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CCBE Guide for Bars & Lawyers on the **New Pact on Migration and Asylum**

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Table of content

Introduction ---- 4

Overview of procedural steps according to the Pact ---- 5

Part 1. Screening Regulation ---- 6

I. Presentation of the regulation, rationale, aim and structure ---- 6
II. Analysis of provisions ---- 8
a. Requirements regarding screening
b. Legal status of persons subject to screening
c. Access to third-country nationals during the screening
d. Provision of information
e. Consequences of screening and right to effective remedy
III. Summary of points for attention for lawyers ---- 17

Part 2. Asylum Procedure Regulation ---- 18

I. Presentation of the regulation, rationale, aim and structure 18
II. Analysis of provisions ---- 19
a. Guarantees for applicants
b. Free legal counselling and legal assistance and representation
c. Applications – steps and requirements
d. Decisions and remedies
e. Safe country concepts
III. Summary of points for attention for lawyers ---- 43

Part 3. Asylum and Migration Management Regulation ---- 44

I. Presentation of the regulation, rationale, aim and structure 44
II. Analysis of provisions ---- 45
a. Right to information, free legal counselling, legal assistance and representation
b. Cases where the transfer is impossible
c. Modified and new criteria (compared to the Dublin III criteria) - family-related criteria and minors
d. Modified and new criteria (compared to the Dublin III criteria) - other
e. Discretionary clauses
f. Procedures, remedies and time limits
g. Consequences of non-compliance
h. Legal questions raised by the 'solidarity mechanism'
III. Summary of points for attention for lawyers ---- 57

Part 4. Crisis Regulation ---- 58

I. Presentation of the regulation, rationale, aim and structure ---- 58
II. Analysis of provisions ---- 59
a. Procedure and time limits
b. Possible derogations
c. Applicable safeguards
d. Access to the applicants in detention or at border crossings
III. Summary of points for attention for lawyers ---- 64

Final conclusions ---- 65

Annex I – Overview of various steps in the NPMA ---- 66

Annex - Additional materials & further reading ---- 67

Introduction

The CCBE is recognised as the voice of the European legal profession representing, through its members, more than 1 million European lawyers. Through its Migration Committee, composed of practitioners specialised in migration and asylum law, the CCBE has been monitoring European and national developments in relation to asylum, in particular, the protection of migrants' and asylum seekers' fundamental rights. The focus is on the access to legal information, legal assistance and representation, legal aid, and to a lawyer as a way to make the rights of asylum seekers effective. Over the past years, the CCBE has been following closely and engaged in dialogue with stakeholders with regards to the reforms of the Common European Asylum System that culminated in the adoption of the New Pact on Migration and Asylum (NPMA) in 2024.

The CCBE is aware that this adoption does not conclude the reforms of the EU framework that will continue evolving in the years to come. Nevertheless, as the NPMA is being implemented and comes into force, it is crucial that lawyers, who play an essential role in making access to justice and rights of migrants effective, are aware of the new rules and are able to work with them.

It is in this spirit that the CCBE prepared this guide, which aims at providing lawyers with an overview of the most important elements of the Pact.

It focuses on the aspects that are crucial from the point of view of practitioners, such as the right to legal assistance during various procedures or access of lawyers to migrants present in the facilities regulated by the Pact.

The guide is divided into four parts. The order in which they were placed in the guide follows the sequence of procedures to which asylum applicants shall be subject under the New Pact, i.e. screening according to the Screening Regulation, , asylum procedure set in the Asylum Procedure Regulation (APR), attribution of responsibility under the Asylum and Migration Management Regulation (AMMR, formerly "Dublin Regulation"). Analysis of the Crisis Regulation was placed at the end of the guide due to its exceptional character.

The selection of the key elements is not exhaustive and should be considered as an introduction into a more detailed study of the topics by the practitioners.

"Accessible information, legal counselling, assistance, representation and exemptions from fees and costs (in general, legal support) are sine qua non conditions for the enjoyment of the human right to asylum and access to justice".[1] - Barbara Mikolajczyk, "The maze of legal support in the New Pact on Migration and Asylum", Odysseus Blog

[1] Barbara Mikolajczyk, "The maze of legal support in the New Pact on Migration and Asylum", available here.

Overview of procedural steps according to the Pact

For the sake of clarity, it is important to understand the sequence of procedures and their main elements established by the Pact. A more detailed graphic in Annex I presents the steps and actors involved.

Screening – Screening Regulation

- Physical security check
- Preliminary health check
- Registration of biometric data (Eurodac)
- Identification and verification of identity
- Security check in databases
- Preliminary vulnerability check
- Filling out of a screening form
- Referral to the procedure

Channelling to the procedure (3 options)

1. **Border procedure: asylum or return – APR/Border Return Regulation**
   - Applied (mandatory) in the following cases: applicant misleading the authorities; applicant being a danger for public security; applicant coming from a country with 20% recognition rate.
   - And possibly applied (optional) in the following cases: an application made at an external border crossing point or in a transit zone; following apprehension in connection with an unauthorised crossing of the external border; following disembarkation in the territory of a Member State after a search and rescue operation; following relocation in accordance with Article 67(11) of Regulation (EU) 2024/1351.

2. **Asylum procedure (regular) – APR**
   - Applied if no ground to apply the Asylum Border Procedure
     - Identification of the country responsible (Dublin rules) – AMMR
     - Admissibility
     - Examination of merits

3. **Return procedure (regular) – Return Directive**
   - Applied if the application is inadmissible or rejected on merits

See also Annex I for a more detailed overview of successive procedures and the right to information, free legal counselling, legal assistance and representation.

Part 1 - Screening Regulation

Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817

I. Presentation of the regulation, rationale, aim and structure

The Screening Regulation (SR) is a new piece of legislation comparing to the Common European Asylum System (CEAS) previously in force. It codifies the practice, already existing in some Member States, to register, check, filter and refer migrants to appropriate procedures. Some elements of the screening are reminiscent of the hotspot approach launched in 2015-2016.

The aim of the Regulation is described in Recital 6: "*the screening of third-country nationals should contribute to ensuring that they are referred to the appropriate procedures at the earliest stage possible and that those procedures are continued without interruption or delay"*.

The Screening Regulation is characterised by three key-elements: **a)** it establishes an 'all irregular third-country nationals' (screening) category; **b**) from the initial objective to speed up the asylum and return procedures and to identify individuals, the Regulation shifts to the current objective of internal-security interests, and; **c)** it creates a legal fiction of 'non-entry'.

In this respect **Article 1** SR of the Regulation manifests a fundamental shift in approach and resulting standards of treatment of protection-seekers because it eliminates the fine line that international and EU law draws between this protected group and other migrants, through the establishment of an 'all irregular third-country nationals' (screening) category with the objective to strengthen control on internal-security grounds.

Furthermore **Article 6 SR** explains that "*During the screening, the persons referred to in Article 5(1) and (2) shall not be authorised to enter the territory of a Member State*." It therefore creates a legal fiction of 'non-entry'.

Some preliminary, general remarks are necessary in this regard. From a fundamental rights protection perspective, the combination of the foregoing key elements raises, *inter alia,* the following issues of concern.

Article 3 SR explains that "*when applying the Regulation, Member States shall act in full compliance with relevant Union Law, including the Charter, with relevant international law, including the Geneva Convention....*". In this context, European Convention on Human Rights (ECHR) also applies under Art. 52 (3) of the Charter.[2]

Furthermore, despite the fact that **the 'non-entry' concept** was traditionally applied to persons in 'transit zones' (i.e. airports) in a border control context and not in an asylum one, to justify an exceptional regime of lowering EU guarantees on access to asylum procedures, standards of

[2] Explanations relating to the Charter of Fundamental Rights (2007/C303/02)

detention etc, it should be recalled that both the CJEU in Joined Cases C-924/19 PPU and C-925/19 PPU and the ECtHR in M.K v Poland [3] have confirmed that there is no such thing as "no man's territory". Strictly speaking, European caselaw on 'pushbacks' highlights the problem that border guards do not always differentiate between protection-seekers and other migrants, and instead treat them in the same manner.

In 2024, the CJEU ruled that the practice of pushbacks at the EU external borders, which effectively removes persons seeking to make an application for international protection from the territory of the EU or removes them from that territory before an application made on entry has been examined, is contrary to EU law. [4]

In a similar vein, ECtHR in A.R.E. v Greece [5] ruled that there had been a violation of Articles 13 and 3 ECHR based on a systematic practice of pushbacks from the Evros region in Greece to Turkey, as well as a return without examination of the alleged risks of ill-treatment and the claim for international protection.

It is therefore important to observe how the screening will be carried out in practice in light of the requirements of the EU and international law, including as established by the case law.

When it comes to its scope, the Screening Regulation applies to all third-country nationals, regardless of whether they have made an application for international protection or not. It distinguishes between a) those who are apprehended in connection with an unauthorised crossing of the external border of a Member State and/or are disembarked in the territory of a Member State following a search and rescue operation under **Article 5 SR**, and b) those illegally staying within the territory of a Member State under **Article 7 SR**.

Regarding the places of screening, **Article 8** SR explains that regarding the former category the screening shall be conducted *"at any adequate and appropriate location designed by each Member State, generally situated at or in proximity to the external border, or alternatively, in other locations within its territory"*. The point of concern in this respect is that the remote location of the screening centres may *de facto* restrict access to services, including legal, social and psychological support.

In the cases under Article 7, the screening shall be conducted at any place within the territory of the Member State, this provision being optional for Member States however.

By performing the checks explained in **Articles 5, 12, 14, 15, 16 SR,** and after filling out the screening form explained in **Article 17 SR**, the overall aim is to facilitate the referral of the persons to the appropriate procedure, depending on whether they have made an application for international protection or not, as described in **Article 18 SR.**

Despite the introduction of national monitoring mechanisms in **Article 10 SR,** the CCBE considers that making available independent legal assistance throughout the screening procedure would be the best practice, to best safeguard respect for fundamental rights.

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[3] CJEU, FMS and Others, Joined Cases C-924/19 PPU and C-925/19 PPU, judgment of 14.05.2020, available here, and ECtHR, M.K. v Poland, application nos. 40503/17, 42902/17 and 43643/17, judgment of 23.07.2020, available here.

[4] CJEU, X. v Staatssecretaris van Justitie en Veiligheid, Case C-392/22, judgment of 29.02.2024, para. 50, available here.

[5] ECtHR, A.R.E. v. Greece, judgment of 07.01.2025, application no 15783/2021, available here.

Although the screening is a new element in the EU law and there is no case law on it yet as based on the Screening Regulation, as indicated already above, there is jurisprudence regarding transit zones, border areas and hotspots that might be relevant to look at when interpreting the Screening Regulation provisions.

II. Analysis of provisions

a. Requirements regarding screening

The screening at the external border shall be carried out within 7 days (Article 8(3)).

The screening within the territory shall be carried out within 3 days (Article 8 (4)).

Based on the current practice (for example, in Closed Controlled Access Center of Samos, Greece), there are reasons for concern that deadlines for completion of screening might be difficult to respect.[6]

The following procedures are part of the screening:

- a preliminary health check
- a preliminary vulnerability check
- identification or verification of identity
- the registration of biometric data
- a security check
- the filling out of a screening form
- referral to the appropriate procedure.

Some of these elements are of great significance in terms of consequences for the migrant, and might require legal assistance.

b. Legal status of persons subject to screening

Whether apprehended in connection with illegal crossing and/or disembarked or illegally staying in a Member State, during the screening procedure the third-country nationals shall "*remain available to the authorities*" **(Articles 6 and 7**). This wording does not refer to detention explicitly and it is therefore unclear what is the status of the persons kept in the centres where screening takes place. These persons have to remain available to the authorities which can mean a *de facto* detention, within the meaning of **Article 2 (12**) which explains that "*detention means the confinement of a person by a Member State within a particular place, where such person is deprived of freedom of movement"*.

[6] See for example "Joint Policy Paper: The EU Screening Regulation", Joint publication by Border Violence Monitoring Network, Mobile Info Team, I Have Rights, ASGI, and Centre for Legal Aid - Voices in Bulgaria, 29th November 2023, p.4), available here.

The possibility to detain persons in order to prevent illegal entry is explicitly recognised by the ECHR, Article 5 (1) (f) provided it is foreseen by law[7]. In this respect, the ECtHR examined *de facto* detention of migrants in Italian hotspots in the case J.A. and Others v. Italy. It found that a stay in the hotspot "*for ten days without a clear and accessible legal basis and in the absence of a reasoned measure ordering their retention before being removed to their country of origin*" amounted to arbitrary detention contrary to Article 5 (1) (f) of the Convention. [8]

In R.R. and Others v. Hungary, ECtHR found that Article 5 ECHR was applicable and violated in a case where the applicants stayed in a transit zone for almost 4 months without any strict definition of legal basis and maximum duration of detention in domestic law.[9]

In the Case C-925/19[10], the CJEU held that detaining asylum seekers or failed asylum seekers in transit zones for the mere fact that they cannot meet their own needs or without a prior examination of the proportionality and necessity of the measure violated EU asylum law (Articles 8 and 9 Reception Conditions Directive (RCD) and Article 15 Return Directive).

In 2017, CPT's report mentioned, regarding the Italian hotspots, included recommendations regarding "*judicial control over deprivation of liberty, the provisions of information about rights and procedures and effective access to a lawyer as well as practical measures to reduce the risk of refoulement".*[11]

The ECtHR considers that the difference between restriction and deprivation of the liberty is a question of difference in the degree or intensity. To find that the situation amounted to detention in the case Abdolkhani and Karimnia v. Turkey, the Court took into account that migrants were not able to leave the reception centre or police station and the access to a lawyer was possible only after the latter presented a notarised power of attorney.[12]

Against this background, it is not excluded that a challenge of stay in a screening centre would lead the court to find a *de facto* detention if it considers that the intensity and degree of restrictions to liberty are high enough.

Being detained implies a set of rights under the Convention such as being informed promptly, in a language which one understands, of the reasons for his arrest and of any charge against him.[13] The uncertainty of the status of being subject to screening is therefore problematic as it is not clear which guarantees apply.

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[7] 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[8] ECtHR, Saadi v. UK, application no. 13229/03, judgment of 29.01.2008, par.77, available here.

[9] See also ECtHR, M.S.H. v. HUNGARY, application no 44283/19, judgment of of 27.02.2025, available here, regarding a stay of an asylum seeker in the Tompa transit zone for 13 months, in which the Court applied the reasoning from R.R. and Others v. Hungary.

[10] CJEU, FMS and Others, Joined Cases C-924/19 PPU and C-925/19 PPU, judgment of 14.05.2020, available here.

[11] CPT, Report from the mission in 2017, available here.

12 ECtHR, Abdolkani v Turkey, application no. 30471/08, judgment of 22.09.2009, par.127, available here.

[13] Article 5 par.2 ECHR

However, if there is a "*de facto* deprivation of liberty", a ground for detention must be fulfilled. Detention without grounds is prohibited by Article 5 ECHR[14]. The Screening Regulation does not contain any grounds for detention itself. However, Article 4(1)(b) of the Screening Regulation refers to Article 3 of Directive (EU) RCD, which means that the grounds for detention enumerated in Article 10(4), first sentence, must be considered and they must be laid down in national law (Article 10(4), second sentence, RCD).

Any detainee must be able to obtain procedural safeguards, specifically those associated to the access to a lawyer, legal information, and legal assistance. It is regrettable that no explicit mention is made in the text about these guarantees. It is believed that they will nevertheless need to be implemented in practice by the different actors while complying with the Charter and the case law of the CJEU and ECtHR.

