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Asylum Information Database

The detention of asylum seekers in Europe

Constructed on shaky ground?

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ecre
European Council on Refugees and Exiles

Introduction

The detention of asylum seekers pending the examination of their application for international protection continues to provoke heated debates in Europe. While the use of immigration detention is generally on the rise in European countries as an integral part of their responses to migration flows, the detention of persons applying for international protection raises particular questions of legality and proportionality. International and European legal standards have established a clear presumption against the detention of migrants and refugees in particular. The case law of the European Court of Human Rights (ECtHR) continues to remind governments that immigration detention concerns persons who have not committed any crime and therefore can only be used for a lawful purpose, as a measure of last resort, and subject to procedural guarantees protecting individuals from being subjected to arbitrary detention.

Since the entry into force of the recast Reception Conditions Directive and Dublin III Regulation,[1] the detention of asylum seekers has been governed by specific provisions of European Union (EU) asylum law, detailing permissible grounds, procedural safeguards and conditions of detention, including of vulnerable applicants.[2] As is the case with all other aspects of the EU asylum *acquis*, the transposition of the detention provisions has generated very divergent legal frameworks and practice across the EU Member States. Whereas it has inspired and legitimised systematic detention of applicants for international protection in some Member States, it has not significantly affected pre-existing practice in others.

At the same time, the introduction of detailed provisions regulating the detention of asylum seekers pending the examination of their claim has not necessarily resulted in clear conceptual distinctions between detention, restriction of freedom of movement and reception in practice. In recent years, states have implemented policies blurring the boundaries between those three notions, thereby deliberately circumventing the obligation to ensure access to key procedural safeguards stemming from EU and international law, as well as the EU Charter of Fundamental Rights.

Drawing from research conducted within the framework of the Asylum Information Database (AIDA), this legal briefing discusses the expansion of the use of detention of asylum seekers in AIDA countries from three different angles. A first part aims to shed light on the scale of detention of asylum seekers through an analysis of available statistical data on the number of applicants detained in 2016, as well as a mapping of detention infrastructure and capacity in the countries concerned. A second part addresses the legal expansion of detention and in particular the consequences of legitimising the detention of asylum seekers through concepts derived from criminal law, such as the risk of absconding. The interplay between criminal and asylum law is further illustrated through a brief discussion of the use of public order as one of the asylum detention grounds listed in Article 8(3) of the recast Reception Conditions Directive. Finally, the briefing raises concern over the systematic abuse of alternatives to detention by some states, including in cases where detention is unlawful, as an instrument of migration control rather than a tool to avoid deprivation of liberty.

The detention of asylum seekers in figures

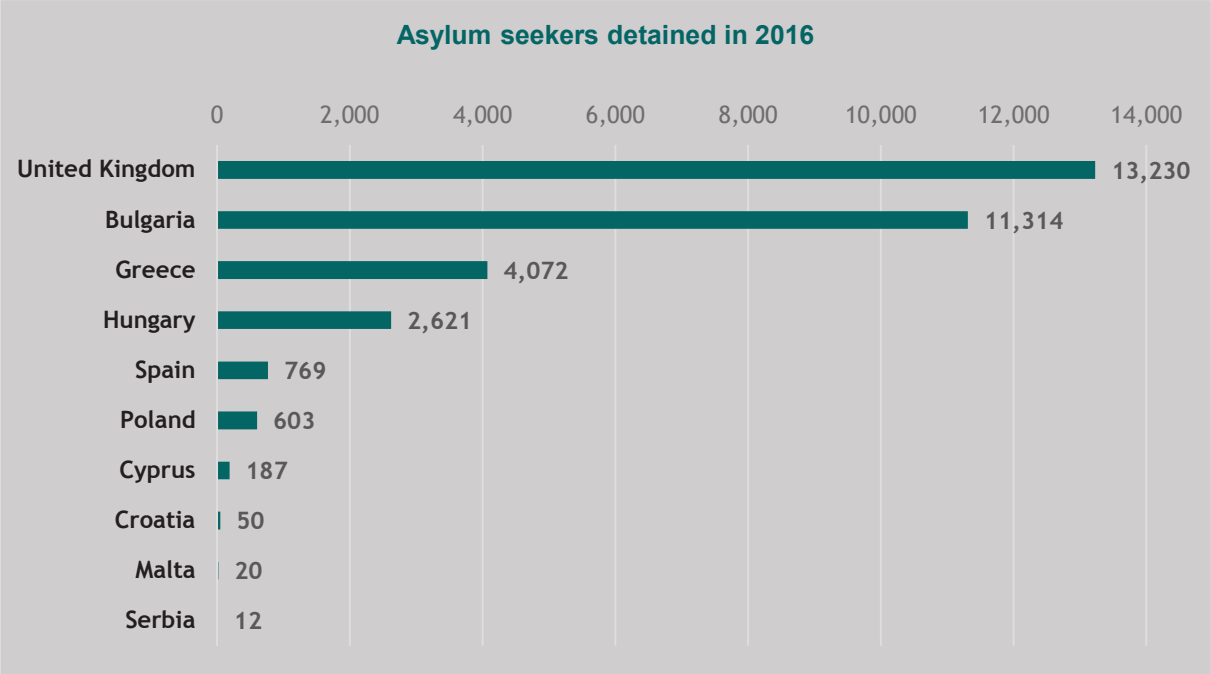
Research on the detention of asylum seekers in Europe is hampered by the lack of accurate statistical data. In this regard, ECRE has described figures on the use of detention as “inexistent data” in the EU’s

1 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), *OJ* 2013 L180/96; Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), *OJ* 2013 L180/31.

