



Comments on the Bill amending deportation and return procedures, residence permits and asylum procedures

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Introduction

This paper summarises comments from legal organisations Refugee Support Aegean (RSA), the Greek Council for Refugees (GCR), HIAS Greece and the Danish Refugee Council (DRC) on the bill amending migration and asylum legislation,¹ submitted to public consultation by the Ministry of Migration and Asylum one year after the last migration reform.²

Part I offers a detailed analysis of key provisions of the bill and of their impact on refugees and asylum seekers, as well as recommendations for changes to bring national legislation in line with existing international and EU law.

Part II sets out proposals to achieve harmonisation of Greek legislation with EU law. The bill offers a crucial opportunity for the legislature to make the necessary corrections to the legal framework in force, with a view to guaranteeing at least a correct and effective transposition of the EU asylum and migration *acquis* – namely the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive and the Return Directive – into domestic law, “in line with the requirements set by the EU legislature”.³ Several provisions of L 4636/2019 (International Protection Act, IPA) and L 3907/2011 do not comply with the Directives. Incorrect transposition **undermines legal certainty and requires administrative and judicial authorities to disapply any domestic provision that is contrary to EU law**.⁴ Moreover, Greece was recently reminded of the pressing need to bring its legislation in line with EU law through a **pilot infringement procedure triggered by the European Commission** in March 2021 and **complaints lodged with the Commission** in June 2021 on infringement of the Asylum Procedures and Reception Conditions Directives.⁵

¹ Ministry of Migration and Asylum, *Σχέδιο Νόμου: «Αναμόρφωση διαδικασιών απέλασης»*, 18 June 2021, available at: <https://bit.ly/3gJO9Ue>.

² L 4686/2020, Gov. Gazette A' 96/12.05.2020.

³ Ministry of Citizen Protection, *Αιτιολογική έκθεση στο Σχέδιο Νόμου Περί Διεθνούς Προστασίας*, 21 October 2019, 2, available at: <https://bit.ly/34COhiG>.

⁴ CJEU, *Joined Cases C-924/19 and C-925/19 FMS*, 14 June 2020, para 183; *Case C-64/20 UH*, 17 March 2021, paras 37-38.

⁵ RSA, 'Asylum seekers in Greece lodge complaint on infringement of Asylum Directives', 16 June 2021, available at: <https://bit.ly/3jiW51F>.

Part I – Analysis of key provisions

1. Distinction between deportation and return: Article 1

Prohibition on deportation or return of asylum seekers

Greek law has established “reception and identification procedures” as a special institutional framework for the management of irregular arrivals in Greece under the responsibility of the Reception and Identification Service (RIS).⁶ These procedures are mandatory for all persons irregularly entering or staying on the territory, who “shall be immediately transferred by police or coast guard authorities to a Reception and Identification Centre” (RIC).⁷ As a rule, persons arriving on the Eastern Aegean islands or at the Evros land border are subjected to reception and identification procedures and are referred by the RIS to the asylum procedure following the making of an asylum application. Crucially, they acquire asylum seeker status and the corollary right to remain on Greek soil upon “making” an application, i.e. the expression of their intention to seek international protection orally or in writing, subject to no administrative formality.⁸ Accordingly, their case is governed by the IPA and not by the deportation (Articles 76 et seq. L 3386/2005) or return (Chapter III L 3907/2011) regimes insofar as they are not in a situation of “illegal stay”.⁹

Yet, the systematic and indiscriminate issuance by police authorities¹⁰ of deportation decisions against persons who hold asylum seeker status¹¹ and have undergone reception and identification procedures circumvents the fundamental safeguards afforded by the IPA to applicants until the completion of their asylum procedure. For their part, administrative courts fail to scrutinise the legality of this practice in the context of judicial review of deportation decisions.¹²

In light of this, the law should **clarify the discrete scopes of the IPA, L 3907/2011 and L 3386/2005 and specify the immediate applicability of the IPA (namely Articles 39 and 65) to irregularly arriving persons** prior to the conduct of deportation or return proceedings.

⁶ Article 8 L 4375/2016.

⁷ Article 14(1) L 4375/2016; Article 39(1) IPA. However, this duty is not complied with in all cases of arrivals: RSA et al., *The Workings of the Screening Regulation*, January 2021, 6-8, available at: <https://bit.ly/3gDHXOP>; Vasileios Papadopoulos, “Ένα νομοσχέδιο με ανομολόγητες προθέσεις – Επαναφορά σε καθεστώς αλλοδαπών πολιτών χωρίς χαρτιά”, 25 June 2021, available at: <https://bit.ly/2T5Eaj5>.

⁸ Article 2(b) Asylum Procedures Directive; Article 2(b) Reception Conditions Directive; Article 65(8) IPA. See also CJEU, Case C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, paras 88-94.

⁹ See CJEU, Case C-181/16 *Gnandi*, 19 June 2018, para 40.

¹⁰ Directorate of the Hellenic Police, Circular 1604/16/1195968, 18 June 2016, available at: <https://bit.ly/3qa9H0G>.