In any case, there are requirements regarding the places where migrants stay during screening. It is important to keep in mind the case law of ECtHR regarding the Greek and Italian hotspots (e.g. M.S.S. v. Belgium and Greece) that pointed to unacceptable shortcomings.[15]

With regards to detention conditions in centres contrary to ECHR, the Court ruled in 2024 in M.A. and others v. Greece[16] that the living conditions in the reception and identification centres (RIC) in Chios and Samos for the applicants, who were asylum seekers arriving to Greek islands in 2019, violated Article 3 ECHR.

In R.R. and Others v. Hungary and in M.S.H. v. Hungary[17], regarding stays of an asylum seeker in the Roszke and Tompa transit zones, the Court found a violation of Article 3 because of the conditions in which the applicants were kept taking into account for example the fact that they were kept in containers and exposed to high heat levels.

For the persons who do not apply for international protection, detention rules from the Return Directive apply.

c. Access to third-country nationals during the screening

Article 8 (6) requires that organisations and persons providing advice and counselling shall have effective access to third-country nationals during the screening. Although not enumerated explicitly, lawyers are covered by this provision.

Article 8 Requirements concerning the screening

(...)
6. Organisations and persons providing advice and counselling shall have effective access to third-country nationals during the screening. Member States may impose limits to such access by virtue of national law where such limits are objectively necessary for the security, public order

[14] See for example ECtHR, Quinn v. France, judgment of 22.03.1995, application no. 18580/91, available here.
[15] M.S.S v. Belgium and Greece, judgment of 21.01.2011, application no 30696/09, para.301, available here,
[16] ECtHR, M.A. v Greece, ruling of 03.10.2024, application no. 15192/20, available here.
[17] ECtHR, M.S.H. v. Hungary, ruling of 27.02.2025, application no. 44283/19, available here.

or administrative management of a border crossing point or of a facility where the screening is carried out, provided that such access is not severely restricted or rendered impossible.

Providing for access of organisations to migrants is welcome in principle, although the limits or exceptions to this access that Member States might impose appear to be overly broad and vague, particularly concerning "*administrative management of a border crossing point*." It could lead to a lack of an effective access to advice. Therefore, lawyers shall be vigilant whenever the access is limited and check the grounds that are invoked for such limitations.

When it comes to asylum seekers, it is also important to recall that in the ruling in Case C-821/19, European Commission v Hungary, , the CJEU stated that service providers such as legal advisors and counsellors have the right to respond to the requests of asylum seekers, a right which they "*derive indirectly from Article 22(1) of Directive 2013/32"* (APD)[18]. In this case, the Court found that national laws criminalising certain assistance provided to migrants constituted a restriction "*of the effectiveness of the right, afforded to asylum seekers under APD, to be able to consult, at their own expense, a legal adviser or other counsellor, since that provision of criminal law is liable to discourage such persons from providing such services to asylum seekers.*" From this reasoning one can infer that the screening processes implemented at national level should not restrict the rights of asylum seekers to consult lawyers under the APR.

Moreover, Article 6 of the European Convention for the Protection of the Profession of Lawyer is relevant in this respect: *"Parties shall ensure that lawyers can: (...) c. have prompt and effective access to their clients and prospective clients, even when they are deprived of liberty; (...) e. have effective access to any relevant materials in the possession or control of the competent public authorities, courts and tribunals when acting on behalf of their clients without undue delay and restrictions;"*[19]

It will also be important to ascertain in practice the specific phase (timing and space) dedicated to providing advice and counselling during the screening. These details are not specified in the text of the regulation**.**

In M.S.S. v Belgium and Greece, the ECtHR considered that the lack of information concerning access to organisations which offer legal advice and guidance combined with the shortage of lawyers on the list drawn up for the legal aid system may also be an obstacle hindering access to a remedy and falls within the scope of Article 13 ECHR, particularly where asylum seekers are concerned.

With regards to obstacles to legal aid, it is important to also refer to the case D. v. Bulgaria[20] where the ECtHR held that there had been a violation of Articles 3 and 13 ECHR, since the applicant had not been granted access to a lawyer or a representative of specialist organisations that would have helped him assess whether his circumstances entitled him to international protection.

Lawyers and Member States should be reminded that provisions on access to lawyers during detention apply also during the screening phase and so do general principles of administrative procedures such as access to the file.

[18] CJEU, European Commission v Hungary, Case C-821/19, judgment of 16.11.2021, available here.
[19] Council of Europe, "Council of Europe adopts international convention on protecting lawyers", 12.03.2025, available here.
[20] ECtHR, D. v. Bulgaria, ruling of 20.07.2021, application no 29447/17, available here.

d. Provision of information

Article 11 Provision of information

1. Member States shall ensure that third-country nationals subject to the screening are informed about (...)

(a) the purpose, duration and elements of the screening, as well as the manner in which it is carried out and its possible outcomes;

(b) the right to apply for international protection and the applicable rules on making an application for international protection, where applicable in the circumstances specified in Article 30 of Regulation (EU) 2024/1348, and, for those third-country nationals having made an application for international protection, the obligations and the consequences of non-compliance laid down in Articles 17 and 18 of Regulation (EU) 2024/1351;

(c) the rights and obligations of third -country nationals during the screening, including their obligations under Article 9 and the possibility to contact and be contacted by the organisations and persons referred to in Article 8(6) (...)

3. The information provided during the screening shall be given in a language which the third-country national understands or is reasonably supposed to understand. The information shall be provided in writing, on paper or in electronic format, and, where necessary, orally using interpretation services. In the case of minors, the information shall be provided in a child-friendly and age-appropriate manner and with the involvement of the representative or person referred to in Article 13(2) and (3). (...)

4. Member States may authorise relevant and competent national, international and non-governmental organisations and bodies to provide third-country nationals with information referred to in this Article during the screening according to national law.

Article 11 requires that migrants are informed about several aspects such as purpose of the screening, the right to apply for asylum and rules applicable to do it, and crucially, the rights and obligations of third-country nationals, including the possibility to contact and be contacted by the organisations providing advice and counselling. It is an obligation for Member States to ensure that this information is provided.

The provision also states that the information provided during the screening shall be given in a language which the third-country national understands or is reasonably supposed to understand. The information shall be provided in writing, on paper or in electronic format, and, where necessary, orally using interpretation services.

There are special requirements for minors – information must be provided in a child-friendly and age-appropriate manner, with involvement of a guardian.

This provision also states that Member States may allow relevant and competent organisations to provide this information.

The requirement to provide information about the rights of migrants and possibility to contact organisations is vague and does not say how it should be done in practice. Therefore, it is important for lawyers to check how this matter is solved at national level.

The text lacks clarity also as to who is responsible for providing the information. The option for MS to allow NGOs or international organisations to provide information to persons introduces ambiguity. The CCBE understands that that the information provision can be carried out either by national authorities involved in screening or other bodies including Frontex or EUAA, or entrusted to lawyers or NGOs authorised by the country.

Furthermore, the text introduces the 'possibility' of third-country nationals to contact and to be contacted by the organisations and persons referred to in Article 8 (6), instead of an explicit right and hence obligation by the screening authorities to respect this right.

The CCBE considers that rules on access to information in the appropriate language and the rights of migrants could be stronger. This information should always be given in a language that he/she understands or he/she has been proved to understand, not only that he/she is reasonably supposed to understand. In this respect, in Conka v. Belgium, ECtHR clarified that obtaining information on the available remedies printed in tiny characters and in a language they did not understand can be one of the factors affecting the accessibility of the remedy. It can also be an obstacle to the prospect of being able to contact a lawyer.[21] In a similar vein, ECtHR in H.T. v Germany and Greece[22] found a violation of Article 3 (procedural limb) taking into account the importance of information in a language the person understands and that the applicant had been hastily removed without access to a lawyer prior to removal.

It is worth recalling that the ECtHR case-law (e.g. Conka v. Belgium) also identified the availability of interpreters as one of the factors affecting access to an effective remedy.[23] Member States must therefore grant the right of the third-country national to receive adequate information in such a way that the person concerned has the possibility to make use of it.

In O.S.A. v. Greece[24], a violation of Article 5(4) ECHR was found in the case of four asylum seekers detained in a Greek hotspot facility due to the practical barriers they faced to challenge the lawfulness of their detention. In this case, the detention decisions were in Greek, a language they did not speak, and they did not have either legal assistance or the sufficient legal knowledge to

[21] ECtHR, Conka v. Belgium, judgment of 05.02.2002,, app.no. 51564/99, available here, par. 44 : « *In the instant case, the Court identifies a number of factors which undoubtedly affected the accessibility of the remedy which the Government claim was not exercised. These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Roma families who attended the police station in understanding the verbal and written communications addressed to them and, although he was present at the police station, he did not stay with them at the closed centre. In those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services; despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre.*"

[22] ECtHR in H.T. v Germany and Greece, judgment of 15.10.2024, app.no. 13337/19, available here.

[23] See ECtHR, Conka v. Belgium, judgment of 05.02.2002, application no 51564/99, para.50, available here; ECtHR, M.S.S v. Belgium and Greece, judgment of 21.01.2011, application no 30696/09, para.301, available here, ;and ECtHR, I.M v. France, judgment of 02.02.2012, application no.9152/09, para.145, available here.

[24] ECtHR, O.S.A. and Others v. Greece, judgment of 21.03.2019, application no. 39065/16, available here.

understand the information brochure provided to them, which referred in general terms to an "administrative court" without specifying which one. Moreover, although a lawyer was present in the hotspot facility, they had not been represented by him and the government had not specified whether the number of lawyers and the funds available to the NGOs had been adequate to meet the needs of all the thousands of occupants of the hotspot center.

In cases regarding allegations of collective expulsions/pushbacks, the ECtHR examines the conditions of the registration process, such as whether information was provided to third-country nationals about the possibility to lodge an asylum application, to request legal aid, and whether individuals were in practice able to consult lawyers and lodge asylum applications. [25]

e. Guarantees for minors

Article 13, along with Recitals 25, 33 and 38, sets stronger guarantees for the screening of minors. It requires:

- The best interest of the child to be a primary consideration.
- The minor to be accompanied by an adult family member if the latter is present.
- Take measures as soon as possible to ensure that a representative or, where a representative has not been appointed, a person trained to safeguard the best interests and general wellbeing of the minor accompanies and assists the unaccompanied minor during the screening in a child-friendly and age-appropriate manner and in a language that he or she understands. These persons must be well trained and independent.
- If there is no appointment of such a person, it cannot act as an obstacle for the minor to apply for international protection.
- Respecting a limit on the number of minors that the persons can take care of: the number must be proportionate and limited and, under normal circumstances, of no more than thirty unaccompanied minors at one time.

In Darboe and Camara v. Italy[26] regarding inadequate age and vulnerability assessment, examined in light of Article 8 ECHR, the ECtHR declared that the age assessment may be conducted by authorities, but it must be accompanied **by sufficient procedural safeguards amongst which access to a lawyer**. The Court ruled that there had been a failure to act with reasonable diligence in respect of declared unaccompanied minor asylum-seeker, not benefiting from minimum procedural guarantees in age-assessment procedure.[27] In F.B. v. Belgium, the ECtHR found a violation of Article 8 because the decision making process, including age assessment, was not surrounded by sufficient procedural guarantees.[28] In particular, the applicant was not informed that medical age assessment requires applicant's consent. In

[25] ECtHR, Hirsi Jamaa v Italy, judgment of 23.02.2012, application no. 27765/09, available here; ECtHR, Sharifi and Others v Italy and Greece, judgment of 21.10.2014, application no. 16643/09, available here ; ECtHR, Khlaifia and Others v Italy, ruling of 15.12.2016, application no. 16483/12, available here; ECtHR, Asady and Others v Slovakia, judgment of 24.03.2020, application no. 24917/15, available here; ECtHR, M.K. v Poland, application nos. 40503/17, 42902/17 and 43643/17, judgment of 23.07.2020, available here ;D.A. v. Poland, judgment of 08.07.2021, application no. 51246/17, available here; ECtHR, M.A. and Others v. Latvia, decision of 29.03.2022, available here.

[26] ECtHR, Darboe and Camara v. Italy, judgment of 21.07.2022, app.no 5797/2017, available here.

[27] Also see in ECtHR, T.S and M.S v. Greece, judgment of 03.10.2024, appl.no. 15008/19, paras 75-79, available here, regarding conditions and detention of minors (.

[28] ECtHR, F.B. v. Belgium, application No. 47836/21, 06.03. 2025, available here.

addition, for the Court, given their invasive nature, these tests can only be performed as a last resort.

In Rahimi v. Greece, a violation of Article 5(4) ECHR was found where a 15-year old unaccompanied boy had not been provided with a lawyer or guardian to be able to apply before court and challenge the lawfulness of his detention.

Regarding detention conditions for minors in transit zones, in K.K.S. v Hungary[29], the ECtHR held that the applicants' stay of almost four months in the transit zone amounted to a *de facto* deprivation of liberty, contrary to Article 5 (1), (4) (see par. 20-21) and also that the applicant was made to stay for almost three months in an institution with prison-type elements, without sufficient adult supervision or support and without appropriate educational and recreational activities being provided to him. The Court fuond that the situation complained of subjected the applicant to treatment which exceeded the threshold of severity required to engage Article 3 of the Convention (par. 18).

Therefore, **the fiction of non-entry should not apply to children. Instead, they should always be granted access to the territory and accommodated in appropriate centres and never in *de facto* detention. Moreover, the best interests of a child should be guaranteed by specialised legal aid.**

f. Consequences of screening and right to effective remedy

Article 17 Screening form

(...)
3. The information in the form referred to in paragraph 1 shall be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure.
It shall be specified whether the information referred to in paragraph 1, points (a) and (b), is confirmed by the screening authorities or declared by the person concerned.
Information contained in the form shall be made available either on paper or in electronic format to the person concerned. Information referred to in point (h) of paragraph 1 of this Article shall be redacted. Before the form is transmitted to the relevant authorities as referred to in Article 18(1), (2), (3) and (4), the person subject to the screening shall have the possibility to indicate that the information contained in the form is incorrect. The screening authorities shall record any such indication under the relevant information as referred to in this Article.

Article 17 describes the screening form and indicates what it should contain. It also specifies that it be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure. The person also has the possibility (instead of the right) to indicate to the screening authorities inaccuracies in the form.

Specification that the document must be amenable to review is welcome as the document should be amenable to appeal in order to ensure access to an effective judicial review. However,

[29] ECtHR, K.K.S. v. Hungary, judgment of 03.10.2024, application no.32660/18, available here.

the fact that it cannot be challenged as a standalone act but only as part of ensuing procedure presents a weakness from the point of view of procedural safeguards. This is a point to which lawyers need to pay attention to.

The simplicity and potential errors in the form may cause a discriminatory and oversimplified assessment in applying for asylum, leading to a violation of Article 18 of the Charter.

In this respect, it is important to recall that the ECtHR in J.A and others v. Italy[30] ruled that the information sheet used in the Lampedusa hotspot could not be qualified as a proper interview but as a simple questionnaire formulated in an extremely concise way and in any event difficult to understand for the aliens concerned (para. 112) and held that that the refusal-of-entry and removal orders issued in the applicants' case did not have proper regard to their individual situation, contrary to article 4 of Protocol 4 to the Convention (para. 116).

In Rahimi v. Greece, the leaflet describing the complaints process against detention centres was not made available in a language comprehensible for the applicant (a child), and, in conclusion, the remedy was not accessible.