2 Articles 8-11 recast Reception Conditions Directive; Article 28 Dublin III Regulation.

statistical collection framework, given that neither the recast Reception Conditions Directive nor the Migration Statistics Regulation[3] contain relevant reporting requirements for Member States.[4]

Nevertheless, some AIDA countries proactively publish information on the use of immigration and asylum detention, and provide some indication as to the scale of detention of asylum seekers. Although available numbers do not allow a comprehensive overview of practice across Europe, figures on the detention of asylum seekers across selected European countries in 2016 show vast differences in the total number of asylum seekers placed in detention:



Source: AIDA, Country Reports, 2016 Update: http://www.asylumineurope.org/reports.

It should be noted that the number of asylum seekers subject to detention may include both persons who applied for asylum from detention and persons who were placed in detention after lodging an asylum claim. In **Greece**, for example, out of a total 4,072 asylum seekers detained in the course of last year, only 2,829 applied for asylum whilst in detention.[5] A significant number of asylum seekers were transferred from Reception and Identification Centres (RIC) on the islands to pre-removal detention centres in the mainland, under the implementation of the EU-Turkey statement.[6] The "restriction on free movement" imposed during the initial stay in RIC also amounts *de facto* to deprivation of liberty, even though it is not recorded as such.[7]

The use of detention increased in **Germany** during 2016 compared to previous years. Whereas "virtually no use [of detention] had been made" after the Court of Justice of the European Union (CJEU) ruled in 2014 that the country could only detain irregular migrants in specialised detention facilities,[8] the authorities have started again to impose detention for the purpose of deportation.[9]

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3 Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection, *OJ* 2007 L199/23.

4 ECRE, *Asylum statistics in the European Union: A need for numbers*, AIDA Legal Briefing No 2, August 2015, available at: http://bit.ly/2kGIEKn, 7.

5 AIDA, Country Report Greece, 117.

6 *Ibid*, 119.

7 *Ibid*, 130-131.

8 AIDA, Country Report Germany, 2016 Update, March 2017, available at: http://bit.ly/2mRJN2L, 72, 78.

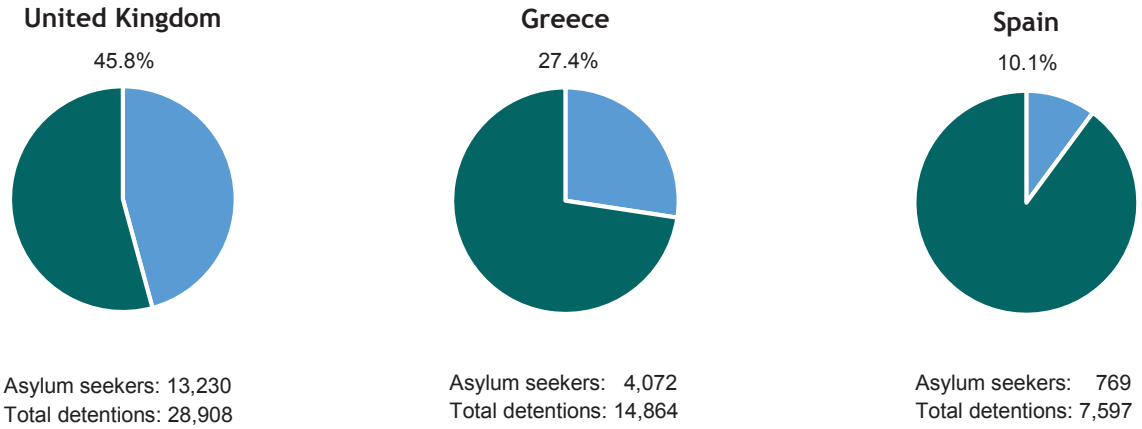
9 *Ibid*, 72.

Increasing resort to detention has also been reported in **Austria** during the last months of 2016,[10] as well as in **Sweden**, where the total number of detention orders last year was 3,714 and represented a steady increase from previous years; 3,524 in 2015, 3,201 in 2014 and 2,893 in 2013.[11] No breakdown is available as regards asylum seekers subject to detention.

The number of asylum-seeking children detained is not available for all countries, yet seemed to be relatively low in the **United Kingdom** (71 out of 13,230 asylum seekers detained) in 2016,[12] whereas no asylum seekers belonging to vulnerable groups were detained in **Croatia**.[13] Conversely, in **Poland**, 292 asylum-seeking children were detained, making up nearly 50% of the total population of detained asylum seekers.[14] **Sweden** detained a total 108 children last year, including but not limited to asylum seekers.[15]

Two levels of further comparison can be made to better understand the scale of detention of asylum seekers in European countries' broader migration and asylum policies: (1) the number of asylum seekers among the total population subject to immigration detention and (2) the number of detained asylum seekers among the total population of applicants for international protection.