¹¹ RSA & Stiftung PRO ASYL, *Submission in M.S.S. and Rahimi*, July 2020, para 35, available at: <https://bit.ly/3yJ22ub>; Vasileios Papadopoulos, ‘Αντιρρήσεις κατά κράτησης αλλοδαπού’ (2020) 2 Διδικ 337-345, 337.

¹² See e.g. Administrative Court of Mytilene, Decision 21/2020, 30 September 2020, para 3. Whereas the deportation decision was issued two days following the referral of the person by the RIS to the Asylum Service, the Court incorrectly reiterates that the execution of the deportation decision was suspended pending a decision on the asylum application made in the meantime.

Derogation from the Return Directive

Furthermore, **Article 1** of the bill regulates the scope of the Return Directive, as transposed into Greek law by Chapter III L 3907/2011. However, **Articles 17(2) and 34 L 3907/2011** already set out the circumstances under which the authorities may derogate from the procedures laid down in the Directive pursuant to its **Article 2(2)** and opt for deportation procedures as set out in **Articles 76 et seq. L 3386/2005**.

Even where they derogate from return procedures, Member States must comply with the minimum safeguards set out in **Article 4(4)** of the Directive (**Article 19(2) L 3907/2011**). Yet, Article 1 of the bill purports to circumvent the very minimum standards that bind the authorities even where they permissibly apply L 3386/2005 instead of L 3907/2011, in direct contravention of EU law. The proposed provision must therefore be deleted.

Nevertheless, the Ministry of Migration and Asylum has correctly identified the need for a clear distinction between return and deportation procedures,¹³ in full compliance with Article 2(2) of the Return Directive. The Court of Justice of the European Union (CJEU) requires a **narrow interpretation of the derogation from the safeguards of the Directive permitted by Article 2(2)(a)**.¹⁴ In accordance with the spirit of the Directive, the Return Handbook of the European Commission states that the aforementioned derogation – i.e. triggering “deportation” rather than “return” – applies to **“border cases”**.¹⁵

The CJEU, supported by both the Greek government and the European Commission, has ruled that the term “in connection with the irregular crossing” in Article 2(2)(a) of the Directive (Article 17(2)(a) L 3907/2011) requires a **“direct temporal and spatial link with that crossing of the border”**. It thereby applies to persons “apprehended or intercepted by the competent authorities **at the very time of the irregular crossing** of the border or near that border after it has been so crossed”.¹⁶ In the same vein, the Return Handbook specifies that the **derogation does not apply to irregular migrants apprehended near the border** since “there is no more DIRECT connection to the act of irregular border crossing”.¹⁷

It is worth recalling that the aforementioned reception and identification procedures applicable to all irregular entrants comprise of five separate and successive stages, including information provision, registration and medical check. They also entail potential transfer of the persons concerned to other facilities throughout the territory for the completion of the process.¹⁸ As a result, the requisite “direct temporal and

¹³ Ministry of Migration and Asylum, *Σχέδιο Νόμου: «Αναμόρφωση διαδικασιών απέλασης» - Ανάλυση συνεπειών ρύθμισης*, 18 June 2021, 7.

¹⁴ CJEU, Case C-444/17 *Préfet des Pyrénées-Orientales v Arib*, 19 March 2019, para 60.

¹⁵ Commission Recommendation (EU) 2017/2338 establishing a common ‘Return Handbook’ [2017] OJ L339/83, para 2.1.

¹⁶ CJEU, Case C-47/15 *Affum b Préfet du Pas-de-Calais and Procureur général de la Cour d’appel de Douai*, 7 June 2016, para 72; Case C-444/17 *Arib*, 19 March 2019, para 46.

¹⁷ Return Handbook, para 2.1.

¹⁸ Article 39(2) IPA.

spatial link with the crossing of the border” is not fulfilled in the case of new arrivals subject to reception and identification procedures.¹⁹

Additionally, the Return Handbook interprets the term “have not subsequently obtained an authorisation or a right to stay” contained in Article 2(2)(a) of the Directive as excluding from “border cases” “irregular entrants who had been apprehended at the external border and subsequently obtained a right to stay as asylum seekers”.²⁰ **The European Commission therefore excludes asylum seekers from Article 2(2)(a) of the Return Directive**, given that they enjoy the right to remain on the territory until the completion of the asylum procedure.²¹

2. Return decisions: Article 2

The discontinuation of the asylum procedure on the basis of implicit withdrawal of an application differs from the rejection of an asylum application, since **it does not entail an assessment of the merits or the admissibility** of the claim by the authorities.²² Hence, the decision to discontinue the examination procedure ordered by the Asylum Service **cannot be appealed before the Appeals Committee**; the applicant submits a request for continuation of the procedure within 9 months, pursuant to Article 81 IPA.²³

Accordingly, it is not possible for the authorities to incorporate a return decision and a discontinuation decision into a single act without creating the risk of removing an asylum seeker before their claim has been examined, in contravention of the *non-refoulement* principle. The undersigned organisations further recall that the correct transposition of EU law into Article 81 IPA is the subject matter of a pending pilot procedure before the Council of State.²⁴

3. Voluntary departure: Article 3

As regards the extension of the voluntary departure period under **Article 22(2) L 3907/2011**, the reduction of the maximum time limit from one year to 120 days runs counter to the purpose of the provision, i.e. safeguarding ties and schooling of children. The abrupt severance of those ties amounts to difficultly repairable harm.²⁵

In addition, the bill repeals **Article 22(5) L 3907/2011** without justification.