The absolute importance of the screening form (and the potential errors therein given that no concrete safeguards are included) is evident in Article 18 which states that "*the form referred to in Article 17 shall be transmitted to the relevant authorities to whom the third-country national is being referred*".

Through screening, third-country nationals will be referred either to the border procedure, asylum procedure or return procedure. The way in which screening data is collected could lead to the wrong procedure, and therefore the form and substance of the information could determine the future of the person concerned. Therefore, it is essential that the third-country nationals concerned have the possibility to challenge the outcome of the screening. Access to effective legal assistance would be important at this stage.

The current wording is a bit ambiguous as it says the form should be made available to the person. It should have been expressly provided that the individual receives a copy of all documentation (including the screening form). Lawyers assisting third-country nationals shall remember to request this form.

The possibility for the person to indicate inaccuracies is also welcome and can be considered as reflecting the right to be heard. However, flagging such inaccuracies does not immediately impact the completion of the screening form, as the indication of inaccuracies only has to be recorded. Lawyers shall remember about this possibility to indicate inaccuracies and use it whenever they find it appropriate.

More generally, when it comes to potential ways to challenge or signal irregularities regarding screening, in addition to national judicial and monitoring mechanisms, lawyers should remember that there exist complaint mechanisms of Frontex and EU Asylum Agency that apply to their staff.[31] For example, for Frontex, the mechanism foresees that: "*Any person who is directly affected by the actions or failure to act on the part of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return*

[30] ECtHR, J.A. and Others v. Italy, judgment of 30.03.2023, application no. 21329/18, available here.
[31] Art. 111 REGULATION (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624; and Art.51 (1) Regulation (EU) 2021/2303, as established by Management Board Decision No 159 of 24 May 2024 (EUAA/MB/2024/056)

operation, return intervention or an operational activity of the Agency in a third country, and who considers himself or herself to have been the subject of a breach of his or her fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint in writing to the Agency."

Given that Member States may be supported by the agencies during screening, and in practice they often are (for example, Frontex during fingerprinting and EUAA for information provision), it is important that practitioners are aware of the complaint mechanisms.[32]

III. Summary of points for attention for lawyers

Legal professionals should pay particular attention to the following elements of the Screening Regulation:

- They should have effective access to third-country nationals during the screening.
- They shall consider invoking the applicable EU Charter of Fundamental Rights and CJEU caselaw, ECHR and the Court's jurisprudence, same as international law and the Convention Relating to the Status of Refugees (Geneva Convention).
- The information from the screening form is amenable to administrative and judicial review during any ensuing asylum or return procedure.
- (In)adequate capacity in the screening centres, especially at or in proximity to the external borders shall by assessed by itself in compliance with Article 4 of the EU Charter and Article 3 ECHR.
- Individuals should be properly informed during screening, in a language they actually do understand.
  Vulnerabilities, including the age of the individual, should be examined thoroughly. Regarding the age, individuals shall enjoy the benefit of the doubt. In case of doubts, individuals should be considered and should be treated as minors until a final decision is issued. During this lapse of time supposed unaccompanied minors should be separated from the adults, they deserve all the safeguards during this period as it has been stated in Articles 23-26 RAMM.
- When considering available mechanism and remedies, lawyers should also remember about Frontex and EUAA complaints mechanisms.

[32] For more information, see Frontex, Frontex Complaints Mechanism, available here and EUAA, Complaints mechanism, available here.

Part 2 - Asylum Procedure Regulation

Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

I. Presentation of the regulation, rationale, aim and structure

The objective of the new regulation is to *"establish a common procedure for granting and withdrawing international protection pursuant to Regulation (EU) 2024/1347" (*Article 1 APR*).*

It applies to "*all applications for international protection made in the territory of the Member States, including at the external border, on the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection" (*Article 2 (1) APR*).*

The APR does not apply to *"applications for international protection and to requests for diplomatic or territorial asylum submitted to representations of Member States" (*Art 2(2) APR*).*

Member States have the opportunity to decide to apply the APR to applications for protection to which Regulation (EU) 2024/1347 does not apply (Art 2 (3) APR).

Recital 6 allows Member States to adopt more favourable provisions than the ones in the Regulation. It can be an important basis for advocacy within the implementation process of the APR on the level of the Member States.

Recital 10 recalls that Member States are bound by obligations under instruments or international law to which they are party. Therefore, the provisions of the APR should be seen and interpreted in accordance with the ECHR and the jurisdiction of the ECtHR, the CFR and the Geneva Convention of 1951. In the same vein, Recital 108 is important for the interpretation of the provisions of the Regulation in accordance with internationally recognised human rights standards.

> *Recital 108*
>
> *This regulation respects the fundamental rights and observes the principles recognised in particular by the Charter. In particular, this regulation seeks to ensure full respect for human dignity and to promote the application of Article 1, 4, 8, 18, 19, 21, 23, 24, and 47 of the Charter.*

Chapter I (**Articles 1 – 7 APR**) includes "General Provisions", dealing with definitions, competent authorities and assistance to them, the role of the United Nations High Commissioner for Refugees and the principle of confidentiality.

Chapter II (**Articles 8 – 25 APR**) defines the "Basic Principles and Guarantees" of the procedure. This chapter is divided into five sections. Section I (Articles 8 – 10 APR) determines the "rights and obligations of applicants". Section II (Articles 11 – 14 APR) sets up the rules for "personal interviews". Section III (Articles 15 – 19 APR) contains the "Provision of legal counselling and legal

assistance and representation". Section IV (Articles 20 – 23 APR) defines "Special guarantees" for special groups of applicants, including minors and unaccompanied minors". Section V (Articles 24 – 25 APR) specifies rules for "Medical examination and age assessment".

Chapter III (**Articles 26 – 64 APR**) constitutes the rules for the "Administrative Procedure". This chapter is subdivided into five sections. Section I (Articles 26 – 33 APR) includes provisions regarding the "Access to the Procedure". Section II (Articles 34 – 35 APR) contains rules for the "Examination Procedure". Section III (Articles 36 – 41 APR) sets up the rules for "Decisions on applications". Section IV (Articles 42 – 56 APR) specifies rules for "Special Procedures", including the "Accelerated examination procedure (Articles 42 APR), the "Asylum border procedure" (Articles 43 – 45 APR), the "Adequate Capacity at Union level and at the level of Member States" (Articles 46 – 50 APR) and "Subsequent applications" (Articles 55 – 56 APR). Section V (Articles 57 – 64) constitutes rules for the concept of "Safe Third Countries".

Chapter IV (**Articles 65 – 66 APR**) stipulates procedural rules for the "Withdrawal of International Protection".

Chapter V (**Articles 67 – 69 APR**) deals with the "Appeal Procedure".

Chapter VI (**Articles 70 – 79 APR**) includes "Final Provisions" of the Regulation.

II. Analysis of provisions

a) Guarantees for applicants

Article 8, that should be read in conjunction with corresponding Recital 31 and 33, enumerates **general guarantees** for applicants.

There is a **right to be informed** about these guarantees. Indeed, the determining authority or, where applicable, other competent authorities or organisations tasked by Member States for that purpose shall inform applicants, in a language which they understand or are reasonably supposed to understand, of the following:

- the right to lodge an individual application;

- the time limits and stages of the procedure to be followed;

- their rights and obligations during the procedure, including those under AMMR, and the consequences of not complying with those obligations, in particular as regards the explicit or implicit withdrawal of an application;

- the right to free legal counselling for the lodging of the individual application and to legal assistance and representation at all stages of the procedure pursuant to Section III of this Chapter and in accordance with Articles 15, 16, 17, 18 and 19;

- the means by which they can fulfil the obligation to submit the elements as referred to in Article 4 of Qualification Regulation (Regulation (EU) 2024/1347);

- the decision of the determining authority in accordance with Article 36.

Recital 31 stresses that **timely information** on the rights and obligations, in a language that the persons understand or should understand, and consequences of non-compliance with them, must be provided especially as non-compliance might entail rejection or inadmissibility of an application. Another element of the right to information is in Recital 33 which explains that "*at border crossing points and in detention facilities, information should be made available on the possibility to make an application for international protection. Basic communication necessary to enable the competent authorities to understand if persons declare their wish to make an application for international protection should be ensured through interpretation arrangements".*

The CCBE considers that information should always be given in a language that he/she understands or he/she has been proved to understand, not only that he/she is reasonably supposed to understand. This information should preferably be provided by a well-prepared legal counsel free of charge for the applicant. It is necessary that a well-prepared interpreter is also present at any stage of the procedure, also when the information under Article 8 (2) is provided, in order to ensure that the applicant understands any information, which is relevant to secure his rights during the asylum procedure. It must be reassured that the applicant has understood the consequences of his refusal to cooperate. The applicant also shall be provided with a formal administrative decision against which he has the right to appeal.

The services of the interpreter shall be provided to the applicant at any stage of the procedure, especially during the personal interview, but also during the appeal procedure, free of charge.

All the information shall be provided timely, in order to secure the procedural rights of the applicant. Any information leaflet shall be translated to the applicant by a trained interpreter and explained to the applicant by a qualified practitioner in any case, free of charge.

The applicant must also be informed about the right to request, at administrative stage, free legal counselling and the right to request legal assistance and representation. Therefore, there are three distinctive concepts in the APR: right to information, right to free legal counselling, and right to legal assistance and representation (see below). The legal counselling, assistance and representation must meet certain requirements. It is recommended, that legal counselling, assistance and representation be provided at all stages of the procedure by qualified practitioners with knowledge of migration and asylum law, including the provision of legal aid, whenever necessary (see below).[33]

The newly introduced legal counselling will play a crucial role regarding the right of the applicant in securing access to asylum. The obligation to provide it as early as possible, including before the lodging of the application, as well as jurisprudence related to early information and advice in asylum procedures, confirms that legal counselling is a *sine qua non* of access to asylum. The absence of legal counselling may thus give rise to a violation of Articles 4 and 18 CFR. Legal information is one relevant element of legal counselling. The case law of the CJEU suggests that if the information is not provided, the principle of effectiveness is violated. [34] This would apply a fortiori to legal counselling.

[33] This recommendation also supported by the ECRE, Legal Note, "The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures", 16.06.2024, available here.

[34] CJEU, Ministero dell'Interno, C-228/21, Judgement of 30.11.2023, available here. , .

Decisions issued by the ECtHR underline the importance of adequate information provision and advice in asylum procedures before the interview or the appeal stage, connecting it with Articles 3 and 13 ECHR.

Article 8 also includes a right of access to the information regarding some elements which were taken into account by the determining authority during the examination of the application.

> *Article 8 General guarantees for applicants*
>
> *(...)*
> *5. The determining authority shall ensure that applicants and, where applicable, their representatives or legal advisers or other counsellors admitted or permitted as such under national law to provide legal advice (''legal advisers") have access to the information referred to in Article 34(2), points (b) and (c), that is required for the examination of applications and to the information provided by the experts referred to in Article 34(3), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application.*

Reference is made to the following elements of Article 34:

- relevant, precise and up-to-date information relating to the situation prevailing in the country of origin of the applicant;
- where applying the concepts of first country of asylum or safe third country, relevant, precise and up-to-date information relating to the situation prevailing in the third country;
- advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, mental health, and child-related or gender issues.

Moreover, Article 10 sets **the right to remain** during the administrative procedure: until the determining authority has taken a decision on the application in the administrative procedure.

The CCBE is of the view that the applicant shall rather have the right to remain on the territory of the Member State until the final decision about his application has been issued. This is necessary to secure the fundamental right of an effective remedy under Article 47 CFR and Article 13 ECHR.

Article 12 guarantees that the applicant shall be given the opportunity of a **personal interview** on the substance of his or her application. The substantive interview may be conducted at the same time as the **admissibility interview** provided the applicant has been informed of such a possibility in advance and has been **able to consult with his or her legal adviser** in accordance with Article 15 or with a person entrusted with providing legal counselling in accordance with Article 16. Article 13 sets the requirements for personal interviews (see also Recitals 14, 15, 21*)*. Paragraph 4 ensures **the presence of the applicant's legal adviser at the personal interview**, where the applicant has decided to avail himself or herself of legal assistance.

The CCBE sees it as a good standard of a fair asylum procedure that each applicant shall be granted full legal assistance by a qualified independent lawyer at the beginning of the asylum procedure and before the admissibility and/or substantive interview takes place. Legal aid should be granted whenever necessary. [35]

[35] This recommendation is also supported by the ECRE Legal Note from June 2024, mentioned above.

The CCBE would advise to adopt at national level a procedural guarantee that a qualified practitioner shall be present at the personal interview in any case (not only where the applicant has decided to avail himself or herself of legal assistance). If the person asks for the legal assistance, Member States must create conditions to ensure that the legal adviser can be present. The request for legal assistance triggers the obligation to ensure the presence of the legal adviser. Moreover, an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the interview shall be provided for the personal interviews. In this regard, it is important that interpreters are trained in migration and international wording/contexts to provide a correct translation of the whole interview.

Article 13 (6) stipulates that in exceptional circumstances, the interview may be conducted by staff of other authorities. The CCBE believes that the personal interviews shall be conducted without exception by a member of the determining authority, who is in charge of making the administrative decision in the asylum case. Reasonable decisions including the assessment of the credibility of the applicant's statement, require that the office who is in charge of the decision also conducts the interview of the applicant.

Article 13 Requirements for personal interviews

(...)
13. An applicant shall be allowed to be assisted by a legal adviser in the personal interview, including when it is held by video conference.
The absence of the legal adviser shall not prevent the determining authority from conducting the interview.
Member States may stipulate in national law that, where a legal adviser participates in the personal interview, the legal adviser may only intervene at the end of the personal interview.
(...)

The **legal advisor shall be present** in any case at the personal interview, unless the applicant formally gives consent to renounce his right to have a legal assistant on his side after having spoken with the legal advisor. The legal advisor shall have the right to intervene at any stage of the interview, whenever it is necessary to protect the procedural rights of the applicant.

Article 14 Report and recording of personal interviews
1. The determining authority or any other authority or experts assisting it in accordance with Article 5 and Article 13(6) with conducting the personal interviews shall make a thorough and factual report containing all the main elements of the personal interview, or a transcript of the interview or a transcript of the recording of such an interview, to be included in the applicant's file.

(...)
6. Applicants and, where they have been appointed, their representatives and their legal advisers shall have access to the report or transcripts referred to in paragraph 1 as soon as possible after the interview and in any case in due time before the determining authority takes a decision.

Access to the recording shall also be provided in the appeal procedure.

Applicants and their legal counsels shall have **access to the complete file** at any stage of the procedure. This is essential in order to provide effective legal assistance, counselling and representation.

b) Free legal counselling and legal assistance and representation

Article 16 of the Geneva Convention is a fundamental source for providing legal support for asylum seekers. The Geneva Convention guarantees refugees equal treatment with nationals in matters of court access. This should be a basis for the interpretation of the provisions of the APR.

Provisions of Section II regarding free legal counselling, legal assistance and representation should be read in conjunction with Recitals 16 and 31 of the APR.