(1) Asylum seekers per total number of persons in immigration detention: 2016

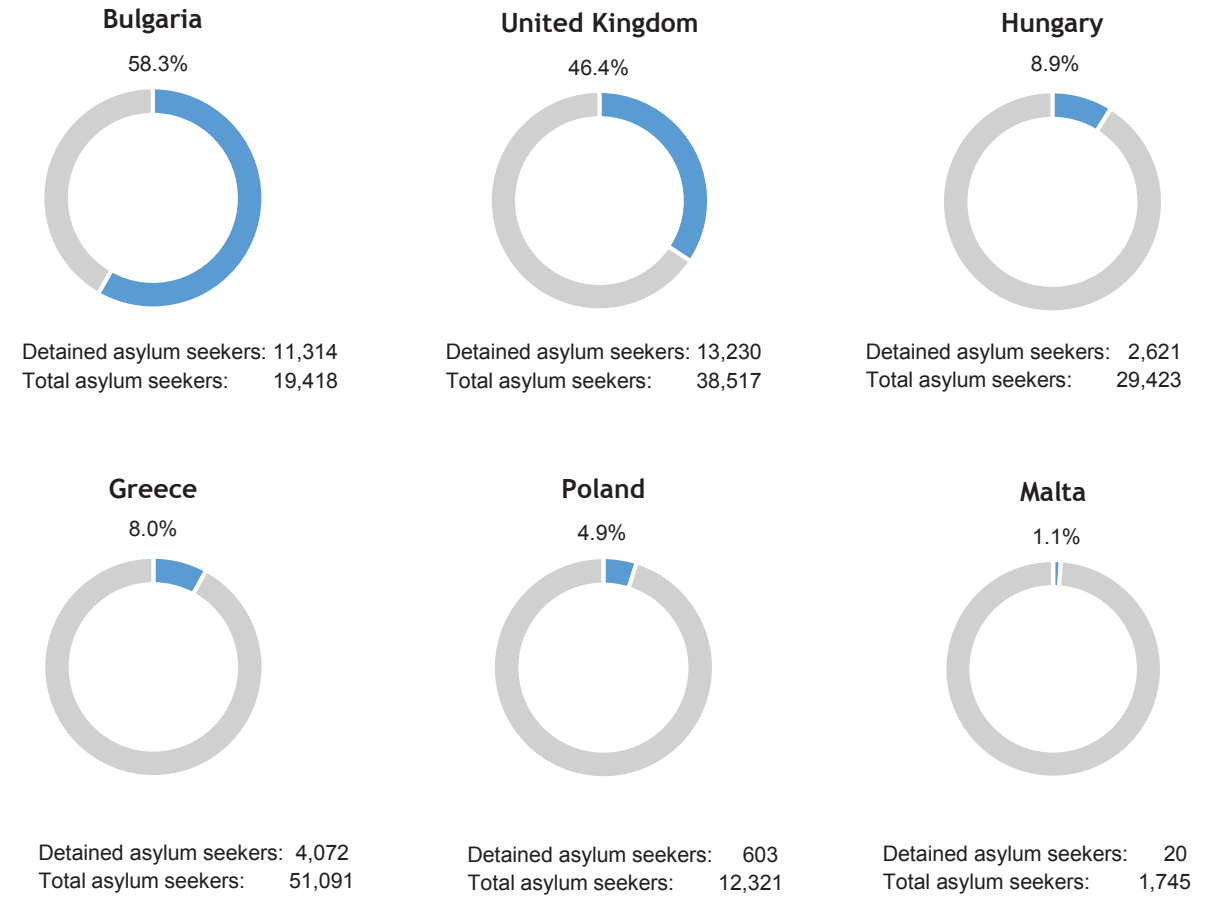


The proportion of asylum seekers in the total population subject to immigration detention last year varied from 45.8% in the **United Kingdom**, to 27.4% in **Greece** and 10.1% in **Spain**.[16]

Disparities also exist with regard to the proportion of detained asylum seekers out of the total population of asylum seekers in different countries in 2016. Selected examples are illustrated below:

10 The number of persons held in the Vordernberg pre-removal detention centre rose from 40 in September, to 80 in November and 130 in December 2016: AIDA, Country Report Austria, 2016 Update, February 2017, available at: http://bit.ly/2lBT7Yl, 83.
11 AIDA, Country Report Sweden, 2016 Update, 55-56.
12 UK Home Office, *Statistics: Detention – Q4 2016*, available at: http://bit.ly/2lYPrA5; AIDA, Country Report UK, 2016 Update, 77.
13 AIDA, Country Report Croatia, 2016 Update, 71.
14 AIDA, Country Report Poland, 2016 Update, 74.
15 AIDA, Country Report Sweden, 2016 Update, 58.
16 AIDA, Country Report UK, 2016 Update, 77; Country Report Greece, 2016 Update, 117; Country Report Spain, 2016 Update, 50.

(2) Detained asylum seekers per total number of asylum seekers: 2016



As illustrated above, whereas countries such as **Bulgaria** and the **United Kingdom** have detained a large number of persons seeking protection, other countries have generally refrained from depriving asylum seekers of their liberty. More particularly, the case of **Malta** illustrates the impact of the departure from the policy of mandatory detention of newly entrants upon arrival in 2015. As the new reception system no longer applies detention as a mandatory or automatic consequence of irregular entry, the number of asylum seekers placed in detention has dropped to 20, representing only 1.1% of the total asylum seeker population in 2016.[17] This number sharply contrasts with detention practice in 2012 and 2013, where an estimated number of 1,650 and 600 asylum seekers were detained respectively.[18]

17 AIDA, Country Report Malta, 2016 Update, available at: http://bit.ly/2n5RU95, 51.
18 AIDA, Country Report Malta: First Update, available at: http://bit.ly/2olioSm, 44; Third Update, available at: http://bit.ly/2ngnhlY, 47.