4. Residence permits for beneficiaries of international protection: Article 15

The proposed **seventh indent of Article 24(1) IPA** introduces a 150 € fine against beneficiaries of international protection who submit a late application for renewal of their residence permit. Such a provision inserts an additional requirement for the

¹⁹ According to Article 39(7)(b) IPA, the Director of the RIC refers such persons to the competent authorities for the purposes of return procedures following the completion of the reception and identification procedure.

²⁰ Return Handbook, para 2.1.

²¹ Article 9(1) Asylum Procedures Directive.

²² Administrative Court of Athens, Decision 113/2020, 11 March 2020.

²³ 6th Appeals Committee, Decision 15235/2020, 10 March 2021.

²⁴ Council of State, Act 12/2020 of the Article 1(1) L 3900/2010 Commission, 23 July 2020.

²⁵ Administrative Court of Athens, Decision 317/2020, 12 August 2020, para 5.

issuance of a residence permit beyond the conditions set out by Article 24 of the Qualification Directive. The penalty also undermines the guarantees afforded by the **sixth indent** of the same provision, according to which an application for renewal of a residence permit shall not be rejected on the sole ground that it was submitted late.

5. Right to remain and postponement of removal: Articles 4 and 18

Article 18 of the bill repeals the express reference to the asylum authorities' duty to postpone removal where the *non-refoulement* principle would be infringed. The organisations recall that the issuance of a humanitarian residence permit to the persons concerned, as permitted by **Article 6(4)** of the Return Directive, is the only effective way for the state to discharge its duties to persons who cannot be removed on account of *non-refoulement* or other grounds e.g. family life, minority, health reasons. It also serves to avoid situations of prolonged limbo and precariousness.²⁶ Accordingly, the possibility for asylum authorities to refer persons to the humanitarian protection regime should be reinstated in Greek law.

At the same time, the bill introduces contradictory provisions insofar as it confers upon asylum authorities competence to order a return decision, while removing their power to order postponement of removal.

With regard to automatic suspensive effect of asylum appeals before the Appeals Committee, the organisations reiterate the need for full reinstatement of appellants' right to remain on the territory pending the outcome of the appeal procedure.²⁷ **Article 2** of the bill requires deportation or return decisions to be incorporated in the decision on the asylum application. In such a case, **the asylum appeal must always carry automatic suspensive effect, in line with CJEU case law**.²⁸ The Court clarified in *Gnandi* that "the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect, before at least one judicial body".²⁹

Furthermore, the obligation on appellants to lodge a separate request for suspensive effect pursuant to **Article 104(2) IPA** remains an **unnecessary procedural layer** in the second instance asylum procedure. This requirement **adds disproportionate burden on both appellants and Appeals Committees** in an appeal procedure already subject to very tight timeframes. It is also redundant in practice, as illustrated by the Committees' **systematic tendency to reject suspensive effect requests after having ruled on the merits of the appeal**.³⁰

²⁶ GCR, *GCR's comments on the draft law amending asylum legislation*, 27 April 2020, available at: <https://bit.ly/3vVYnpX>.

²⁷ RSA, *Comments on the Reform of the International Protection Act*, 23 April 2020, 14, available at: <https://bit.ly/3h1Y0pT>; *Comments on the International Protection Bill*, 21 October 2019, 5, available at: <https://bit.ly/3x2f1FW>.

²⁸ CJEU, Case C-181/16 *Gnandi*, 19 June 2018, para 56.

²⁹ *Ibid*, para 58.

³⁰ See e.g. 4th Appeals Committee, Decision 12645/2020, 21 July 2020; 6th Appeals Committee, Decision 5692/2020, 28 February 2020; 10th Appeals Committee, Decision 7465/2020, 24 April 2020; 13th Appeals Committee, Decision 2727/2020, 9 April 2020; 14th Appeals Committee, Decision 4334/2020, 9 April 2020; 19th Appeals Committee, Decision 19883/2020, 11 August 2020.

At a minimum, the legislature should bring domestic law in line with Article 46 of the Asylum Procedures Directive. **Article 104(3) IPA**, as amended by Article 26 L 4686/2020 and currently in force, fails to correctly transpose **Article 46(7)** of the Directive on the conditions for applying Article 46(6) of the Directive in border procedures. The Directive specifies that Member States may derogate from the rule of automatic suspensive effect of appeals in border procedures only in the exhaustive cases laid down in paragraph 6. Yet, Article 104(3) IPA does not refer to those circumstances (as transposed in Article 104(2) IPA) but provides that “the possibility to derogate from the right to remain” applies to the border procedure, provided that certain guarantees are complied with. As a result, **contrary to EU law, Greek law excludes appeals against all types of decisions taken in the border procedure from automatic suspensive effect**. The implementation of the border procedure in practice confirms that appeals against decisions including inadmissibility on “safe third country” or unfoundedness are also stripped of automatic suspensive effect, in contravention of the Asylum Procedures Directive.