Recital 16 recognises that *"It is in the interests of both Member States and applicants that applicants receive at a very early stage comprehensive information on the procedure to be followed and on their rights and obligations. In addition, it is essential to ensure a correct recognition of international protection needs already at the stage of the administrative procedure by providing good quality information and legal support which leads to more efficient and better quality decision-making. For that purpose, access to legal counselling, assistance and representation should be an integral part of the common procedure for international protection".* Obtaining information about the procedure, rights and obligations, is a first, necessary step that must be ensured in order for other rights to be effectively applied. Full and comprehensive information, counselling, assistance and representation are key conditions for the enjoyment of the human right to asylum and the access to justice.[36]

Article 15 describes general principles regarding **the right to consult** in an effective manner, a legal adviser or other counsellor on matters relating to their applications at all stages of the procedure. It specifies then:

> *Article 15 Right to legal counselling and legal assistance and representation*
>
> *1. Applicants shall have the right to consult, in an effective manner, a legal adviser or other counsellor on matters relating to their applications at all stages of the procedure.*
>
> *2. Without prejudice to the **applicant's right to choose his or her own legal adviser or other counsellor at his or her own cost**, an applicant **may request free legal counselling in the administrative procedure** provided for in Chapter III, in accordance with Article 16, and **free legal assistance and representation in the appeal procedure** provided for in Chapter V, in accordance with Article 17.*
> *The applicant shall be **informed as soon as possible** and **at the latest when registering** the application in accordance with Article 27 **of his or her right to request free legal counselling or free legal assistance and representation.***
> *3. Member States may provide for free legal assistance and representation in the administrative procedure in accordance with national law.*
> *4. Member States may organise the provision of legal counselling and legal assistance and representation in accordance with their national systems.*

[36] There can be referred to the guarantees provided by the EU Charter of Fundamental Rights, see also ECRE Legal Note of June 2024, mentioned above.

The CCBE regrets that a distinction is made between the administrative procedure and the judicial procedure as regards legal assistance, and it recommends lawyers and national bar to make use of all possibilities at national levels to ensure that legal assistance and representation is provided at the very beginning of asylum procedures.

The regulation foresees, as it was under the APD until now, upon request of the applicant, mandatory right to free legal assistance and representation at the appeal stages only. Before, at the administrative stage, Member States can foresee such a free legal assistance and representation but they do not have to. Moreover, the applicant can at his own cost choose their own legal advice or other counsellor. In addition, the applicant has the right to be informed about the aforementioned rights before the application is registered.

The novelty however lies in **the right to free legal counselling in the administrative procedure**. More information about this right is set in **Article 16**.

Article 16 Free legal counselling in the administrative procedure

1. Member States shall, at the request of the applicant, provide free legal counselling in the administrative procedure provided for in Chapter III.
For the purposes of the first subparagraph, effective access to free legal counselling may be assured by entrusting a person with the provision of legal counselling in the administrative stage of the procedure to several applicants at the same time.
2. For the purposes of the administrative procedure, free legal counselling shall include the provision of:
(a) guidance on and an explanation of the administrative procedure including information on rights and obligations during that procedure;
(b) assistance on the lodging of the application and guidance on:
(i) the different procedures under which the application may be examined and the reasons for the application of those procedures,
(ii) the rules related to the admissibility of an application,
(iii) legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application in accordance with Articles 67, 68 and 69.
3. Without prejudice to paragraph 1, the provision of free legal counselling in the administrative procedure may be excluded where:
(a) the application is a first subsequent application considered to have been lodged merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal from the Member State;
(b) the application is a second or further subsequent application;
(c) the applicant is already assisted and represented by a legal adviser.
4. For the purpose of implementing this Article, Member States may request the assistance of the Asylum Agency. In addition, financial support may be provided through Union funds to the Member States, in accordance with the legal acts governing such funds.

Legal counselling must be constructed as a service that encompasses comprehensive information, meaningful advice and concrete guidance and has to be supported by a reliable

system of communication between authorities and asylum applicants. Its provision has to be available, accessible and effective.[37]

Regarding the question, who shall provide free legal counselling, Member States need to determine it. The CCBE understands that this concept is something more than provision of information but less than legal assistance and representation. Looking at the activities that APR indicates as part of FLC, it is clear that FLC **overlaps with legal assistance/advice**. According to Article 16 APR, FLC includes for example assistance on the lodging of the application and guidance on legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application in accordance with provisions on effective remedy. Therefore, the CCBE believes that **lawyers are best suited to carry out these activities, which, without any doubts, require solid legal background.**

The CCBE believes that this would also be in line with the spirit of Article 19 (1) APR which sets conditions for the provision of FLC, assistance and representation and requires that legal advisers or other counsellors or NGOs are "admitted, permitted or accredited". This allows to deduce that **a level of legal expertise shall be expected from those who will provide FLC**. Among these, legal advisers are listed as first and therefore, **Member States are encouraged to envisage delegating this function to lawyers, in close consultation with bars.**

It is important to stress that foreseeing lawyers as the best option would also allow to meet the standard of **good quality information and legal support** that is mentioned in recital 16 APR. Asylum lawyers are trained to advise on procedures and rights. The European Commission also stressed the importance of quality of any activities undertaken by stakeholders or relevant organisations in its common implementation plan by requiring quality control from Member States. In case of lawyers, this quality is already in place – it is ensured by bar membership, deontological rules and continuous training requirements ensure quality framework.

The FLC shall be provided by a person who is independent. Therefore, FLC should not be provided by, for instance, a state agency.[38] It is a CCBE standing policy that in order to ensure absolute independence by avoiding possible conflicts of interests or any undue interference in their work, and to ensure protection of professional secrecy, legal aid providers should not have the status of civil servant/public employee. The FLC should build on that as it involves activities that overlap with legal assistance.[39] To best guarantee this requirement of independence and avoidance of conflict of interest, it would be best practice that FLC be not provided by civil servants/public employees of authorities/ministries/services that deal with asylum applications.

When it comes to other requirements for a legal counselling that is beneficial for asylum seekers and allows Member States to reach an efficient system, the following elements should be considered.

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[37] In addition to the CCBEs views, please see ECRE Legal Note 16 from June 2024, mentioned above.
[38] See the ruling of the Austrian Constitutional Court, of 14 December 2023, which indicated as unconstitutional a system in which lawyers employed by public authority provided legal assistance, available here.
[39] The CCBE took note of the fact that the EUAA in its Practical guide on free legal counselling, 01.10.2025, available here, seems to admit that civil servants or public employees can provide free legal counselling if safeguards of independence are met, e.g. these persons are not part of the same organizational unit which is directly responsible for the implementation of the decision making process or is perceived as such.

Asylum seekers shall be **informed about the fact that they have a right to request** FLC as soon as possible and at the latest during registration, as required by APR. Therefore, this information shall be provided to asylum seekers as part of information provision as set in Article 8 APR. This information is crucial because otherwise, asylum seekers ignore their rights.

The FLC shall be individual. Although the APR foresees an option for Member States to provide FLC in groups, the CCBE thinks that this option shall not be preferred. It is difficult to imagine how group counselling can meet a **standard of confidentiality** for example. Legal counselling for several applicants simultaneously at the same time contradicts the principles of confidentiality and effectiveness of legal counselling. To meet these standards and to ensure that the counselling given is properly understood and thus **effective**, Member States shall be recommended to foresee FLC on individual basis.

Moreover, it is important to ensure **effective access of asylum seekers to FLC providers** (see Article 18(3) below). This should be read as an obligation for Member States based on Article 8 that requires that asylum seekers have an opportunity to communicate with legal advisors. This access can be particularly challenging in border areas.

The requirement that **FLC is upon request** of the applicant can in practice be an obstacle to access to it. Member States could think about offering free legal counselling *ex officio*, not depending on the request of the applicant. It is the CCBE recommendation to set up legal information points for migrants, at least in bigger cities and at the borders, especially in situations of higher numbers of arrivals. These contact points should be staffed with lawyers from the legal aid system and/or be funded from national, regional or local budgets. It is the States' responsibility to ensure access to justice and effectiveness of fundamental rights through legal aid and therefore the costs of such activities should not be transferred to lawyers.[3]

Based on the wording of Article 18 APR, the CCBE believes that Member States should be recommended to ensure **access to the file** by FLC providers if they are lawyers. This again points that lawyers would be the best suited to provide FLC as they are bound by professional secrecy.

The CCBE would like to stress that in any case, FLC shall not serve as an excuse to replace free legal assistance in the countries where it already exists. Therefore, **Member States shall be recommended to maintain the free legal assistance in the administrative stage** if it existed before the adoption of the Pact. Indeed, the CCBE is convinced that the access to a fully qualified lawyers from the very start of the procedures is the best standard that Member States shall aim at as it allows the migrant to properly follow various procedures and is for the benefit of the national asylum and judicial systems' efficiency.

When introducing free legal counselling, the authorities shall think to **prioritise the unity of action of the lawyer**, from the first provision of the legal advice or legal counselling in the administrative phase to the appeal (administrative or judicial). Having different persons involved in various steps of the procedure is detrimental to the applicant and the case. It is crucial that there is one advisor throughout the procedures as it ensures consistency of the action and has an impact on the chances of the person to get asylum. The asylum interview is like a hearing, even if it is an administrative procedure. Therefore, it is important that a lawyer is present at the interview stage as well.

Member States shall also be recommended to **consult with the bars** as they are often involved in provision of legal aid and can provide useful insights and share their experience to shape the FLC at national level. This consultation is also necessary as the introduction of FLC, by overlapping with legal assistance, can impact the existing legal aid systems and access to justice beyond the migration field. Therefore, FLC shall be introduced in national system in a way that it runs smoothly along the legal assistance and representation. Moreover, the Commission common implementation plan specifically refers to bars as examples of actors to be identified to play a role in the implementation.[4]

As indicated in the Common Implementation Plan, Member States shall be recommended to foresee **the capacity that is proportional to the needs for FLC**. In other words, it is necessary to foresee enough counsellors, especially lawyers, to ensure FLC.

The CCBE wishes to recall that in the landmark ruling in M.S.S. v Belgium and Greece, the ECtHR considered that **the lack of information concerning access to organisations which offer legal advice and guidance combined with the shortage of lawyers on the list drawn up for the legal aid system may also be an obstacle hindering access to a remedy and falls within the scope of Article 13 ECHR**, particularly where asylum seekers are concerned.

The grounds for the exclusion of free legal counselling are subjective and give national authorities an important leeway for withdrawing it. These provisions should be approached with caution as they may involve a violation of the right to an effective asylum procedure.

To conclude, while the CCBE understands that Member States must be given some room for manoeuvre to implement the New Pact, the CCBE calls on them to aim to reach the highest standards possible under the New Pact.

When it comes to **free legal assistance and representation at the appeal stage**, it is regulated by **Article 17**. Main principles remain the same as under the previous APD. It is important to remember that asylum seekers conserve the right to ask for legal assistance and representation at the administrative stage at their own cost. Member States can also foresee a right to free legal assistance and representative from the administrative stage.

Article 17 Free legal assistance and representation in the appeal procedure

*1. In the appeal procedure, Member States shall, **at the request of the applicant**, ensure that he or she is provided with free legal assistance and representation. Such free legal assistance and representation shall include the preparation of the procedural documents required under national law, the preparation of the appeal and, in the event of a hearing, participation in that hearing before a court or tribunal.*
*2. The provision of free legal assistance and representation in the appeal procedure **may be excluded** by the Member States where:*
(a) the applicant, who shall disclose his or her financial situation, is considered to have sufficient resources to afford legal assistance and representation at his or her own cost;
(b) it is considered that the appeal has no tangible prospect of success or is abusive;
(c) the appeal or review is at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of appeal;
(d) the applicant is already assisted or represented by a legal adviser.
3. Where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal on the grounds that the appeal is considered to have no tangible prospect of success or to be abusive, the applicant shall have the right to an

effective remedy before a court or tribunal against that decision. For that purpose, the applicant shall be entitled to request free legal assistance and representation.

As with free legal counselling, it is important to note that legal assistance and representation shall be provided **at the request** of the applicant. Lawyers and bars should therefore be vigilant and proactive on this point.

Similarly, grounds for exclusion of free legal assistance and representation are subjective and give national authorities an important leeway for withdrawing free legal assistance and representation.

Until that decision is provided, the court procedure in the merits shall be suspended in order to guarantee the right of the applicant to have an effective remedy (see also the decision of the CJEU in Gnandi).[40]

Legal aid shall be provided in accordance with the CCBE recommendations on legal aid and CCBE recommendations on legal aid in the field of migration and international protection.[41]

It is also relevant to refer to the judgement of the ECtHR in the case of Feilazoo v. Malta regarding legal aid[42]. In this judgement the ECtHR asserts that the state must display diligence so as to secure to the party the genuine and effective enjoyment of the rights guaranteed under Article 6 ECHR. The legal aid system has to be provided in a way "*to offer individuals substantial guarantees to protect their rights"* (§ 126.). The legal aid system must be provided in a way which avoids "*a lack of practical and effective representation, which incurs the State's liability under the Convention"*.[43]

It is also important to recall that the ECtHR takes into account the difficulties in contacting a lawyer when assessing the existence of collective expulsions in light of the prohibition set by Article 4 of the Fourth Protocol to ECHR.[44]

Not being assisted by a legal representative (along with lack of access to an interpreter and not speaking the language of proceedings) can affect the ability of applicants to present their case (M.D. and others v. Russia, par.92).

Article 18 Scope of legal counselling and legal assistance and representation

*1. A legal adviser who legally represents an applicant under the terms of national law shall be **granted access to the information in the applicant's file** on the basis of which a decision is or shall be taken.*
*2. Access to the information or to the sources in the applicant's file **may be denied** in accordance with national law where the disclosure of information or sources would jeopardise national security, the security of the organisations or persons providing the information or the*

[40] CJEU, Gnandi, Case C-181/16, judgment of 19.06.2018, available here.
[41] CCBE recommendations on a framework on legal aid in the field of migration and international protection, 25.11.2022, available here. ;
[42] ECtHR, Feilazoo v. Malta, judgment of 11.03.2021, application no. 6865/19, available here. here
[43] ECtHR, Anghel v. Italy, judgment of 25.06.2013, application no. 5968/09, par. 61 and126, available here..
[44] ECtHR, Conka v. Belgium, judgment of 05.02.2002,, app.no. 51564/99, available here.

security of the persons to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised or where the information or sources are classified under national law. In those cases, the determining authority shall:
(a) make access to such information or sources available to the courts or tribunals in the appeal procedure; and
(b) ensure that the applicant's right of defence is respected.
As regards point (b) of the first subparagraph, Member States ***shall grant access to information or sources to a legal adviser who*** *legally represents the applicant and who has undergone a security check, in so far as the information is relevant for examining the application or for taking a decision to withdraw international protection.*
3. The applicant's legal adviser or the person entrusted with providing legal counselling, who counsels, assists or represents an applicant ***shall have access to closed areas****, such as detention facilities and transit zones, for the purpose of counselling, assisting or representing that applicant, in accordance with Directive (EU) .../... [+].*

Article 19 Conditions for the provision of free legal counselling, assistance and representation

1. Free legal counselling, assistance and representation ***shall be provided by legal advisers or other counsellors, admitted or permitted under national law*** *to counsel, assist or represent the applicants* ***or by non-governmental organisations accredited*** *under national law to provide legal services or representation to applicants.*
2. Member States ***shall lay down specific procedural rules*** *concerning the arrangements for filing and processing requests for the provision of free legal counselling, assistance and representation in relation to applications for international protection or they shall apply the existing rules for domestic claims of a similar nature,* ***provided that*** *those rules are not more restrictive or do not render access to free legal counselling or free legal assistance and representation impossible or excessively difficult.*
3. Member States shall lay down specific rules concerning the exclusion of the provision of free legal counselling, assistance and representation in accordance with Article 16(3) and Article 17(2), respectively.
4. Member States ***may also impose monetary limits or time limits*** *on the provision of free legal counselling, assistance and representation,* ***provided that*** *such limits are not arbitrary and do not unduly restrict access to free legal counselling, assistance and representation. As regards fees and other costs, the treatment of applicants shall not be less favourable than the treatment generally given to their nationals in matters pertaining to legal assistance.*
5. Member States may request from the applicant the total or partial reimbursement of the costs incurred in relation to the provision of legal assistance and representation where the applicant's financial situation considerably improves in the course of the procedure or where the decision to provide free legal assistance and representation was taken on the basis of false information supplied by the applicant. For that purpose, applicants shall immediately inform the competent authorities of any significant change in their financial situation.