The infrastructural expansion of detention

An overview of detention capacity in AIDA countries (except for **Ireland** and **Switzerland**) reflects the diversity of infrastructural arrangements across the continent in 2016:

Number and capacity of pre-removal / asylum detention centres: 2016				
*	Name	No	Location	Capacity
AT	Pre-removal detention centre	5	Vordernberg, Vienna Roßauer Lände, Vienna Hernalser Gürtel, Zinnergasse, Salzburg	1,057
BE	Pre-removal detention centre	5	127 bis, Caricole, Brugge, Merksplas, Vottem	571
BG	Immigration detention centre	3	Busmantsi, Lyubimets, Elhovo	940
CY	Pre-removal detention centre	1	Menogia	186
DE	Detention pending deportation centre	7	Pforzheim, Mühldorf am Inn, Eisenhüttenstadt, Hannover, Büren, Ingelheim am Rhein	:
ES	Detention centre for foreigners (CIE)	7	Algeciras, Barcelona, Barranco Seco, Madrid, Murcia, Tenerife, Valencia	2,572
FR	Administrative detention centre (CRA)	24	Bordeaux, Coquelles, Hendaye, Lille-Lesquin, Lyon-Saint Exupéry, Marseille, Mesnil-Amelot, Metz-Queuleu, Nice, Nimes, Palaiseau, Paris-Palais de Justice, Paris-Vincennes, Perpignan, Plaisir, Rennes, Rouen-Oissel, Sète, Strasbourg, Toulouse, Guadeloupe, Guyane, Mayotte, Réunion	1,798
GR	Pre-removal detention centre	7	Amygdaleza, Petrou Ralli, Corinth, Paranesti, Xanthi, Orestiada, Kos	5,215
HR	Reception centre for foreigners	1	Ježevo	86
HU	Asylum detention centre	3	Békéscsaba, Kiskhunhalas, Nyírbátor	765
IT	Identification and expulsion centre (CIE)	4	Brindisi, Caltanissetta, Rome, Turin	359
MT	Detention centre	1	Safi Barracks B Block	200
NL	Detention centre	3	Schiphol, Rotterdam, Zeist	789
PL	Guarded centre for asylum seekers	6	Biała Podlaska, Białystok, Lesznowola, Kętrzyn, Krosno Odrzańskie, Lesznowola, Przemyśl	557
SE	Pre-removal detention centre	5	Gävle, Märsta, Flen, Kållered, Åstorp	357
UK	Immigration removal centre (IRC)	14	Harmondsworth, The Verne, Yarl's Wood, Dungavel, Tinsley, Campsfield, Cedars, Brook House, Morton Hall, Colnbrook	4,000
SR	Shelter for foreigners	1	Padinska skela	80
TR	Removal centre	20	Adana, Antalya, Aydın, Bursa, Çanakkale, Edirne, Erzurum, Gaziantep, Hatay, Istanbul, Izmir, Kayseri, Kirklareli, Kocaeli, Muğla, Tekirdağ, Van	7,216

Source: AIDA, Country Reports, 2016 Update. Note that this table does not cover all locations where detention of asylum seekers is applied, but only those centres designated by the respective countries to that end.

Countries in the Mediterranean region have set up particularly large detention infrastructure, reaching over 2,500 places in **Spain**, 5,200 in **Greece** and 7,200 in **Turkey**. However, plans for further expansion of detention capacity have been announced across the region:

Turkey: The Directorate-General for Migration Management (DGMM) has indicated the prospective establishment of 18 new pre-removal centres, totalling an additional detention capacity of 8,070 places to the existing capacity of 7,216 places. These include: seven centres supported by EU funding; ten supported by the Investment Programme; and one reception centre to be transformed into a detention centre.[19]

[19] Turkish Directorate-General for Migration Management, *Removal centers*, 30 March 2017, available at: http://bit.ly/2osejRh.

Italy: At the end of 2016, a Ministry of Interior Circular ("Circular Gabrielli") announced the reopening of formerly closed Identification and Expulsion Centres (*Centri di identificazione ed esuplsione*, CIE).[20] Shortly after that, Decree-Law 13/2017 ("Orlando-Minniti Decree"), converted into law on 12 April 2017,[21] provided for the establishment of CIE, now termed Removal Detention Centres (*Centri di permanenza per il rimpatrio*, CPR), in every region of the country.[22]

Spain: The Ministry of Interior announced in April 2017 the construction of three new Detention Centres for Foreigners (*Centros de internamiento de extranjeros*, CIE) in Madrid, Malaga and Algeciras.[23]

Greece: The Ministry of Migration Policy announced at the end of 2016 the creation of new detention centres in order to increase capacity "as soon as possible", in line with the recommendations of the Joint Action Plan on the implementation of the EU-Turkey statement issued on 8 December 2016.[24] A pre-removal detention centre already started operating in Kos at the end of March 2017 with a capacity of 150 places.[25]

Beyond heavy and well-documented ramifications on the rights and welfare of individuals concerned, detention also entails financial costs that have often been denounced as disproportionate to the migration control objectives it pursues.[26] High costs associated with detention were also recalled by the European Parliament in amendments to the Dublin IV Regulation proposal.[27]

Though the exact financial implications of detention policies cannot straightforwardly be ascertained, debates at national level have pointed out the lack of cost-efficiency in governments' over-reliance on detention of asylum seekers and irregular migrants:

Austria: An evaluation of the establishment of the largest pre-removal detention centre in Vordernberg by the Court of Auditors found the location of the centre not to have been selected based on "traceable strategic and economic planning", as 80% of deportations were carried out at border-crossing points. Compared to other centres, the cost of detention in Vordernberg is significantly higher, reaching €834 per day.[28]

Cyprus: The cost of operation of the Menogia centre for the year 2015 was estimated at more than €725,000 according to data provided by the authorities.[29] According to civil society organisations, many of these costs could be avoided through the use of alternatives.[30]

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20 AIDA, Country Report Italy, 2016 Update, 87.