6. Subsequent application fee: Article 21

The proposed 50 € fee for every subsequent application under **Article 89(10) IPA** severely violates EU law. The submission of a subsequent application forms **part of the fundamental right to asylum** enshrined in Article 18 of the EU Charter of Fundamental Rights. Moreover, the CJEU and the European Commission deem it a **necessary step for the examination of an asylum application** where the initial application has been rejected contrary to procedural standards,³¹ as in the case of systematic dismissal of asylum applications based on Turkey being a “safe third country” despite a clear lack of prospects of readmission thereto.³²

It is worth highlighting that Greek law has already incorporated the Asylum Procedures Directive³³ provisions setting out special procedural rules for the rapid and efficient processing of subsequent applications in Article 83(9)(e), 84(1)(e), 89 and 92(1)(d) IPA.

7. Return decision following rejection of asylum appeal: Article 23

As discussed in the analysis of Article 1 above, **asylum seekers always fall within the scope of the Return Directive**, given that they enjoy the right to remain on Greek soil from the making of their asylum application. Therefore, the issuance of a deportation decision under L 3386/2005 instead of a return decision under L 3907/2011 against a person who has sought asylum and appeals before the Appeals Committee is unlawful.

³¹ CJEU, Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 189-203; European Commission, Reply to parliamentary question, P-000604/2021, 1 June 2021, available at: <https://bit.ly/35DmoY8>.

³² HIAS and Equal Rights Beyond Borders, *Refugees in legal limbo: Another overlooked casualty of externalising asylum at any cost*, 18 June 2021, available at: <https://bit.ly/2S9de2w>.

³³ See CJEU, Case C-921/19 *LH v Staatssecretaris van Justitie en Veiligheid*, 10 June 2021.

Part II – Harmonisation of Greek law with EU Directives

The following section identifies specific provisions of the IPA and L 3907/2011 in need of immediate amendment to be brought in line with EU law and to safeguard legal certainty.

1. Reception and identification procedures: Article 39 IPA

Article 39(4)(a) IPA imposes a “restriction of freedom” regime on persons undergoing reception and identification procedures, consisting of a prohibition to exit the premises of the RIC. However, **in view of the degree of restriction of newly arrived persons’ liberty** through the obligation to remain within the RIC, the lack of possibilities to receive visitors outside the facility and the limitation and surveillance of their movements by the authorities,³⁴ **the measure amounts to de facto detention in the meaning of Article 2(h) of the Reception Conditions Directive.**

“Restriction of freedom” pursuant to Article 39(4)(a) IPA is **indiscriminately applied for a maximum of 25 days**, for the purpose of completing reception and identification procedures. **The measure does not, however, observe the EU law requirements for detention of asylum seekers under Articles 8-11 of the Reception Conditions Directive and Article 26 of the Asylum Procedures Directive**, notably an individualised assessment of the exhaustive grounds for detention, of the necessity and proportionality of deprivation of liberty.³⁵ As a result, the domestic law provision contravenes both Directives.

2. Detention of asylum seekers: Article 48 IPA

Article 48(3) IPA incorrectly transposes **Article 11(6)** of the Reception Conditions Directive. EU law limits the possibility for Member States to derogate from the obligation to provide separate accommodation to detained families only vis-à-vis applicants held in “at a border post or in transit zone” outside the context of the border procedure. This requirement is not incorporated in Greek law.

3. Withdrawal of reception conditions: Articles 39, 51, 57 IPA

Article 39(10)(c) IPA provides for reduction or withdrawal of material reception conditions where an asylum seeker does not comply with a transfer to a different facility for the purpose of completing the reception and identification procedure. Similar grounds for reduction or withdrawal are laid down in **Article 10(5) JMD 1/7433/2019** relating to applicants who refuse to be transferred from a RIC to a reception centre. These provisions run counter to EU law, since they **exceed the exhaustive grounds for reduction or withdrawal of reception conditions set out in Article 20(1)-(3)** of the Reception Conditions Directive. Non-compliance on the part of a minor asylum seeker with the obligation to enrol in school or failure to attend classes pursuant to **Article 51(2) IPA** equally falls outside the scope of permissible reduction or withdrawal grounds.

³⁴ CJEU, Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 226-227.

³⁵ *Ibid*, paras 258-259.

Furthermore, the CJEU has clarified that sanctions pursuant to **Article 20(4)** of the Reception Conditions Directive differ from grounds for reducing or withdrawing reception conditions. **According to the Court, the Directive does not allow Member States to terminate material reception conditions as a sanction** against applicants who violate the house rules of reception centres.³⁶ In light of this, the provisions of **Article 57(4) IPA** and secondary legislation (**Article 10(1)(c) JMD 1/7433/2019, Article 18(1)(b) JMD 23/13532/2020**) contravene Article 20(4) of the Directive.