Regarding the scope of FLC and FLAR, Article 18 (1) guarantees **free access to the file for lawyers representing applicants** at any stage of the procedure, including the administrative procedure. Indeed, legal assistance and representation can only be effective, if the lawyer has

access to the complete information, included into the file. Moreover, counsellors and lawyers shall have access to the applicant at any time of the asylum procedure, at an any place where the applicant is located.

The CCBE is concerned that the **grounds for the exclusion of the access of the file** are wide and unclear. They also give in inacceptable range of leeways for the national authorities, which might contradict the right of the applicant to have an effective counselling and representation in his asylum procedure.

The applicant's rights of defence can only be respected, if his counsellor has access to the complete information of the file. The provision foreseeing that this access can be denied can endanger the applicant's right to have an effective asylum procedure. Lawyers should check the basis of such a decision if they are denied access.

Regarding the conditions for the provision of FLC and FLAR, Article 19 speaks about "*legal advisers or other counsellors, admitted or permitted under national law to counsel, assist or represent the applicants or by non-governmental organisations accredited under national law to provide legal services or representation to applicants.*" The CCBE believes that when considering accreditation Member States ensure that these providers are well trained and qualified. Fully qualified lawyers are best suited to guarantee good quality advice that will allow applicants to benefit from their rights.

Where States implement a system based on requests, they will need to set specific procedural rules concerning the arrangements for filing and processing requests for the provision of free legal counselling, assistance and representation. It will be important for lawyers to verify this aspect at national level.

c) Applications – steps and requirements

Various steps of the asylum procedure are clarified in the text of the APR: making an application, registering, and lodging.

Making the application (Article 26) relates closely to the access to the procedure and it is a first step for the third-country national to assert his right for international protection. Therefore, the CCBE recommends, that any doubts as to whether a certain declaration is to be construed as an application for international protection shall be interpreted in favour of the applicant. If there still remain any doubts on the quality of the declaration, an interpreter should be consulted to avoid any misunderstanding.

Article 27 sets rules regarding **the registration of applications** for international protection and clarifies which information shall be registered. The authorities should register the application within **5 working days**. Moreover, in paragraph 3, the deadline is extended for an additional 3 days (so up to eight days in total), in cases where the application is made to an authority entrusted with the task of receiving applications for international protection which is not responsible for registering applications. This time frame (compared to six working days in the APD) requires attention to safeguard the rights of the applicant and his access to legal counselling and representation.

Article 28 sets the rules regarding **lodging of an application** for international protection stating, that the applicant shall lodge the application with the competent authority of the Member State

where the application is made as soon as possible and no later than **21 days** from when the application is registered.

Paragraph 4 gives Member Staes the opportunity to provide in national law for the possibility for the applicant to lodge an application by means of a form, including where he or she is unable to appear in person owing to enduring serious circumstances beyond his or her control, such as imprisonment or long-term hospitalisation. The CCBE encourages Member States to make use of this opportunity in order to improve the access of applicants to a procedure of international protection under these special circumstances.

Paragraph 6 requires attention as it foresees **the right of applicants to submit any additional elements** relevant for its examination, until a decision under the administrative procedure is taken on their application, i.e. until the final decision is conducted. Member States can set a deadline for the submission of such documents within the time for submitting those additional elements with which the applicant shall endeavour to comply. This is an important safeguard for applicants who thus shall be allowed to submit new facts and evidence, especially when the applicant learns about new facts or gets new evidence, which he could not have submitted earlier.

The Regulation also foresees rules regarding the documents that need to be provided to the applicant. Article 29 states, that the competent authorities of the Member State where an application for international protection is made shall provide the applicant with **a document indicating that an application has been made and registered**. After the lodging of the application another document shall be issued to the applicant, which shall be considered sufficient means for applicants to identify themselves to national authorities and to access their rights for the duration of the procedure for international protection. This document shall be valid for up to 12 months or until the applicant is transferred to another Member State in accordance with Regulation (EU) 2024/1351. The validity of the document shall be renewed so as to cover the period during which the applicant has a right to remain on its territory.

An important provision with regards to the **access to the procedure is Article 30 which describes the rules regarding this access in detention facilities and at border crossing points**. The principle is that when there are indications that **a person may wish** to make an application for international protection, the competent authorities shall **provide them with information on the possibility to do so**. This means that whenever there are signs that **may (but not must)** indicate such a wish, authorities must behave in a way that facilitates the making of application by informing the person of this possibility. In addition, the same provision requires arrangement for interpretation services to be made in case a person makes an application. Moreover, there are **provisions guaranteeing access to lawyers** as it is stipulated in Article 30 (3).

Article 30 Access to the procedure in detention facilities and at border crossing points

(...)
*3. Organisations and persons permitted under national law to provide advice and counselling shall **have effective access to applicants held in detention facilities or present at border crossing points, including transit zones, at external borders**. Such access may be subject to a prior agreement with the competent authorities.*
*Member States may impose **limits on access** as referred to in the first subparagraph, by virtue of national law, **where** they are objectively necessary for the security, public order or*

administrative management of a border crossing point, including transit zones, or detention facility, ***provided that access is not severely restricted or rendered impossible.***

It is important that interpretation, legal counselling, assistance and representation are provided to the applicant in a detention facility or at border crossing point in a timely manner and at all stages of the procedure. Member States should ensure adequate access for legal counsels and lawyers for applicants living in these facilities (see also Article 18 (3)). If Member States decide to impose limits on the access, it will be important to verify the basis for them as these limits should be justified based on the reasons listed in the article and they cannot make access too restricted or impossible.

Furthermore, there are reinforced requirements in the APR for the applications of **unaccompanied minors** (Article 32 for example).

Due to their vulnerability, particular attention should be paid that the unaccompanied minor has access to interpretation, legal counselling, assistance and representation free of charge at any stage of the asylum procedure. They shall be represented by a court appointed legal guardian during the whole asylum procedure in order to protect his/her rights as a vulnerable person.

When it comes to the **examination procedure** (Article 34), the Regulation sets the principles according to which the authorities should examine, e.g. objectivity, impartiality and individual character, and well as the elements that should be taken into account. These include for example: relevant statements and documentation, relevant, precise and up-to-date information relating to the situation prevailing in the country of origin, the individual position and personal circumstances of the applicant. Moreover, provisions require that the staff examining applications is well-trained and documents are translated where necessary. Examples of grounds upon which the authority may prioritise the examination are also enumerated, e.g. in case the application is likely to be well founded.

When it comes to the duration of the examination (Article 35), **regarding admissibility**, it should in principle be examined as soon as possible and no later than **2 months** from the date on which the application is lodged.

However, there are several scenarios in which this timeline is deviated from:

1) The time is shortened to 10 days in case of an application filed after a return decision is issued and it is done more than seven working days after a return decision is received. There is a caveat: provided that the migrant had been informed of the consequences of not making an application within that time limit and that no new relevant elements have arisen since the end of that period.
2) There are different grounds on which the time limit might be extended by no more than two months. This is the case where: a disproportionate number of third-country nationals or stateless persons make an application for international protection within the same period of time, making it unfeasible to conclude the admissibility procedure within the set time limits; complex issues of fact or law are involved; the delay can be attributed clearly and solely to the failure of the applicant to comply with his or her obligations under Article 9.

Regarding **time limits for the examination on merits**, it should be concluded as soon as possible and no later than **6 months** from the date on which the application is lodged.

This may be extended by a period of not more than 6 months for the same reasons as above for admissibility. In this regard, it is important to mention that the CJEU interpreted the exception regarding a large number of simultaneous applications from the previous APD strictly.[45]

There is also an exception for **accelerated procedures** which should be concluded as soon as possible and no later than **3 months** from the date on which the application is lodged.

The Regulation also foresees a possibility for the determining authority to postpone concluding the examination procedure where it cannot reasonably be expected to decide within the time limits laid down in paragraph 4 due to an uncertain situation in the country of origin which is expected to be temporary.

Another exception to timelines is in cases where a court or tribunal annuls the decision of the determining authority and refers the case back. In such cases, Member States shall lay down time limits for the conclusion of the examination procedure and those time limits shall be shorter than the time limits set out in this Article.

d) Decisions and remedies

Article 36 Decisions on applications

1.A decision on an application for international protection shall be given in writing and it shall be notified to the applicant as soon as possible in accordance with the national law of the Member State concerned. Where a representative or legal adviser legally represents the applicant, the competent authority may notify the decision to him or her instead of the applicant.

Recital (39)
In order to guarantee the rights of the applicant, a decision concerning his or her application should be given in writing. Where the decision does not grant international protection, the applicant should be given in fact and in law, information on the consequences of the decision and the modalities for challenging it.

The CCBE recommends that the decisions shall be delivered in any case to the legal representative of the applicant and the migrant. This seems to be necessary to protect the applicant's right for an effective remedy and to avoid the loss of rights due to the danger of missing a deadline for filing a remedy.

[45] CJEU, Staatssecretaris van Justitie en Veiligheid v X, C-662/23, 08.05.025, available here, regarding the fact that a 6-month decision deadline may be extended only for major spikes in applications, not structural deficiencies.

The information how the decision can be challenged should be delivered to the applicant in a language he or she understands or he/she has been proved to understand, not only that he/she is reasonably supposed to understand, if he or she is not legally represented by counsel.

Article 38 Decision on the admissibility of the application

1. The determining authority may assess the admissibility of an application, in accordance with the basic principles and guarantees provided for in Chapter II, and may be authorised under national law to reject an application as inadmissible where any of the following grounds applies:

(...)
(e) the applicant concerned was issued with a return decision in accordance with Article 6 of Directive 2008/115/EC and made his or her application only after seven working days from the date on which the applicant received that return decision, provided that he or she had been informed of the consequences of not making an application within that time limit and that no new relevant elements have arisen since the end of that period.

2. The determining authority shall reject an application as inadmissible where the application is a subsequent application where no new relevant elements as referred to in Article 55(3) and (5) relating to the examination of whether the applicant qualifies as a beneficiary of international protection in accordance with regulation (EU) 2024/1347 or relating to the inadmissibility ground previously applied, have arisen or have been presented by the applicant.

Recital 87
Decisions taken on an application for international protection rejecting it as inadmissible, as unfounded or manifestly unfounded in relation to refugee or subsidiary protection status, or as implicitly withdrawn, as well as decisions to withdraw refugee or subsidiary protection should be subject to an effective remedy before a court or tribunal in compliance with all requirements and conditions laid down in Article 47 of the Charter. To ensure the effectiveness of the procedure, the applicant should lodge his or her appeal within a set time limit. For the applicant to be able to meet those time limits and with a view to ensuring effective access to judicial review, he or she should be ***entitled to free legal assistance and representation****. (...)*

The CCBE suggests, that even in case of inadmissibility each asylum application must be investigated and decided individually, based on the arguments, statements and the evidence, provided by the applicant. It would be contrary to international law to "automatically" deny international protection if one of the listed circumstances occurs. The person whose application is declared inadmissible enjoys the right to challenge that decision before a court and to free legal assistance and representation.

In cases of inadmissibility founded on the first country of asylum or a safe third country or asylum being granted in another Member State, Member States should have the obligation to investigate the application on a case-to-case basis and to examine and evaluate the arguments of the applicant properly to fulfil the requirements of the principle of non-refoulement (Article 18 Charter and Article 3 ECHR).

Regarding inadmissibility based on protection already granted by another Member State, the following case law should be kept in mind:

- In Jawo and in Ibrahim, the CJEU specified that a Member State may reject an application as inadmissible on that basis where the living conditions that the applicant could be expected to encounter as the beneficiary of protection in the other Member State "*would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4*".[46]
- In QY, the Court said that *"where the competent authority of a Member State cannot exercise the option available to it under the last of those provisions to reject as inadmissible an application for international protection made by an applicant, to which another Member State has already granted such protection, on account of a serious risk that that applicant will be subjected, in that other Member State, to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, that authority must carry out a new, individual, full and up-to-date examination of that application in a new international protection procedure conducted in accordance with Directives 2011/95 and 2013/32. Within the framework of that examination, that authority must nevertheless take full account of the decision of that other Member State to grant international protection to that applicant and of the elements on which that decision is based'.*[47]

Regarding inadmissibility related to making an application only seven days after receiving a return decision, the CCBE points out, that it might be a contradiction to the provisions of the Geneva Convention to set such a time limit. Also, the time period of seven days is too short in order to exclude the applicant from filing an asylum application. At least the consequences of the expiration of this time must be explained to the asylum seeker in writing and in a language, he or she understands or he/she has been proved to understand, not only that he/she is reasonably supposed to understand. Also, during this time period legal advice and assistance free of charge must be provided to the third country national.

As for the rejection of a subsequent application without new relevant elements, a *res judicata* decision shall only be made after an individual examination of the arguments, facts and evidence the applicant provides and after an oral hearing of the applicant in the presence of a legal advisor provided to the applicant free of charge.

Article 40 Explicit withdrawal of applications

[...]
2. The competent authorities shall, at the time of the withdrawal of the application, inform the applicant in accordance with Article 8(2), point (c), of all procedural consequences of such a withdrawal in a language he or she understands or is reasonably supposed to understand.

It is recommended that the information about the consequences of a withdrawal must be provided in a language the applicant understands or he/she has been proved to understand, not only that he/she is reasonably supposed to understand, in the presence of a well-trained interpreter.

Article 41 Implicit withdrawal of applications

[46] CJEU, Jawo, C-163/17, judgment of 19.03.2019, available here, and CJEU, Bashar Ibrahim and others, Joined cases C-297/17, C-318/17, C-319/17 and C-438/17, judgment of 19.03.2019, available here.
[47] CJEU, QY, C-753/22, judgment of 18.06.2024, available here.

1. An application shall be declared as implicitly withdrawn where:

- *(a) the applicant, without good cause, has not lodged his or her application in accordance with Article 28, despite having had an effective opportunity to do so;*
- *(b) the applicant refuses to cooperate by not providing the information referred to in Article 27(1), points (a) and (b), or by not providing his or her biometric data;*
- *(c) the applicant refuses to provide his or her address, where he or she has one, unless housing is provided by the competent authorities;*
- *(d) the applicant has, without justified cause, not attended a personal interview although he or she was required to do so pursuant to Article 13 or, without justified cause, refused to respond to questions during the interview to the extent that the outcome of the interview was not sufficient to take a decision on the merits of the application;*
- *(e) the applicant has repeatedly not complied with reporting duties imposed on him or her in accordance with Article 9(4) or does not remain available to the competent administrative or judicial authorities, unless he or she can demonstrate that that failure to remain available was owing to specific circumstances beyond his or her control;*
- *(f) the applicant has lodged the application in a Member State other than the Member State provided for in Article 17(1) and (2) of Regulation (EU) 2024/1351 and does not remain present in that Member State pending the determination of the Member State responsible or the implementation of the transfer procedure, where applicable.*

(...)

The CCBE points out, that denying protection on such elusive grounds, without assessing whether the person is or not a refugee, can constitute a violation of the Geneva Convention, for the lack of cooperation or the failure to attend an interview have nothing to do about the fear of being persecuted in the country of origin. Vigilance of lawyers is indicated in these cases.