21 Internazionale, 'Il decreto Minniti-Orlando sull'immigrazione è legge', 12 April 2017, available in Italian at: http://bit.ly/2o61iKT.

22 Decreto Legge 17 febbraio 2017, n. 13 - Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegal, available in Italian at: http://bit.ly/2kZOBQe.

23 El Confidencial, 'Zoido anuncia la creación de tres nuevos CIE en Málaga, Algeciras y Madrid', 4 April 2017, available in Spanish at: http://bit.ly/2o5y9zo.

24 AIDA, Country Report Greece, 2016 Update, 119.

25 *Ibid*.

26 For recent examples, see Detention Action, *Without detention: Opportunities for alternatives*, September 2016, available at: http://bit.ly/2kS7qoR; Lydie Arbogast, *Migrant detention in the European Union: A thriving business*, July 2016, available at: http://bit.ly/2n8kfen.

27 European Parliament, *Amendments 535-771 to the Draft report [on the Dublin IV Regulation]*, 4 April 2017, available at: http://bit.ly/2p7rdT0, Amendment 755 (Salvatore Domenico Pogliese, Alessandra Mussolini): "Because of measures taken to counteract absconding, the cost of detention in certain Member States is very high."

28 AIDA, Country Report Austria, 2016 Update, 88, citing Austrian Court of Auditors, *Vollzug der Schubhaft mit Schwerpunkt Anhaltezentrum Vordernberg*, 2016/22, available in German at: http://bit.ly/2kNGiKi.

29 Future Worlds Center, *Αναζητώντας εναλλακτικές στην κράτηση υπηκόων τρίτων χωρών στην Κύπρο*, November 2016, available in Greek at: http://bit.ly/2kAN5aG, 15.

30 *Ibid*.

Croatia: With support from EU funding, a special wing for vulnerable groups was built at the end of 2015 in the Ježevo pre-removal detention centre, with the aim of detaining families and unaccompanied children. At the end of 2016, the building was empty as no vulnerable groups were placed in detention,[31] and no vulnerable asylum seekers had been placed in detention throughout the year.[32]

The legal expansion of detention

Alongside increasing financial and infrastructural investments on detention, the European Union and its Member States have also made a questionable reading of applicable legal standards with a view to legitimising a more systematic and extended use of detention of asylum seekers.

The legal and normative basis of immigration and asylum detention already fits uneasily with the moral justification of deprivation of liberty in areas such as criminal law. The administrative nature of detention of asylum seekers should mean that their right to liberty is interfered with not as a result of wrongdoing or as punishment, but for reasons related to the processing of their protection claim or the safeguarding of states' right to control entry into their territory. As it appears in the European Convention on Human Rights (ECHR), and its corollary provision in the EU Charter of Fundamental Rights,[33] detention peculiar to the situation of non-nationals should be limited to "preventing an unauthorised entry" in a country or effecting removal to another country.[34]

Yet the elaboration of the EU framework of immigration and asylum detention has stirred further away from administrative objectives and closer to the punitive logic one finds in criminal law. Scholars such as Costello have pointed out that even "commonly accepted grounds of immigration detention", such as the risk of absconding or the verification of a person's identity,[35] illustrate "what Legomsky has termed the 'asymmetric' incorporation of the logic of criminal law, that is, incorporation of criminal law concepts without the attendant due process guarantees."[36]

Whereas much debate and litigation in Europe has revolved around the pertinent criteria for assessing the existence of a "risk of absconding" of an asylum seeker, the concept and normative basis of "absconding" itself are far from straightforward, as illustrated by a recent preliminary reference by the High Administrative Court of Baden-Württemberg in **Germany** to the CJEU.[37] The Court inquired whether "absconding" in the context of the Dublin system requires a deliberate withdrawal of the asylum seeker from the procedure, or whether a prolonged absence from his or her designated residence would be sufficient.

In its proposal to recast the Reception Conditions Directive, the European Commission has attempted to inject normative value to the concept by defining absconding as:

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31 ECRE, *Balkan route reversed: The return of asylum seekers to Croatia under the Dublin system*, December 2016, available at: http://bit.ly/2kueKpB, 14-15.

32 AIDA, Country Report Croatia, 2016 Update, 71.

33 Article 6 EU Charter.

34 Article 5(1)(f) ECHR.

35 These grounds are laid down in Articles 8(3)(a), (b) and (f) of the recast Reception Conditions Directive.

36 Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68:1 CLP 143-177, citing Stephen Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 Wash & Lee L Rev 469.

37 High Administrative Court of Baden-Württemberg, Decision A 11 S 2151/16, 15 March 2017, available in German at: http://bit.ly/2p5w8GU.