Finally, the Greek legislature has failed to transpose into **Article 57(5) IPA** the requirement on the competent authorities to take into consideration the principle of proportionality pursuant to **Article 20(5)** of the Directive.

4. Victims of torture and violence: Article 61 IPA

Article 61 IPA provides that victims of torture or violence shall be certified by a “medical report from a public hospital, a military hospital or adequately trained doctors of public health institutions, including forensic services”. The limitation of competent bodies for the issuance of medical reports contravenes EU law, since no such possibility is afforded to Member States by **Article 25(1)** of the Reception Conditions Directive or the Istanbul Protocol. According to the latter, certification of victims of torture requires an interdisciplinary approach involving a social worker and medical, psychological and legal expertise.

Importantly, **certification of victims of torture or other forms of violence pursuant to Article 61 IPA has never taken place** since the entry into force of the provision,³⁷ due to the absence of the necessary means and procedures within the responsible public health institutions.³⁸ The inability of the state to comply with the obligations stemming from the provision is systematically and explicitly acknowledged by the competent authorities, including “Evangelismos” General Hospital of Athens, “Vostanio” General Hospital of Mytilene, “Skylitsio” General Hospital of Chios, General Hospital of Samos, General Hospital of Kos, Northern Aegean Forensic Service and Dodecanese Forensic Service.³⁹ Meanwhile, neither the administration nor the courts accept medical reports from entities other than those set out in Article 61 IPA.⁴⁰

As a result, the aforementioned provision renders certification of victims of torture impossible in practice. This jeopardises the Greek authorities’ duty to identify and refer torture victims to rehabilitation services even where they have been certified by medical reports of specialised bodies in line with the Istanbul Protocol.

³⁶ CJEU, Case C-233/18 *Haqbin*, 12 November 2019, para 56.

³⁷ Article 23 L 4540/2018, as restated verbatim in Article 61 IPA.

³⁸ National Commission for Human Rights, *Έκθεση της ΕΕΔΑ για την προστασία αιτούντων/αιτουσών άσυλο-θυμάτων βασανιστηρίων και άλλων μορφών σκληρής, απάνθρωπης ή ταπεινωτικής μεταχείρισης ή τιμωρίας*, September 2020, available at: <https://bit.ly/3tAeLw9>.

³⁹ RSA et al., *The Workings of the Screening Regulation*, January 2021, 16-18, available at: <https://bit.ly/3pdhwSG>.

⁴⁰ Administrative Court of Appeal of Piraeus, Decision 20/2019; Decision 206/2019.

5. Access to documents: Article 71(4) IPA

The provision incorrectly transposes **Article 23(1)** of the Asylum Procedures Directive, given that it fails to “establish in national law procedures guaranteeing that the applicant's rights of defence are respected”, namely by making sources taken into consideration by the determining authority available to lawyers who have undergone a security check.

6. Guarantees for the examination of the asylum application: Article 74 IPA

Relating to the obligations of the Asylum Service prior to taking a decision on an asylum application, **Article 74(3) IPA** refers to the collection and keeping of “specific and precise” information related to the country of origin of the applicant. According to **Articles 10(3)(b)** and **Recitals 39 and 48** of the Asylum Procedures Directive, however, such information must also be “up-to-date”.⁴¹

In addition, Greek law has failed to transpose the corollary provision of **Article 12(1)(d)** of the Directive on access of the applicant and/or their representative or legal advisor to the specific sources of information taken into consideration by the determining authority for the purpose of deciding on the application.

7. Personal interview: Article 77 IPA

Under **Article 15(3)(c)** of the Asylum Procedures Directive, Member States shall “select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly.” However, Greek legislation incorrectly transposes the provision into **Article 77(12)(b) IPA**, as amended by Article 10 L 4686/2020, which provides that the “interpreter selected shall be able to ensure the necessary communication in a language the applicant understand or is reasonably supposed to understand”.

Domestic law does not meet the clear standards set by EU law to **guarantee effective and uninterrupted communication during the personal interview through the use of the language preferred by the applicant, unless there is another language which the applicant in fact understands and in which they are able to clearly communicate**. The conduct of the interview in a language the applicant is reasonably supposed to understand does not comply with the requirements of EU law.