Additionally, many asylum seekers do not receive adequate and clear information on how to apply for international protection and conduct themselves in the proceedings, an issue that still generates controversy within the ECHR. The Regulation grants a wide margin of discretion to national authorities in this regard and heightens the risk that applications will be considered as implicitly withdrawn when, in fact, the applicant may not have received enough assistance to understand what was required of them during the proceedings.

Furthermore, the decision about "implicit withdrawal" should be provided with a written decision of the authority, which can be appealed on the court level.

Article 42 makes **accelerated procedures mandatory** in a broad variety of cases. Some vague and subjective situations are included in which applicants are deemed to have only raised issues that are not relevant to the examination of the asylum claim, made false and contradictory allegations, or intentionally misled the authorities. The implicit logic in these provisions is that, in such situations, the applicant has a lower likelihood of being a *bona fide* asylum seeker, and thus their application can be examined more quickly, as it will probably lead to a rejection.

The same presumption of rejection applies when the applicant has not made an application as soon as possible after entering the Member State's territory and, as mentioned above, when they are a national of a so-called "safe country of origin" or a country for which the proportion of decisions granting international protection EU-wide is 20% or lower. This last scenario seems to be extremely problematic and this rule may raise several issues. It might create a bias against

applicants from such countries without any evidence of its rationale, for recognition rates per country of origin vary widely among Member States. Therefore, there is a need to vigilance, and it might be necessary to proactively ask for preliminary rulings from the CJEU.

Article 43 sets the conditions for applying the **asylum border procedure**. Its application is normally optional for Member States but there are cases in which it becomes mandatory (Article 45).

Article 43 Conditions for applying the asylum border procedure

1. Following the screening carried out in accordance with Regulation (EU) 2024/1356, where applicable and provided that the applicant has not yet been authorised to enter Member States' territory, a Member State may, in accordance with the basic principles and guarantees of Chapter II, examine an application in a border procedure where that application has been made by a third-country national or stateless person who does not fulfil the conditions for entry to the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:

(a) following an application made at an external border crossing point or in a transit zone;

(b) following apprehension in connection with an unauthorised crossing of the external border;

(c) following disembarkation in the territory of a Member State after a search and rescue operation;

(d) following relocation in accordance with Article 67(11) of Regulation (EU) 2024/1351.

The decisions may be taken as part of the border procedure **both on inadmissibility and on merits**. For the latter, it can only be done though in particular scenarios which include: any of the circumstances referred to in Article 42(1), points (a) to (g) and (j) (i.e. for example, coming from safe country of origin or from a country with 20% recognition rate), and Article 42(3), point (b) (i.e. unaccompanied minors considered a danger to public security), apply.

When it comes to the **mandatory application of the border procedure:** "*A Member State shall examine an application in a border procedure in the cases referred to in Article 43(1) where any of the circumstances referred to in Article 42(1), point (c), (f) or (j), apply.*" Relevant provisions of Article 42 refer to misleading the authorities, applicant being a danger for public security and coming from a country with 20% recognition rate.

Both in pith and substance, summary rejections of asylum applications seem to remain a central objective of the Pact through the generalisation of special procedures and the introduction of vague and disputable notions, leaving a considerable margin of discretion to Member States. This increases the risk of refoulement in violation of international law; a risk which is all but virtual, given that the common procedural guarantees are not free from ambiguities and allow derogations in case of border and accelerated procedures.[48]

The CCBE points out, that in consequence, the Regulation may lead to the border and accelerated procedures becoming the rule for the vast majority of asylum seekers. They also

[48] See also the CCBE positions on APR:CCBE position paper of 2021, available here; and CCBE position paper of 2017, available here.

derogate from the ordinary asylum procedure on two main aspects: the requirement of very short – and in fact unworkable – time-limits and the adoption of ambiguous rules governing suspensive effect of appeal. In border procedures, the application must be **lodged within only 5 days** from the registration (Article 51 (1)). That is less than a quarter of the time available in regular procedures. The entire border procedure must be completed as quickly as possible and no later than **12 weeks** from the registration of the application, or 16 weeks in case of transfer to another Member State (Article 51(2)).

Strictly limited timeframes affect the effective exercise of procedural guarantees. They reduce the applicant's possibility to adequately prepare and substantiate the application, restrict the opportunity for meaningful consultation with legal counsel regarding the organisation of the claim, and may in practice prevent the applicant from securing legal assistance if none has been provided. Lawyers should be aware that such compressed deadlines require immediate action in order to safeguard the applicant's right to an effective remedy.

In I.M. v. France, the ECtHR ruled that the time-limit of five days to lodge an asylum application, along with the difficulties in accessing interpretation services, offered insufficient protection against refoulement and was contrary to Articles 3 and 13 ECHR.[49]

The CCBE points out time limit of 5-10 days might be too short to secure the right of an effective remedy and may violate Article 47 of the CFR and/or Article 3 and 13 of the ECHR. See also again Recital 87 quoted above.

Legal assistance and representation are guaranteed by Article 47 CFR and Article 13 ECHR, in order to secure the applicant's right to an effective remedy. The assistance and representation have to be provided by well-trained and legal counsels, independent from government control or influence at any stage of the procedure.[50]

In the APR, **the right to an effective remedy** is anchored in Article 67 and Recitals 91 – 93.

Article 67 The right to an effective remedy

1. Applicants and persons subject to withdrawal of international protection shall have the right to an effective remedy before a court or tribunal, in accordance with the basic principles and guarantees provided for in Chapter II that relate to the appeal procedure, against the following:
(a) a decision rejecting an application as inadmissible;
(b) a decision rejecting an application as unfounded or manifestly unfounded in relation to both refugee and subsidiary protection status;
(c) a decision rejecting an application as implicitly withdrawn;
(d) a decision withdrawing international protection;
(e) a return decision issued in accordance with Article 37 of this Regulation.
(...)
3. An effective remedy as referred to in paragraph 1 shall provide for a full and ex nunc examination of both facts and points of law, at least before a court or tribunal of first instance, including, where applicable, an examination of the international protection needs pursuant to Regulation (EU) 2024/1347.

[49] ECtHR, I.M. v. France, judgment of 02.02.2012, application no. 9152/09, available here. See also the CCBE position paper of 2021, available here, mentioned already above.
[50] See also the recommendations set out and specified in the ECRE Legal Note from June 2024, mentioned above.

It should be recalled that CJEU considers that Article 47 does not have to be specified in national law in order to confer invokable right on individuals. The same principle was applied to Article 46 APD – predecessor of Article 67 APR.[51]

The CJEU also ruled that "*as regards the scope of the right to an effective remedy, as defined in Article 46(3) of that directive, the Court has held that the words 'shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law' must be interpreted as meaning that the Member States are required, by virtue of that provision, to order their national law in such a way that the processing of the actions referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand".*[52]

Article 68 describes the rules regarding **the suspensive effect of appeal**. Article 68(3) **excludes suspensive effect** in cases where the application was examined under the accelerated procedure or rejected as inadmissible under Articles 38 (1)(a), (d), (e) and 38(2), as implicitly withdrawn, as an unfounded or manifestly unfounded subsequent application. Although the Regulation states that this is without prejudice to the observance of the *non-refoulement* principle and that a court may allow the applicant to remain in the Member State even in these cases, the presumption of exclusion of suspensive effect remains, leaving it up to the applicant to prove that the protection from refoulement applies to their case. The ECtHR has repeatedly held, that an effective remedy against ill-treatment in cases of refoulement must include automatic suspensive effect (e.g. Gebremedhin v. France).[53]

The ECtHR considerations in par. 293 in the case M.S.S. v Greece are truly relevant for this explanation as they contain the safeguards for an effective remedy and one of them is the suspensive effect: "*the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority, independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, and reasonable promptness … In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect. The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention".*

It is possible to ask the ruling body for the right to stay until the judgement or decision has been rendered. During that time, the person cannot be put in detention for the purpose of a return, see the CJEU ruling in case Staatssecretaris van Veiligheid en Justitie. [54]

The CCBE recommends that free legal assistance shall be provided *ex officio* and not only upon request. This seems to be necessary to protect the right of the applicant to have an effective remedy, to make sure that the rights of applicants are effective. Moreover, the CCBE suggests that

[51] CJEU, Alace (LC and CP), Joined Cases C-758/24 and C-759/24, judgment of 01.08.2025, available here.
[52] CJEU, CV, Case C-406/22, judgment of 04.10.2024, available here.. See this case for more considerations regarding the right to effective remedy and what is implies.
[53] ECtHR, Gebremedhin v. France, judgment of 26.04.2025, application no. 25389/05, available here.
[54] CJEU, C-269/18 PPU, ruling of 05.07.2018, available here. See also Article 9.1 Return Directive: postponement of the return when it would violate the principle of non-refoulement or as long a suspensive effect has been granted to a pending appeal.

interpretation shall be provided during the whole appeal procedure. This seems to be necessary to protect the right of the applicant to have an effective remedy.

It is also important to note that Recitals 88 and 89 refer to Member States competence to organise their national court system and determine the number of instances of appeal. It is important to monitor if the already existing levels of remedies available in a Member State are not reduced during the implementation process. This is another field of advocacy for the national bars and lawyers on the level of the Member States.

Regarding Recital 94 (right to remain regarding returns) in order to guarantee the effectiveness of remedies (Article 47 CFR and Article 13 ECHR), remedies should automatically have suspensive effect unless a court for clearly defined reasons excludes the suspensive effect. At least, there must be a guarantee that there will be no deportation of the applicant until the court has decided about the suspensive effect of the remedy. In this regard, reference should be made to the ruling of CJEU in the Gnandi case.[55]

e) Safe country concepts

Regarding the safe country concepts, they are regulated in Articles 56 –66. However, it is important to be aware that in 2025, the European Commission proposed to amend these rules to facilitate the application of the concepts. In April, the Commission **proposed to accelerate the implementation of two important rules** under the Pact already before the Pact enters into force in June next year.[56] This covers:

- 20% recognition rate threshold: Member States can apply the border procedure or an accelerated procedure to people coming from countries where, on average, 20% or fewer applicants are granted international protection in the EU.
- Safe third countries and safe countries of origin can be designated with exceptions, giving Member States greater flexibility by excluding specific regions or clearly identifiable categories of individuals.

In addition, it **proposed to make use of one of the novelties of the Pact and establish an EU list of safe countries of origin**, the nationals from which will see their applications processed in an accelerated or border procedure. A first EU list covering Kosovo, Bangladesh, Colombia, Egypt, India, Morocco and Tunisia. The Commission is also considering that **EU candidate countries**, in principle, meet the criteria to be designated as safe countries of origin since as part of their EU membership path, they are working towards reaching the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. A candidate country would be excluded only under certain specific circumstances: indiscriminate violence in conflict situations, sanctions adopted by the Council towards that country, or an EU-wide recognition rate of asylum applicants higher than 20%.

[55] CJEU, Gnandi, Case C-181/16, judgment of 19.06.2018, available here.
[56] See the text of the Commission proposal of 16.04.2025 available here.

In this regard, it is important to mention the ruling of the CJEU in joined cases LC and CP, which regarded the implementation of the provisions regarding safe country of origin by Italy.[57] It was about the provisions on SCO of the former APD as a basis for accelerated procedures at the border conducted in the centres established under the Italy-Albania protocol on the Albanian territory. The court declared that it was not possible for a Member States to qualify a country a SCO where the country did not meet the material criteria of designation as SCO from the directive regarding certain categories of people. In other words, it was not possible to declare a country SCO with exceptions for certain categories; the requirements of safety must be assessed for the entire population. In an earlier ruling, the court adopted similar considerations regarding exceptions for some parts of territory of a country.[58]

However, the new APR, applicable as of June 2026, foresees such a possibility in Article 61 (2): *"The designation of a third country as a safe country of origin both at Union and national level* ***may be made with exceptions for specific parts of its territory or clearly identifiable categories of persons."***[59]

Subsequently, in May, the Commission proposed to **update the "safe third country" concept**.[60] The amendments to APR regard the application of the safe third country concept (STC), as foreseen under Article 77 APR which mandated the Commission to revise the concept of STC.

The proposal aims at making the application of STC concept more flexible for Member States. It maintains the optional nature of the application of the STC concept. Moreover, the proposal does not revise the criteria for 'safety' of the third country.

The amendments proposed regard first, **Article 59 (5) point b) APR.**

The proposal would allow Member States to **apply the concept** of STC in the following three scenarios. First, when there is a connection between the applicant and the third country concerned. Second, when the applicant transited through the third country concerned. Third, without requirement of connection or transit, when there is an agreement with the third country requiring the examination of the merits of the application.

A key change is the potential removal of the requirement for a "meaningful" connection" between the applicant and the safe third country. This amendment removes a connection condition if there is the aforementioned agreement, potentially allowing for transfers based on mere transit or agreements between the EU and the third country. However, this scenario cannot be applied to unaccompanied minors.

Second, **Article 68 (3) point b) would also be amended.** The article regards **suspensive effect of appeal**. Par. 3 point b) currently reads: "3. *Without prejudice to the principle of non-refoulement, the applicant and the person subject to withdrawal of international protection shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one of the following decisions: (...) b) a decision which rejects an application as inadmissible*

[57] CJEU, Alace (LC and CP), Joined Cases C-758/24 and C-759/24, judgment of 01.08.2025, available here.
[58] CJEU, CV, Case C-406/22, judgment of 04.10.2024, available here.
[59] On this point, see the consideratins of the court in CJEU, Alace (LC and CP), Joined Cases C-758/24 and C-759/24, judgment of 01.08.2025, par. 105-108, available here.
[60] See the text of the Commission proposal of 20.05.2025, available here.

pursuant to Article 38(1), point (a), (d) or (e), or Article 38(2), except where the applicant is an unaccompanied minor subject to the border procedure".

Article 38(1), point (a), (d) or (e), or Article 38(2) allow to reject applications as inadmissible in cases of: first country of asylum, relocation programmes, return decisions, and subsequent applications.

The proposal is to amend this provision by adding to the decisions for which there is no automatic suspensive effect, the decisions rejecting admissibility based on the concept of safe third country (Article 38 (1) (b)). The proposal therefore limits appeal rights.

It is important to note that as a reason for this amendment, the Commission points to the fact that "r*emoving the automatic suspensive effect of the appeal could help reduce procedural delays in applying the STC concept and prevent potential abuses of appeal opportunities by the applicants, while still ensuring the protection of the applicant's fundamental rights, by allowing them to request the suspensive effect. Furthermore, to ensure the protection of the rights of applicants from the risk of refoulement, there is an automatic suspensive effect against the return decision taken as per Article 37 APR in relation to the inadmissibility decision when there is a risk of breaching the principle of non-refoulement. This should guarantee that the persons shall not be transferred where there is a risk of refoulement in the third country, or where there is a risk of serious harm, or inhuman or degrading treatment, in the third country."*[61]

The link and consistency with the proposal for a Return Regulation as well as safeguard against the violation of the principle of *non-refoulement* is explained in the following way.[62] *"(8) To enhance procedural efficiency, the applicant should not have an automatic right to remain on the territory of a Member State for the purpose of an appeal against inadmissibility decisions taken on the basis of the safe third country concept. Nonetheless, the enforcement of the corresponding return decision is to be suspended during the time limit within which the person concerned can exercise his or her right to an effective remedy before a court of first instance and when such appeal is lodged where there is a risk of breach of the principle of non-refoulement."*

Another point to be noted regards the possibility to consider that there is a **risk of absconding** when applying the STC concept and limit the freedom of movement or detain the applicant in line with the Reception Conditions Directive.