> "[T]he action by which an applicant, in order to avoid asylum procedures, either leaves the territory where he or she is obliged to be present in accordance with [the Dublin Regulation] or does not remain available to the competent authorities or to the court or tribunal"[38]

Yet again, the definition of "absconding" in the Commission proposal reveals a worrying trend of criminalisation of asylum seekers in the EU legal framework.[39] The term connotes morally blameworthy conduct on the part of the asylum seeker for the sole reason that he or she seeks to exercise the right to asylum in a country other than that designated by the Dublin system as responsible.[40]

Public order detention: an orderly interpretation?

The tension between asylum and criminal law is also evident in respect of other grounds for detention. Recent developments in the interpretation of detention of asylum seekers for reasons of public order, foreseen by Article 8(3)(e) of the recast Reception Conditions Directive, illustrate equally vividly the uneasy interplay between the two regimes in different countries:

Hungary: Irregular entry or crossing the external border constitutes a criminal offence under national law. Asylum seekers who have been convicted of irregular entry are automatically considered as posing a "threat to public safety" under the Asylum Act, and are thus liable to asylum detention.[41] More controversial is the designation of such a measure as "house arrest" in detention centres rather than detention *per se* by the authorities, despite criticism from UNHCR and the Hungarian Helsinki Committee.[42]

Greece: The arbitrary use of public order reasoning behind detention of asylum seekers has also been a longstanding concern in Greece, despite the fact that courts have found in most cases that the offences invoked by the authorities are not such as to justify detention on public order grounds.[43]

However, the increasing situation of overcrowding on the Eastern Aegean islands following the implementation of the EU-Turkey statement in 2016 led Greece to adopt a more controversial interpretation of asylum detention grounds, raising serious questions "as to whether in this case the administrative measure of immigration detention is used with a view to circumventing procedural safeguards established by criminal law".[44] A police circular of 18 June 2016 has established that persons demonstrating "law-breaking conduct" (*παραβατική συμπεριφορά*) will be transferred out of the islands and into pre-removal detention centres in mainland Greece.[45]

Between that date and until the end of 2016, as many as 1,626 persons with "law-breaking conduct" had been transferred from the islands to pre-removal detention centres in the mainland, accounting for

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38 European Commission, *Proposal for a recast Reception Conditions Directive*, COM(2016) 465, 13 July 2016, Article 2(10).

39 Illustrating Costello's concern that "[w]e have analogized hastily from those facing criminal charges, who would evade a criminal process and sanction." See Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68:1 CLP 143-177.

40 ECRE, *Comments on the Commission proposal to recast the Reception Conditions Directive*, October 2016, available at: http://bit.ly/2gDGs0Z, 8.

41 AIDA, Country Report Hungary, 2016 Update, 70. See also Gruša Matevžič, 'What more can be done? – lost hope in improving judicial review of asylum detention in Hungary', 1 March 2017, available at: http://bit.ly/2m8Rt0r.

42 *Ibid*, 72-73.

43 AIDA, Country Report Greece, 2016 Update, 120-121.

44 *Ibid*, 119.

45 Directorate of the Hellenic Police, "Εγκύκλιος ΕΛΑΣ 1604/16/1195968/18-6-2016 Διαχείριση παράτυπων αλλοδαπών στα Κέντρα Υποδοχής και Ταυτοποίησης, διαδικασίες Ασύλου, υλοποίηση Κοινής Δήλωσης ΕΕ- Τουρκίας της 18ης Μαρτίου 2016 (πραγματοποίηση επανεισδοχών στην Τουρκία)", available in Greek at: http://bit.ly/2ngIEj6.

nearly 40% of the total number of asylum seekers detained in the course of the year.[46] Following visits to the pre-removal detention facilities of Corinth, Petrou Ralli and Amygdaleza, the Greek Council for Refugees reported that the people concerned were transferred there without any evidence or circumstances suggesting they would present a threat to public order.[47] As mentioned above, these asylum seekers are subject to the "fast-track border procedure" even though their claims are not lodged at the border.

Belgium: Belgium too has increasingly resorted to detention of public order grounds in 2016, on the basis of "accusations that were later deemed untrue or which the judiciary decided not to prosecute. When courts later reviewed the legality of detention orders, they regularly ruled that they were illegal."[48]

Similar questions on the intersection of criminal detention and asylum detention have arisen in the case of *M.B. v. Netherlands*, communicated on 8 March 2017 by the European Court of Human Rights.[49]

Another crucial question is whether protection of public order should be a legitimate reason for detaining asylum seekers at all. Under a strict reading of the normative basis for detention of non-nationals under the ECHR, it should not: this form of administrative detention is only lawful insofar as it is used to prevent an unauthorised entry or to effect a person's removal. Nevertheless, the ambiguity seems to have been exacerbated by the jurisprudence of the CJEU. In *J.N.*,[50] the Court shied away, based on the autonomy of Union law doctrine, from squarely clarifying whether detention on public order grounds is reconcilable with the circumscribed ECHR grounds for deprivation of liberty, insofar as it entails detention of an asylum seeker entitled to remain in the country.