8. Implicit withdrawal: Article 81 IPA

Points (a) and (b) of Article 28(2) of the Asylum Procedures Directive are incorrectly transposed by **Article 81(2)(b) and (d) IPA**, given that domestic law does not allow the asylum seeker to demonstrate within a reasonable timeframe that their failure to attend the personal interview or their departure from their place of residence is due to

⁴¹ See also the term “actualisées” in the French version and “actualizada” in the Spanish version of Article 10(3)(b) of the Directive.

circumstances beyond their control. **Failure to incorporate this procedural safeguard carries significant consequences in practice, insofar as it results in the discontinuation of the procedure or rejection of the asylum application**, as the case may be. This should be read in conjunction with the prohibition on reverting cases from the Appeals Committees back to the Asylum Service for a new personal interview at first instance, even where the procedure is marred by irregularities.⁴²

Furthermore, the indicative list of grounds for declaring an asylum application implicitly withdrawn under **Article 81(2) IPA** includes criteria unrelated to the applicant's wish to follow the asylum procedure, such as:

- **point (e)** on non-compliance with obligations set out in Article 78 IPA, in particular the obligation to appear in person or to submit a residence certificate no earlier than two or three days prior to the – written – examination of the appeal.⁴³ The widespread use of this provision results in systematic and disproportionate dismissal of appeals by the Appeals Committees;⁴⁴
- **point (h)** on non-compliance with a transfer to a reception facility, which disregards the spirit of the Reception Conditions Directive and the conditions set by EU law on Member States' power to transfer applicants from one reception centre to another;⁴⁵
- **point (f)** on failure to renew the International Protection Applicant Card on the next working day following its expiry;
- the broad and repetitive reference to non-compliance with the authorities in **point (g)**.

9. Examination procedure: Article 83 IPA

Greek law has failed to transpose **Article 31(6)(a)** of the Asylum Procedures Directive. According to the provision, where the first instance examination of the asylum claim exceeds six months, the authorities shall inform the applicant of the delay.

Additionally, **point (b)** of the same paragraph has not been correctly transposed into **Article 83(6) IPA** as domestic law refers to “the maximum time limit in each case” and not to a deadline of six months. This hampers the applicant's unhindered access to the guarantees afforded by the Directive when the processing of the case reaches six months.

Finally, **Article 83(9) IPA** on the accelerated procedure exceeds the exhaustive grounds laid down in **Article 31(8)** of the Asylum Procedures Directive. EU law does not permit the use of accelerated procedures where “the applicant refuses to comply with the obligation to have their fingerprints taken pursuant to domestic legislation”.

⁴² Article 105 IPA; Council of State, Decision 689/2021, 30 May 2021, para 15.

⁴³ Article 97(1) IPA.

⁴⁴ Ombudsman, Παρατηρήσεις στο σχέδιο νόμου «Βελτίωση Μεταναστευτικής Νομοθεσίας», 8 May 2020, 6, available at: <https://bit.ly/3vJ4uyx>.

⁴⁵ RSA, *Comments on the International Protection Bill*, 21 October 2019, 4, available at: <https://bit.ly/3x2f1FW>.

10. Safe third country: Article 86 IPA

The organisations reiterate the concerns expressed upon the adoption of Article 86 IPA and its amendment by Article 16 L 4686/2020. **The “safe third country” concept in Greek legislation must urgently be brought in line with EU law.** Albeit contrary to **Article 38** of the Asylum Procedures Directive,⁴⁶ Article 86 IPA has been systematically applied in the fast-track border procedure since the entry into force of the IPA, leading to a **tenfold increase in dismissals of asylum claims by Syrian nationals as inadmissible at first instance**, from 245 in 2019 to 2,839 in 2020.⁴⁷ Broader use of the concept by asylum authorities across the territory is expected following the adoption of **JMD 42799/2021** on 7 June 2021, which declares Turkey a “safe third country” for asylum seekers originating from Syria, Afghanistan, Somalia, Pakistan and Bangladesh.⁴⁸

The systematic use of the “safe third country” concept as an inadmissibility ground has raised serious legal and political concerns⁴⁹ over the past five years of implementation of the EU-Turkey deal.⁵⁰ In addition, given the current suspension of readmissions under the deal for more than a year, Greek authorities systematically violate their obligation to assess asylum applications on their merits on account of the refusal of the third country to allow the applicant to enter its territory.⁵¹ Subsequent applications are the only route for applicants whose claims were unlawfully dismissed as inadmissible,⁵² as discussed in relation to **Article 21** of the bill above.

Connection criterion

As regards the criteria for the determination of a connection between the applicant and a third country, based on which it would be reasonable for them to be returned there, **Article 86(1)(f) IPA** provides that transit, in conjunction with specific circumstances, may substantiate such a connection.⁵³ The provision thereby contravenes **Article 38(2)(a)** of the Asylum Procedures Directive, per which **transit through a third country cannot in itself constitute a criterion for the existence of a connection between the applicant and that country**, since it often results from chance.⁵⁴ Although it refers to a number of personal circumstances, many of which are not conducive to a personal connection to a third country, domestic legislation

⁴⁶ RSA, *Comments on the International Protection Bill*, 21 October 2019, 5, available at: <https://bit.ly/3x2f1FW>; *Comments on the Reform of the International Protection Act*, 23 April 2020, 12-13, available at: <https://bit.ly/3h1Y0pT>.

⁴⁷ RSA, ‘Asylum statistics for 2020 A need for regular and transparent official information’, 12 February 2021, available at: <https://bit.ly/3gYbGBZ>.

