public security or

national security of the recast Return Directive, or the ban on child detention. By contrast, the Commission and the Council put forward solutions that differ from the discussed NGOs' policy options, as for instance the limits on the suspensive effect of the appeal against return decisions or the introduction of a border procedure under Chapter V in the Return Directive, recast.

Figure 1. sums up the most recurring policy options advanced by stakeholders and researchers to address the increasing use of detention of irregular migrants and asylum seekers.

Figure 1. Policy Options



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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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