At the same time, the CJEU in *J.N.* also upheld a strict reading of protection of public order or national security as a detention ground, by setting out the conditions aimed at "creating a strictly circumscribed framework in which such a measure may be used."[51] In addition to the limitations stemming from the wording of Article 8 and 9 of the recast Reception Conditions Directive and the obligation not to rely on an interpretation of the Directive which would be in conflict with the fundamental rights or with other general principles of EU law, the Court also explicitly referred to the interpretation of the concepts of national security and public order in its case law on other EU law instruments, which is considered also to be applicable in the case of said Directive. This implies that detention where public order or national security so require is only allowed if "the individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned." Whereas this remains a matter of case-by-case assessment by national administrations and courts, it is at least clear from the *J.N.* jurisprudence that a very high threshold applies and that therefore the abovementioned systematic and automatic detention on public order grounds in **Hungary** and **Greece** goes beyond the strict circumscription of national authorities' powers to detain asylum seekers.

Detention through itinerant border procedures

The legal expansion of detention also transpires in the use of detention of asylum seekers in the context of border control. More specifically, recent national legislative reforms have created risks of systematic and arbitrary detention through the almost exclusive conduct of asylum procedures at the border. **Hungary** and **Poland** in particular have taken measures to transform border procedures, provided as

46 AIDA, Country Report Greece, 2016 Update, 122.
47 *Ibid*.
48 AIDA, Country Report Belgium, 2016 Update, 14.
49 ECtHR, *M.B. v. the Netherlands*, Application No 71008/16, Communicated 8 March 2017.
50 Case C-601/15 PPU *J.N. v. Staatssecretaris van Justitie en Veiligheid*, Judgment of 15 February 2016.
51 *Ibid,* para 57.

special procedures under EU law for deciding on a person's right to enter the territory,[52] into their main asylum apparatus:

Hungary: The latest reform of Hungarian asylum legislation, entering into force at the end of March 2017, has codified an automatic and indefinite detention regime for all asylum seekers, whose claims may now be examined solely in the transit zones in Röszke and Tompa.[53] Contrary to the position of the Hungarian government, confinement in those transit zones amounts to deprivation of liberty and has been sanctioned by the European Court of Human Rights.[54]

Poland: A proposal for a similar automatic detention regime in containers at the border was submitted by the Polish government shortly after the Hungarian legislative reform. Civil society organisations have levelled similar critiques against the systematic and unjustified use of detention of asylum seekers.[55]

The opposite trend is witnessed in other countries, whereby processes designed as border procedures are also implemented in locations far from the border and well within the territory of the country:

Greece: The 2016 asylum reform introduced a "fast-track border procedure" applicable in exceptional circumstances where a large number of applications are made at the border or in Reception and Identification Centres (RIC) at points of arrival.[56] Following the EU-Turkey statement, the procedure is applied to persons who have entered Greece after 20 March 2016 and are detained upon arrival in the RIC of Lesvos, Chios, Samos, Leros and Kos. However, contrary to its scope of application as defined in the law, this procedure is also applied to persons who are transferred from these islands to the pre-removal detention centre of Corinth in the mainland and lodge an asylum application there.[57]

Belgium: During the border procedure, asylum seekers are held in detention centres close to the airport but also in other centres located in the territory, while in both cases they are considered not to have formally entered the territory yet.[58]

The risk of automatic alternatives to detention

One of the main improvements brought about by the recast Reception Conditions Directive was the codification of alternatives to detention for asylum seekers such as residence in an assigned place, reporting obligations or deposit of a financial guarantee.[59] The duty to consider the applicability of less coercive measures before imposing detention, on the grounds specified by the Directive, should mean that alternatives are subject to the same legal requirements of an individualised assessment as detention. Yet practice in different countries illustrates growing risks of a perverse understanding of alternatives to detention as a systematic migration control measure rather than a less coercive means of pursuing the specific objectives linked to detention in individual cases:

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52 Article 43 recast Asylum Procedures Directive. EU law permits detention of asylum seekers in such situations: Article 8(3)(c) recast Reception Conditions Directive.

53 Hungarian Helsinki Committee, *Government's new asylum bill on collective push-backs and automatic detention*, 15 February 2017, available at: http://bit.ly/2p5MM9D; ECRE, *Asylum in Hungary: Damaged beyond repair?*, March 2017, available at: http://bit.ly/2oiNWi9; UNHCR, 'UNHCR urges suspension of transfers of asylum-seekers to Hungary under Dublin', 10 April 2017, available at: http://bit.ly/2oYF3Y0.

54 ECtHR, *Ilias and Ahmed v. Hungary*, Application No 47287/15, Judgment of 14 March 2017.

55 Helsinki Foundation for Human Rights, 'Kontenery dla uchodźców – kolejny krok wstecz w ochronie praw cudzoziemców', 6 April 2017, available in Polish at: http://bit.ly/2pttwzn.

56 Article 60(4) Greek Law 4375/2016; Joint Ministerial Decision 13257/2016 "on the implementation of the special border procedure (Article 60(4) L 4375/2016)", Gov. Gazette B/3455/26.10.2016.

57 AIDA, Country Report Greece, 2016 Update, 59.

58 AIDA, Country Report Belgium, 2016 Update, 41.

59 Article 8(2) and (4) recast Reception Conditions Directive.

France: The 2016 immigration law reform has introduced the possibility of notifying a house arrest (*assignation à résidence*) measure for up to six months to asylum seekers during the Dublin procedure of determination of the Member State responsible for their claim.[60] A subsequent Ministry of Interior instruction on the implementation of Dublin transfers has encouraged Prefectures to systematically resort to house arrest and surveillance from the beginning of Dublin procedures, prioritising these measures over detention.[61] The practical application of this power varies from one Prefecture to another: it is systematically applied in Marseille and Paris, whereas its use is not systematic in Lyon.[62]

Hungary: Throughout 2016, a designated residence was imposed in 54,615 cases and bail was imposed in 283 cases.[63] These numbers raise questions as to the individualised character of assessments prior to the application of alternatives to detention. As mentioned above, in many cases the authorities also order "house arrest" in the form of designated residence in a detention centre.