⁴⁸ GCR et al., ‘Greece deems Turkey “safe”, but refugees are not: The substantive examination of asylum applications is the only safe solution for refugees’, 14 June 2021, available at: <https://bit.ly/3jlv3U>.

⁴⁹ Minos Mouzourakis, ‘Ο ορισμός της ασφαλούς τρίτης χώρας στη μεταρρύθμιση του Κοινού Ευρωπαϊκού Συστήματος Ασύλου’ (2018) 1 Εφαρμογές Δημοσίου Δικαίου 11-17.

⁵⁰ Υίοτα Massouridou, ‘Η «Δήλωση ΕΕ-Τουρκίας» και οι συνακόλουθες διαδικασίες ασύλου στα νησιά του Αιγαίου. Είναι η Τουρκία ασφαλής τρίτη χώρα για τους Σύρους πρόσφυγες σύμφωνα με το ενωσιακό δίκαιο;’ (2020) 2 Διδικ 227-234.

⁵¹ Article 38(4) Asylum Procedures Directive; Article 86(5) IPA.

⁵² European Commission, Reply to parliamentary question, P-000604/2021, 1 June 2021, available at: <https://bit.ly/3wNS5tm>.

⁵³ See also Council of State, Decision 2347/2017, 22 September 2019, para 61.

⁵⁴ CJEU, Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, paras 45-50; Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 158-159.

currently in force maintains transit as the cornerstone of criteria for the determination of a sufficient connection, contrary to the position of the CJEU in the *LH* and *FMS* rulings.

Methodology

The organisations recall that **Article 86(2) IPA** makes no provision on the methodology to be followed by the authorities in order to assess whether a country qualifies as a “safe third country” for an individual applicant, i.e. the rules on the basis of which the authorities examine whether the safety and connection criteria apply in his or her particular case. **The CJEU holds that the enactment of methodology rules is a necessary precondition for the use of the concept as an inadmissibility ground.**⁵⁵ The case law of the Court clarifies that the “safe third country” concept requires the establishment of a process under a national regulatory act. In the absence of such legislation at domestic level, the application of the concept is contrary to EU law. The interpretation of the Directive in *LH* and *FMS* echoes the Court’s case law on the prior requirement of regulatory measures for the application of the “safe country of origin”⁵⁶ concept under Article 36 of the Directive and the “significant risk of absconding” under Articles 2 and 28 of the Dublin Regulation.⁵⁷

Methodology rules on the “safe third country” concept should elaborate the process and steps to be followed by the determining authority so as to assess whether the asylum system and practice of a third country fulfils the criteria of Article 38 of the Asylum Procedures Directive both in general terms and in the individual circumstances of the applicant. Moreover, methodology rules encompass the reliable sources of information on the basis of which the determining authority should assess whether or not the “safe third country” criteria are fulfilled in the individual circumstances of the applicant. These sources should include reports of reputable human rights organisations on the situation of asylum seekers in the third country in question, in line with Strasbourg jurisprudence.⁵⁸

The Greek legislature should therefore proceed to an **in-depth amendment of Article 86 IPA aimed at elaborating methodology rules on the process and steps to be followed by the determining authority** in order to assess whether the asylum system and its implementation by a third country fulfils the criteria of Article 38 of the Directive both generally and in the individual case of each applicant.

It is crucial to recall that **the Ministry of Migration and Asylum established a Working Group on safe third countries** in November 2020.⁵⁹ The Working Group was entrusted with reviewing the “safe third country” concept within 3 months of its creation but **never**

⁵⁵ CJEU, Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, para 48; Joined Cases C-924/19 and C-925/19 *FMS*, 14 May 2020, para 158.

⁵⁶ CJEU, Case C-404/17 A v *Migrationsverket*, 25 July 2018.

⁵⁷ CJEU, Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor*, 15 March 2017.

⁵⁸ ECtHR, *Ilias and Ahmed against Hungary* [Grand Chamber], Application No 47287/15, 21 November 2019, paras 99, 235.

⁵⁹ Ministry of Migration and Asylum, ‘Συγκρότηση Ομάδας Εργασίας για τον καθορισμό ασφαλών τρίτων χωρών και ασφαλών χωρών καταγωγής’, 17 November 2020, available at: <https://bit.ly/3yQNcln>.

completed its task.⁶⁰ The recent JMD 42799/2021 equally fails to meet the state's obligation to lay down methodology rules.

Accordingly, the authorities should urgently hold a targeted consultation with experts with a view to the adoption of specific legislative standards incorporating rules on the methodology for the application of the "safe third country" concept in conformity with Article 38(2) of the Asylum Procedures Directive. **Pending the adoption of such legislative provisions, the application of the "safe third country" concept in Greek law should at least be suspended**, since it contravenes EU law and cannot be implemented pursuant to existing legislation.