Regarding the Staff Working Document, it contains an analysis of (amongst others) the right to effective remedy, including the case law of the CJEU and ECtHR.[63]

The proposal also removes the automatic suspensive effect in cases where an asylum seeker is transferred to a safe third country, meaning they could be deported before the appeal is heard or decided.[64]

[61] See the text of the Commission proposal of 20.05.2025, available here.
[62] As of November 2025, the work of legislators on a new Return Regulation is ongoing. See the text of the Commission proposal of 11.03.2025, available here.
[63] European Commission, Staff Working Document regarding the Review of the safe third country concept, 20.05.2025, available here.
[64] See also ECRE Statement of 21.05. 2025 "Proposed reform of the Safe Third Country Concept", available here.

III. Summary of points for attention for lawyers

It is recommended that lawyers approach and apply the APR with vigilance especially with regard to the following points:

- There are several general safeguards for the applicants, including the right to be informed about the right to free legal counselling and right to legal assistance and representation.
- It will be important to understand how the free legal counselling is implemented in every Member States and how it interplays with the right to legal assistance and representation.
- A crucial aspect will be to watch that the counselling provided to applicants is of good quality and does not undermine the effectiveness of their rights and access to justice. The new concept should not serve to lower the standard of guarantees for asylum seekers.
- In principle, lawyers have the right to access border areas where asylum seekers stay and should have access to the file, although there is some margin for Member States to impose limits in this regard.
- There are new time limits for various steps of the procedure and for appeals.

Part 3 - Asylum and Migration Management Regulation

REGULATION (EU) 2024/1351 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013

I. Presentation of the regulation, rationale, aim and structure

The objectives of the new regulation are threefold. As per Article 1, the AMMR:

> *"(a) sets out a common framework for the management of asylum and migration in the Union, and for the functioning of the Common European Asylum System;*
>
> *(b) establishes a mechanism for solidarity;*
>
> *(c) lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection*."

This section does not provide an exhaustive list of the changes from the Dublin III Regulation, but it highlights the most notable and/or problematic changes.

A common framework is then laid out in Part II, which foresees that the European Commission will annually adopt: an annual report (Articles 9-10), a decision identifying Member States under migratory pressure (Article 11), and a proposal for a Council decision (Article 12), identifying annual relocations and financial contributions of the Member States.

What used to be known as the Dublin III Regulation now corresponds to **Part III** of the AMMR, entitled "Criteria and Mechanisms for Determining the Member State Responsible".

Solidarity mechanisms are introduced in Part IV, with various possibilities for the Member States to agree on reallocating certain responsibilities and/or relocating applicants and/or beneficiaries of international protection. In this Part IV, the only rights of eligible persons expressly mentioned are: to be kept together with other relocated family members if any (Article 67). As per Recital 26, the AMMR is not intended to create a "right to choose" one's Member State of relocation.

The analysis below aims to shed light on points of interest and/or vigilance for lawyers and therefore, it focuses mainly on Part III, and addresses some elements of Part IV.

II. Analysis of provisions

a) Right to information, free legal counselling, legal assistance and representation

Several provisions in the AMMR relate to legal assistance: Recital 39 or Articles 19-21. These provisions, like the provisions in the APR, contain a new concept: free legal counselling. A special section of this guide is devoted to this concept in the Chapter regarding APR above as it is in the APR that the concept is described in most details.

Recital 39
Providing good quality information and legal support on the procedure to be followed to determine the Member State responsible as well as the rights and obligations of the applicants in that procedure is in the interests of both Member States and applicants. To increase the effectiveness of the procedure for determining the Member State responsible and ensure correct application of the responsibility criteria as set out in this Regulation, legal counselling should be introduced as an integral part of the system for determining the Member State responsible. For that purpose, legal counselling should be made available for the applicants, upon their request, to provide guidance and assistance on the application of the criteria and mechanisms for determining the Member State responsible.

Article 19 Right to information

1.As soon as possible and in any event by the date when an application for international protection is registered in a Member State, the competent authority of that Member State shall provide the applicant with information on the application of this Regulation, on his or her rights pursuant to this Regulation, and on the obligations set out in Article 17 as well as the consequences of non-compliance set out in Article 18. That information shall include in particular information on: (...)

(l) the right to be granted legal counselling free of charge on matters relating to the application of the criteria set out in Chapter II or the clauses set out in Chapter III of this Part at all stages of the procedure for determining the Member State responsible, as set out in Article 21;

(m) in the event of an appeal or review, the right to be granted, on request, legal assistance free of charge where the person concerned cannot afford the costs involved;

Article 21 Right to legal counselling

1. Applicants shall have the right to consult, in an effective manner, a ***legal adviser or other counsellor****, admitted or permitted as such under national law, on matters relating to the application of the criteria set out in Chapter II or the clauses set out in Chapter III of this Part at* ***all stages of the procedure*** *for determining the Member State responsible provided for in this Regulation.*
2. Without prejudice to the applicant's right to choose his or her own legal adviser or other counsellor at his or her own cost, an applicant may request free legal counselling in the procedure for determining the Member State responsible.
3. Free legal counselling shall be provided by legal advisers or other counsellors admitted or permitted under national law to counsel, assist or represent applicants or by non-

governmental organisations accredited under national law to provide legal services or representation to applicants.
For the purposes of the first subparagraph, effective access to free legal counselling may be assured by entrusting a person with the ***provision of legal counselling in the administrative stage of the procedure to several applicants*** *at the same time.*
Member States may organise the provision of legal counselling in accordance with their national systems.
Member States shall lay down specific procedural rules concerning the arrangements for filing and processing requests for the provision of free legal counselling as provided for in this Article.
(...)
6. For the purposes of the procedure for determining the Member State responsible, the free legal counselling shall include the provision of:
(a) guidance on and explanations of the criteria and procedures for determining the Member State responsible, including information on rights and obligations during all stages of that procedure;
(b) guidance on and assistance in providing information that could help determine the Member State responsible in accordance with the criteria set out in Chapter II of this Part;
(c) guidance and assistance on the template referred to in Article 22(1).
7. Without prejudice to paragraph 1, the provision of free legal counselling in the procedure for determining the Member State responsible may be excluded where the applicant is already assisted and represented by a legal adviser.
8. For the purpose of implementing this Article, Member States may request the assistance of the Asylum Agency. In addition, financial support may be provided through Union funds to the Member States, in accordance with the legal acts applicable to such funding.

The content of free legal counselling in the AMMR differs from the APR as it is specified what it covers, i.e. only the procedure for determining the Member State responsible. In particular, it is composed of the three elements regarding guidance, explanations and assistance as described in Article 21(6).

However, in order to understand the concept as a whole, both regulations need to be read together. Similar principles as in APR are set in AMMR. Counselling may or may not be provided by a lawyer and it might be provided to groups of applicants. This raises the question of the quality and independence of counselling (see above in the part devoted to APR) as explained above The CCBE considerations from Part II regarding FLC and legal assistance apply here *mutatis mutandis*. In addition, applicants conserve the right to ask for legal assistance at any stage at their own cost. Member States have a lot of discretion, including an obligation to establish detailed procedural rules on the forms of submitting and processing requests for free legal counselling and, at further stages, free legal assistance and representation.

Article 22 Personal interview

(...)
5. Where duly justified by the circumstances, Member States may conduct the personal interview by video conference. In such a case, the Member State shall ensure the necessary

*arrangements for the appropriate facilities, procedural and technical standards**, **legal assistance*** and interpretation, taking into account guidance from the Asylum Agency.*
*6. The personal interview shall take place under conditions which ensure appropriate confidentiality. It shall be conducted by a person qualified under national law. Applicants who are identified as being in need of **special procedural guarantees** pursuant to Regulation (EU) 2024/1348, shall be provided with **adequate support** in order to create the conditions necessary for effectively presenting all elements allowing for the determination of the Member State responsible. (…)*
*7. The Member State conducting the personal interview shall make an audio recording of the interview and make a written summary thereof which shall contain at least the main information supplied by the applicant at the interview (…). **The Member State shall ensure that the applicant or the legal adviser or other counsellor, admitted or permitted as such under national law, who is legally representing the applicant has timely access to the summary, as soon as possible after the interview and in any event before the competent authorities take a decision on the Member State responsible**. The applicant shall be given the opportunity to make comments or provide clarification orally or in writing with regard to any incorrect translations or misunderstandings or other factual mistakes appearing in the written summary at the end of the personal interview or within a specified time limit.*

The provision on personal interview (Article 22) does not guarantee the presence of a lawyer during the personal interview in all cases. **Legal assistance is expressly required only for minors** (Article 23) and for interviews conducted by video conference.

b) Cases where the transfer is 'impossible'

Article 16 Access to the procedure for examining an application for international protection

(…)
3. Where it is impossible for a Member State to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that the applicant, because of the transfer to that Member State, would face a real risk of violation of the applicant's fundamental rights that amounts to inhuman or degrading treatment within the meaning of Article 4 of the Charter, the determining Member State shall continue to examine the criteria set out in Chapter II or the clauses set out in Chapter III of this Part in order to establish whether another Member State can be designated as responsible.
Where a Member State cannot carry out the transfer pursuant to the first subparagraph of this paragraph to any Member State designated on the basis of the criteria set out in Chapter II or the clauses set out in Chapter III of this Part or to the first Member State with which the application was registered, and cannot establish whether another Member State can be designated as responsible, that Member State shall become the Member State responsible for examining the application for international protection.

Transfers are "impossible" when they entail a real risk of inhuman or degrading treatment in the meaning of Article 4 of the Charter (Article 16(3)).

'Systemic flaws' in the Member State of destination are no longer mentioned (unlike in Art. 3(2) of the Dublin III Regulation). As recently emphasized by the CJEU in Staatssecretaris van Justitie en Veiligheid, concerning Article 3(2) of the Dublin III regulation, "*According to that provision, only*

'systemic' flaws, 'resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter]', make such a transfer impossible"[65]. Whether the existence of systemic flaws will remain relevant in spite of the new phrasing of Article 16(3) remains to be seen in future CJEU case law.

What remains relevant so far is the CJEU's assessment of the existence of a real risk:

- *"63 In that regard, the referring court will have to examine, first, whether there are substantial grounds for believing that the applicant in the main proceedings would, in the event of transfer, face a real risk of (...) being subjected (to measures or practices which) would expose him to a situation of extreme material poverty that would not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that would undermine his physical or mental health or put him in a state of degradation incompatible with human dignity, placing him in a situation of such gravity that it may be equated with inhuman or degrading treatment (...)*
- *64 In that assessment, the situation that must be considered is the situation in which the applicant concerned would risk finding himself or herself during his or her transfer to the Member State responsible or thereafter (...).*[66]

c) Modified and new criteria (compared to the Dublin III criteria) - family-related criteria and minors

The definition of the family members was modified in the new AMMR comparing to the former Dublin Regulation.

> *Article 2 Definitions*
>
> *(...)*
> *(8) 'family member' means, insofar as the family already existed before the applicant or the family member arrived on the territory of the Member States, the following members of the applicant's family who are present on the territory of a Member State:*
> *(a) the spouse of the applicant or the applicant's unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals;*
> *(b) a minor child of couples referred to in point (a) or of the applicant, provided that that child is unmarried and regardless of whether that child was born in or out of wedlock or adopted as defined under national law*
> *(c) where the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present;*

[65] CJEU, X. v Staatssecretaris van Justitie en Veiligheid, Case C-392/22, judgment of 29.02.2024, para. 58, available here.

[66] CJEU, X. v Staatssecretaris van Justitie en Veiligheid, Case C-392/22, judgment of 29.02.2024, para. 63-64, available here.

(d) where the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for that beneficiary, whether by law or by the practice of the Member State where the beneficiary is present;

(9) 'relative' means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law;

The definition now includes family ties formed in transit countries *en route* to the Dublin area, as opposed to only those formed in the country of origin (Article 2(8)).

Note that children (descendants) over 18 and siblings over 18 are still not considered as 'family members'. However, in the interpretation and application of EU law – including the AMMR – due regard should be paid to the case law of the ECtHR, regarding the right to family life under Article 8 ECHR. It may therefore be relevant to check e.g. recent decisions in cases Kumari v. the Netherlands[67] and Martinez Alvarado v. the Netherlands[68], both concerning complaints about refusals to grant family reunification: in both cases the ECtHR reiterated that there could be no family life between parents and their adult children or adult siblings unless they could demonstrate "*additional elements of dependency, involving more than normal emotional ties*".

Article 26 Family members who legally reside in a Member State

1. Where the applicant has a family member who has been allowed to reside as a beneficiary of international protection in a Member State or who resides in a Member State on the basis of a long-term residence permit in accordance with Council Directive 2003/109/EC ([40]) or long-term residence permit granted in accordance with national law, where that Directive does not apply in the Member State concerned, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned have expressed their desire to that effect in writing.
2. Where the family member had previously been allowed to reside as a beneficiary of international protection, but has later become a citizen of a Member State, that Member State shall be responsible for examining the application, provided that the persons concerned have expressed their desire to that effect in writing.
3. Paragraphs 1 and 2 shall also apply to children born after the family member arrived on the territory of the Member States.

Reunification of applicants is foreseen not only with family members who are present in a Member State as beneficiaries of protection, but also with family members who were beneficiaries of protection and have been naturalized or obtained long-term resident status (Art. 26).

Article 25 Unaccompanied minors

[67] ECtHR, Kumari v. the Netherlands, decision of 19.11.2024, application no. 44051/20, available here.
[68] ECtHR, Martinez Alvarado v. the Netherlands, judgment of 10.12.2024, application no. 4470/21, available here.

(...)
*5. In the absence of a family member, sibling or relative as referred to in paragraphs 2 and 3, the Member State responsible shall be that **where the unaccompanied minor's application for international protection was first registered**, if it is in the best interests of the child.*

Recital 53
In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age should be a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence on the territory of another Member State of a family member, sibling or relative who can take care of him or her should also become a binding responsibility criterion. In order to discourage unauthorised movements of unaccompanied minors in the absence of such a family member, sibling or relative, which are not in the best interests of the child, the Member State responsible should be the Member State where the unaccompanied minor's application for international protection was first registered, if it is in the best interests of the child. Where the unaccompanied minor has applied for international protection in several Member States, and a Member State considers that it is not in the best interests of the child to transfer him or her to the Member State responsible on the basis of an individual assessment, that Member State should become responsible for examining the new application.

Absent a relative or family member, unaccompanied minors will be attributed to the Member State where they first applied, subject to an individualized best interest determination (Article 25(5), see also Recital 53). This is to be approached with vigilance since it appears to depart from the CJEU's judgment in case MA and Others v Secretary of State which exempted UAMs from unvoluntary take charge transfers, precisely to preserve their best interests.[69]

d) Modified and new criteria (compared to the Dublin III criteria) – other

Article 33 Entry

*1. Where it is established, on the basis of proof or circumstantial evidence as described in the lists referred to in Article 40(4) of this Regulation, including the data referred to in Regulation (EU) 2024/1358, that **an applicant has irregularly crossed the border into a Member State by land, sea or air from a third country, the first Member State that the applicant enters shall be responsible** for examining the application for international protection. That responsibility shall cease if the application is registered more than 20 months after the date on which that border crossing took place.*
*2. Notwithstanding the first paragraph of this Article, where it is established, on the basis of proof or circumstantial evidence as described in the lists referred to in Article 40(4) of this Regulation, including the data referred to in Regulation (EU) 2024/1358, that an **applicant has been disembarked on the territory of a Member State following a search and rescue operation, that Member State shall be responsible** for examining the application for international protection. That responsibility shall cease if the application is registered more than 12 months after the date on which that disembarkation took place.*

[69] CJEU, C-648/11, MA and Others v Secretary of State, 06.06.2013, available here.