Malta: The 2015 reform of the reception system and transposition of the recast Reception Conditions Directive created ambiguity as to the applicability of alternatives to detention where detention is not resorted to, raising civil society organisations' concerns that alternatives to detention would be imposed even where no ground for detention exists. This was the case in 2016 as five persons were subjected to reporting obligations, residence at an assigned place and surrender of documents after being released from detention.[64]

Moreover, automatic recourse to alternatives to detention as a general means of migration control becomes all the more problematic when used as a gateway to detention. In **France**, the 2016 Ministry of Interior instruction on Dublin transfers has advised Prefectures to resort to detention where the transfer cannot be guaranteed through house arrest.[65] In Lyon and some areas in the Paris region such as Essonne, the Prefecture notifies individuals in the document of appointment of the Dublin interview (*convocation Dublin*) that they may be issued a transfer decision and a detention order at the same time, without prior resort to house arrest.[66]

In light of this, misinterpreting alternatives to detention as systematic measures of migration control risks turning the legal constraints to detention of asylum seekers on their head. Rather than a last-resort measure permissible on strictly circumscribed grounds, detention seems to be increasingly legitimised as a punitive measure *per se*, justified by the individual's failure to comply with an alternative. The European Commission proposal reflects this approach by providing an additional ground for detention under the Reception Conditions Directive:

> "In order to tackle secondary movements and absconding of applicants, an additional detention ground has been added. In case an applicant has been assigned a specific place of residence but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, the applicant may be detained in order to ensure the fulfilment of the obligation to reside in a specific place."[67]

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60 Article L.742-2 French Code of Entry and Residence of Foreigners and the Right to Asylum (Ceseda), as amended by Law n. 2016-274 of 7 March 2016.

61 AIDA, Country Report France, 2016 Update, 98, citing French Ministry of Interior, Instruction NOR: INTV1618837J of 19 July 2016 relating to the application of the Dublin III Regulation – Resort to house arrest and administrative detention in the context of execution of transfer decisions.

62 AIDA, Country Report France, 2016 Update, 40.

63 AIDA, Country Report France, 2016 Update, 40.

64 AIDA, Country Report Malta, 2016 Update, 53.

65 French Ministry of Interior, Instruction NOR: INTV1618837J of 19 July 2016 relating to the application of the Dublin III Regulation – Resort to house arrest and administrative detention in the context of execution of transfer decisions, 6.

66 La Cimade, 'Dublin : état des lieux et conseils pratiques en Ile de France', 2 May 2017, available in French at: http://bit.ly/2iUiHaz.

67 European Commission, *Proposal for a recast Reception Conditions Directive*, COM(2016) 465, 13 July 2016, Explanatory Memorandum, 14.

The new ground foreseen in Article 8(3)(c) of the proposal constructs an artificial legal obligation to comply with residence restrictions to bypass the requirement of satisfying one of the existing grounds for detention under the Directive and the obligation to consider alternative measures beforehand.[68] As illustrated in **France**, such a reasoning seems already to be encouraged in practice, while other countries such as **Austria** have introduced legislative reforms to codify systematic residence restrictions and a corollary power to detain those who fail to observe them.[69]

Concluding remarks

The overview of detention practices in AIDA countries once again reveals significant gaps and inconsistencies in reliable data collection on immigration and asylum detention at European level. While such statistics are collected and provided by national authorities in some countries, the lack of reporting obligations on detention in relevant EU instruments, including the Migration Statistics Regulation, leads to the absence of any comprehensive overview of detention practices in EU Member States. Given the significant scale of detention and *de facto* detention practices documented in some countries covered in this briefing, such a data collection gap remains unjustifiable and should be addressed by the European Union.

The legal and infrastructural expansion of asylum detention at national level resonates in the ongoing discussions on the legislative reform of the Common European Asylum System (CEAS). Despite the huge and disproportionate financial and human cost of detention, and the lack of effectiveness of states' over-reliance thereon, the European Commission proposals under negotiation broaden the scope of asylum detention and impose obligations on Member States to restrict freedom of movement of asylum seekers, in particular with the aim of enforcing compliance with the Dublin Regulation. This approach risks further streamlining asylum detention as an ostensibly necessary component of a functioning CEAS and legitimising current trends in some Member States towards the use of detention as a first response rather than a measure of last resort.

Increasing the grounds for restricting freedom of movement of asylum seekers, on the other hand, risks encouraging and justifying *de facto* detention policies, allowing states to circumvent procedural guarantees that are essential to protect asylum seekers from arbitrary detention. As the European Courts have failed to clarify existing ambiguity on the legality of detention of asylum seekers in light of the ECHR and the EU Charter of Fundamental Rights, the EU co-legislators carry an important responsibility to ensure that the EU legal framework makes asylum detention truly exceptional, and even impermissible with respect to the most vulnerable applicants, including unaccompanied children.

68 ECRE, *Comments on the Commission proposal to recast the Reception Conditions Directive*, October 2016, 12.

69 See e.g. AIDA, 'Austria: Movement restrictions and detention ahead of EU reform', 26 May 2017, available at: http://bit.ly/2rZFzsE.