11. Manifestly unfounded applications: Article 88 IPA

The organisations recall that **Article 32(2)** of the Asylum Procedures Directive allows states to declare an application "manifestly unfounded" only in the cases where the use of an accelerated procedure is permitted under **Article 31(8)** of the Directive. Greek legislation remains incompatible with EU law, given that **Article 88 IPA** foresees several grounds for manifest unfoundedness beyond those permitted by the Directive: inadmissible subsequent applications in **para 2(j)**; serious violation of the obligation to cooperate in **para 2(k)**; stay on the territory solely for economic reasons under **para 3**.

Furthermore, **Article 97(2) IPA** establishes a presumption of abusive lodging of an asylum appeal with the sole aim of delaying or frustrating the execution of a deportation decision. However, failure to appear in person before the Appeals Committee or to submit a residence certificate within two or three days under **Article 78(3) IPA** cannot *per se* substantiate such an intention. Appellants are already required to challenge first instance decisions in the form of a written appeal indicating the full appeal grounds under **Article 93 IPA**. Compliance with this obligation entails a clear indication of their intention to challenge the first instance decision through the submission of specific arguments to the Appeals Committee. Such an intention is in no way negated by the appellant's inability to meet the strict and disproportionate requirements set by Article 78(3) IPA.

Importantly, the rejection of an application as "manifestly unfounded" carries increasingly detrimental procedural consequences for applicants, since no voluntary departure period is granted in such a case under **Article 3** of the bill.

12. Appeals: Article 112 IPA

Article 112(1) IPA insufficiently transposes **Article 26(1)** of the Reception Conditions Directive, since it omits the possibility for an applicant to lodge an appeal against decisions relating to the granting of reception conditions. Due to the incorrect transposition of the Directive, **asylum seekers have no remedy in fact and law against decisions rejecting their access to reception conditions**.

⁶⁰ Efsyn, 'Μαζικές απορρίψεις ασύλου με την «υπογραφή» Μηταράκη', 8 June 2021, available at: <https://bit.ly/35z8Son>.

13. Pre-removal detention: Article 92(4) IPA, Article 30 L 3907/2011

Article 92(4) IPA, inserted by L 4686/2020, provides that detention in a pre-removal centre shall be ordered, as a rule, following the rejection of an asylum appeal by the Appeals Committee. The same law amended **Article 30 L 3907/2011** in such a way as to render pre-removal detention the default approach to return procedures. Greek law thereby establishes systematic detention in **stark contravention of the state's duty to follow the "gradation of the measures" set out in the Return Directive for carrying out returns⁶¹ and to use administrative detention as a last resort**, where necessary, following an individualised assessment and on specific grounds, in line with **Article 15(1)** of the Return Directive⁶² and the fundamental right to liberty.⁶³

Moreover, as already indicated by the European Commission to Greece,⁶⁴ **the EU *acquis* does not permit pre-removal detention on national security grounds.**⁶⁵

14. Risk of absconding: Article 18(g) L 3907/2011

Under **Article 3(8)** of the Return Directive, Member States shall lay down in their national law objective criteria, on the basis of which authorities assess the existence of a risk of absconding in the return procedure. Compliance with this obligation requires the enactment of a legislative provision of general application with a view to assessing such a risk in conformity with the principles of **certainty, predictability, accessibility and protection from arbitrariness, in line with CJEU case law.**⁶⁶ Accordingly, a non-exhaustive list of criteria falls short of the duty to enact objective criteria in domestic legislation and of the requirement of legal certainty.

15. Criminalisation of illegal entry: Article 83 L 3386/2005

Constant CJEU case law holds that EU Member States' criminal law in the area of irregular entry and stay should comply with the Return Directive and should not jeopardise the achievement of its objectives.⁶⁷ In light of this, **as already stated by the European Commission, Article 83(1) L 3386/2005 contravenes the Directive, as it punishes the offence of irregular entry by a sentence of imprisonment.**⁶⁸

⁶¹ CJEU, Case C-61/11 *El Dridi*, 28 April 2011, paras 36-41.

⁶² See the terms "may only keep in detention" in the English version and "peuvent uniquement placer en rétention" in the French version of the provision.

⁶³ Article 5 European Convention on Human Rights; Article 6 EU Charter.

⁶⁴ European Commission, *Letter of Formal Notice – Infringement 2014/2231*, C(2014) 7344, 16 October 2014, 3.

⁶⁵ CJEU, Case C-357/09 *PPU Kadzoev*, 30 November 2009; Return Handbook, para 14.1.

⁶⁶ CJEU, Case C-528/15 *Al Chodor*, 15 March 2017, paras 40-43.

⁶⁷ CJEU, Case C-806/18 *JZ*, 17 September 2020, paras 26-27; Case C-329/11 *Achugbabian*, 6 December 2011, para 50.

⁶⁸ European Commission, *Letter of Formal Notice – Infringement 2014/2231*, C(2014) 7344, 16 October 2014, 24. See also Vasileios Papadopoulos, "Ένα νομοσχέδιο με ανομολόγητες προθέσεις – Επαναφορά σε καθεστώς αλλοδαπών πολιτών χωρίς χαρτιά", 25 June 2021, available at: <https://bit.ly/2T5Eqj5>.