3. Paragraphs 1 and 2 of this Article shall not apply if it can be established, on the basis of proof or circumstantial evidence as described in the lists referred to in Article 40(4) of this Regulation, including the data referred to in Regulation (EU) 2024/1358, that the ***applicant was relocated to another Member State*** *pursuant to Article 67 of this Regulation after having crossed the border. In that case, that other Member State shall be responsible for examining the application for international protection.*

The irregular entry criterion is maintained and expanded (Article 33 AMMR): it applies to persons disembarked in the context of SAR operations and, save in these last situations, makes the criterion applicable **for twenty months after entry** instead of twelve currently.

Article 30 Diplomas or other qualifications

1. Where the applicant is in ***possession of a diploma or qualification*** *issued by an education establishment established in a Member State, that* ***Member State shall be responsible*** *for examining the application for international protection, provided that the application is registered less than six years after the diploma or qualification was issued.*
2. Where the applicant is in possession of more than one diploma or qualification issued by education establishments in different Member States, the responsibility for examining the application for international protection shall be assumed by the ***Member State which issued the diploma or qualification following the longest period of study*** *or, where the periods of study are identical, by the Member State in which* ***the most recent diploma or qualification*** *was obtained.*

Having obtained a diploma in a Member State becomes a criterion for identifying the Member State responsible for processing the application for international protection.

e) Discretionary clauses

Article 35 Discretionary clauses

1. ***By way of derogation from Article 16(1),*** *a* ***Member State may decide to examine an application*** *for international protection by a third-country national or a stateless person registered with it, even if such examination is not its responsibility according to the criteria laid down in this Regulation.*
2. The Member State in which an application for international protection is registered and which is carrying out the procedure for determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State ***to take charge of an applicant*** *in order to bring together any family relations, on humanitarian grounds based in particular on meaningful links regarding family, social or cultural considerations, even where that other Member State is not responsible according to the criteria laid down in Articles 25 to 28 and 34. The persons concerned shall express their consent to that effect in writing.*
The take charge request shall contain all the material in the possession of the requesting Member State necessary to allow the requested Member State to assess the situation.

The requested Member State shall carry out any necessary checks to examine the humanitarian grounds referred to in the request, and shall reply to the requesting Member State within two months of receipt of the request using the electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A refusal of the request shall state the reasons on which the refusal is based.

A discretionary clause subsists in Article 35(1), allowing a Member State to decide to examine an application for international protection, even if such examination is not its responsibility according to the criteria laid down in the AMMR.

However, as clarified by the CJEU in AHY v Minister for Justice concerning the discretionary clause of the Dublin III Regulation, a refusal by Member State authorities to apply such a clause does not trigger a right to judicial review.[70] Nevertheless, the case law of the UN Committee on the Rights of the Child regarding application of the Dublin III Regulation suggests that a Member State may *have to* apply the discretionary clause in order to comply with the Convention on the Rights of the Child.[71]

f) Procedures, remedies and time limits

AMMR contains rules on several procedures and can affect the situation of applicants. This is the case of the submission by a Member State of a **take charge request**.

Article 39 Submitting a take charge request

1. If the Member State referred to in Article 38(1) considers that another Member State is responsible for examining the application, it shall, immediately and in any event within two months of the date on which the application was registered, request that other Member State to take charge of the applicant. Member States shall prioritise requests made on the basis of Articles 25 to 28 and 34.
Notwithstanding the first subparagraph of this paragraph, in the case of a Eurodac hit with data recorded pursuant to Articles 22 and 24 of Regulation (EU) 2024/1358 or of a VIS hit with data recorded pursuant to Article 21 of Regulation (EC) No 767/2008, the request to take charge shall be sent within one month of receiving such hit.
Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State where the application was registered.
Where the applicant is an unaccompanied minor, the determining Member State shall, at any time before a first decision regarding the substance is taken, where it considers that it is in the best interests of the child, continue the procedure for determining the Member State responsible and request another Member State to take charge of the applicant, in particular if the request is based on Article 26, 27 or 34, notwithstanding the expiry of the time limits laid down in the first and second subparagraphs of this paragraph.

Article 46 Detailed rules and time limits

[70] CJEU, AHY, Case C-359/22, judgment of 18.04.2024, here
[71] See the case note Save the Children, "Rights of accompanied children in asylum proceedings: the challenges of a holistic approach and high quality decision-making", available here.

(...)
2. Where the transfer does not take place within the time limit set out in paragraph 1, first subparagraph, the Member State responsible shall be relieved of its obligations to take charge of or to take back the person concerned and responsibility shall be transferred to the transferring Member State. That time limit may be extended up to a maximum of one year if the transfer could not be carried out due to the imprisonment of the person concerned or up to a maximum of three years from when the requesting Member State informed the Member State responsible that the person concerned, or a family member to be transferred together with the person concerned, has absconded, is physically resisting the transfer, is intentionally making himself or herself unfit for the transfer, or is not complying with medical requirements for the transfer.
Where the person concerned becomes available to the authorities again and the time remaining from the period referred to in paragraph 1 is less than three months, the transferring Member State shall have a period of three months to carry out the transfer.

Article 41 Submitting a take back notification

1. In a situation referred to in Article 36(1), point (b) or (c), the Member State where the person is present shall make a take back notification immediately and in any event within two weeks after receiving the Eurodac hit. Failure to make the take back notification within that time limit shall not affect the obligation of the Member State responsible to take back the person concerned.

Time limits have been shortened (e.g. the ordinary **time limit for submitting a take charge request is two months** instead of three currently (Article 38(1))). However, the following should be noted:

- The time limit to carry out a transfer in cases where the transferee absconds is prolonged – from 18 months to three years – and any form of resistance is equated to absconding (Article 46(2)). It is recommended to be very vigilant as to what behaviors will be interpreted as triggering this extension of the deadline – especially in cases involving mental health issues.

- Member States missing the deadline for requesting a take-back will no longer become responsible (Article 41(1)).

In case of non-compliance, deprivation of reception conditions is foreseen, although this is "*without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations"* (Article 18(1)).

Furthermore, provisions regarding the **notification of a transfer decision** contain some procedural safeguards for the applicants, in particular, the right to be informed about legal remedies available against the decision and the duty for Member States to inform the legal representative of the applicant.

Article 42 Notification of a transfer decision

(...)
*3. **Where a legal adviser or other counsellor, admitted or permitted as such under national law, is legally representing the person concerned**, Member States may notify the decision*

referred to in paragraph 1 to such legal adviser or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.
4. The decision referred to in paragraph 1 of the Article shall also include information on the legal remedies available pursuant to Article 43, including on the right to apply for suspensive effect, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned is required to appear, if that person is travelling to the Member State responsible by his or her own means.
Member States shall ensure that ***information on persons or entities that are able to provide legal assistance to the person concerned is communicated to the person concerned*** *together with the decision referred to in paragraph 1, unless that information has already been communicated.*
5. ***Where the person concerned is not legally represented by a legal adviser or other counsellor, admitted or permitted as such under national law, Member States shall provide him or her with information on the main elements of the decision, which shall include information on the legal remedies available and the time limits*** *applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.*

Provisions on **judicial remedies** have been modified significantly and contain many points, including deadlines, that will require vigilance from lawyers. It is important to get acquainted with these provisions, in particular Article 43, as they will be relevant for any appeals regarding AMMR.

Article 43 Remedies

1. The applicant or another person as referred to in Article 36(1), points (b) and (c), shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision before a court or tribunal.
The scope of such remedy shall be limited to an assessment of*:*
(a) whether the transfer would, for the person concerned, result in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter;
(b) whether there are circumstances subsequent to the transfer decision that are decisive for the correct application of this Regulation;
(c) whether Articles 25 to 28 and 34 have been infringed, in the case of persons taken charge of pursuant to Article 36(1), point (a).
2. Member States shall provide for ***a period of at least one week but no more than three weeks after the notification*** *of a transfer decision within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.*
3. The person concerned shall have ***the right to request****, within a reasonable period of time from the notification of the transfer decision but in any event no longer than the period provided for by Member States pursuant to paragraph 2, a court or tribunal* ***to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review****. Member States may provide in national law that the request to suspend the implementation of the transfer decision must be lodged together with the appeal pursuant to paragraph 1. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken* ***within one month*** *of the date when the competent court or tribunal received that request.*
Where the person concerned has not exercised his or her right to request suspensive effect, the appeal against, or review of, the transfer decision shall not suspend the implementation of the transfer decision*.*

A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.
If suspensive effect is granted, the court or tribunal shall endeavour to decide on the substance of the appeal or review within one month of the decision to grant suspensive effect.
4. ***Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.***
5. Member States shall ensure that ***legal assistance and representation in the appeal procedure are granted on request free of charge where*** *the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of persons subject to this Regulation shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance and representation.*
Member States may provide that free legal assistance and representation is not to be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success, provided that *access to legal assistance and representation is not thereby arbitrarily restricted.*
Where a decision not to grant free legal assistance and representation pursuant to the second subparagraph is taken *by an authority other than a court or tribunal, Member States shall provide for an* ***effective remedy before a court or tribunal to challenge that decision****. Where the decision is challenged, the remedy shall be an integral part of the remedy referred to in paragraph 1.*
Member States shall ensure that legal assistance and representation are not arbitrarily restricted and that effective access to justice for the person concerned is not hindered*.*
Legal assistance shall include at least *the preparation of the required procedural documents. Legal representation shall include at least the representation before a court or tribunal and may be restricted to legal advisers or counsellors specifically designated by national law to provide legal assistance and representation.*
Procedures for access to legal assistance and representation shall be laid down in national law*.*

The **one-week time-limit** after the notification to exercise the right to an effective remedy may be in conflict with CJEU case law on Article 47 of the Charter and the effectiveness of judicial remedies.[72] It is important to keep in mind that the suspensive effect must be requested, i.e. the appeal in itself is not suspensive. An important safeguard is the fact that Member States must ensure access to legal assistance (and not only legal counselling) for the applicants, i.e. assistance by a fully qualified lawyer. Legal assistance and representation are granted for free upon request. Member States may refuse free legal assistance and representation based on the vague ground of "no tangible prospect of success", but their refusal can be appealed and cannot amount to arbitrary restriction and deprivation of access to justice for the applicant.

The limited scope of the remedy is reduced compared to Dublin III and relevant CJEU case law (Ghezelbash)[73]. This new restriction appears to revert to the Dublin II (Abdullahi) approach, but it

[72] See the analysis by Steve Peers, "The new EU asylum laws, part 7: the new Regulation on asylum procedures", analysis.
[73] CJEU, Ghezelbash, C-63/15, judgment of 07.06.2016, available here.

is doubtful whether this restrictive approach would be compatible with Article 47 of the Charter and with Article 13 ECHR [74].

g) Consequences of non-compliance

Article 18 Consequences of non-compliance

1. Provided that the applicant has been informed of his or her obligations and the consequences of non-compliance therewith in accordance with Article 11(1), point (b), of Regulation (EU) 2024/1356 or Article 5(1) and 21 of Directive (EU) 2024/1346, the applicant ***shall not be entitled to the reception conditions*** *set out in Articles 17 to 20 of that Directive in any Member State other than the one in which he or she is required to be present pursuant to Article 17(4) of this Regulation from the moment he or she has been notified of a decision to transfer him or her to the Member State responsible. The first subparagraph shall be without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations.*

In case of non-compliance, deprivation of reception conditions is foreseen, although this is without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations.

The compliance of this provision (or of its implementation) will have to be closely scrutinized, especially in light of the Haqbin case, which rules out the removal of material reception conditions if this leads to violations of Articles 1 and 4 of the Charter.[75] In this regard, see also subsequent case law of the CJEU such as Changu or the recent ruling in case S.A. & R.[76]

h) Legal questions raised by the 'solidarity mechanism' (Part IV)

The solidarity measures foreseen in Part IV include the possibility for Member States to organise the 'relocation' of applicants for international protection and where bilaterally agreed by the contributing and benefitting Member State concerned, of beneficiaries of international protection (Art. 56(2)(a)). The relocation procedure is laid out in Articles 67 and 68, which contain no mention of a judicial remedy against transfer decisions made in this context. Here, too, vigilance is advised since Article 47 of the Charter clearly requires a judicial remedy for cases where such decisions might infringe rights conferred by EU law.

[74] CJEU, Abdullahi, Case C-394/12, judgment of 10.12.2023, available here. Regarding the compatibility with the Charter and ECHR, see F. Maiani's discussion in "Responsibility-determination under the new Asylum and Migration Management Regulation: plus ça change… – EU Immigration and Asylum Law and Policy", available here.
[75] CJEU, Haqbin, C-233/18, judgment of 12.11.2019, available here.
[76] CJEU, Changu, C-352/23, judgment of 12.09.2024, available here, and CJEU, S.A., C-97/24, judgment of 01.08.2025, available here.

III. Summary of points for attention for lawyers

It is recommended that lawyers approach and apply the AMMR with vigilance especially with regard to the following points:

- The right to an effective judicial remedy is not always expressly mentioned but will have to be considered not only for challenging application of the Dublin criteria but also reception conditions, implementation of solidarity mechanisms, refusal to transfer...
- Need to connect with other instruments of the Pact (e.g. references to RCD, APR...)
- Like all of the New Pact, the AMMR needs to be read also in the light of fundamental and human rights instruments, and with CJEU, ECtHR case law, and UN Human Rights Committees case law as well.
- The many novelties may need interpretation by the CJEU – possibly by means of references for preliminary rulings - so as to ensure the consistency EU law as well as full fundamental rights compliance.

Part 4 - Crisis Regulation

REGULATION (EU) 2024/1359 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147

I. Presentation of the regulation, rationale, aim and structure

The objective of the Crisis Regulation is to set special measures for a situation of **crisis or *force majeure*** in the field of migration and asylum which arises due to circumstances beyond the control of the Union and its Member States.[77] It aims at equipping Member States with tools and enhance their preparedness for such situations.

The Regulation names **three scenarios** that fall into the meaning of "exceptional situations" (see Article 1 that provides the definitions):

- the mass arrivals of third-country nationals and stateless persons in the territory of one or more Member States;
- a situation of instrumentalisation of migrants by a third country or a hostile non-state actor with the aim of destabilising the Member State or the Union;
- a situation of *force majeure* in the Member State.

The first two scenarios are referred to as "crisis situation."

However, the wording ("these can include") can be interpreted as pointing to the non-exhaustive character of the list.

It is further explained that in those circumstances, it is possible that the measures and flexibility provided under AMMR and APR are not sufficient to address such exceptional situations.

The Regulation complements other mechanisms foreseen by the EU law and ensures the effective application of the principle of solidarity and fair sharing and the adaptation of rules regarding asylum procedure. It is also made clear that "*This Regulation shall not affect the fundamental principles and guarantees, established by the legislative acts from which derogations are allowed pursuant to this Regulation.*"

Regarding the structure, the Regulation is divided into six chapters. Chapter I deals with general provisions, Chapter II concerns governance, in particular the procedure to follow. Chapter III is about solidarity measures applicable in a situation of crisis, with reference to AMMR provisions regarding solidarity. This includes types of contributions that a Member States can request to be

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REGULATION (EU) 2024/1359 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 Regulation - EU - 2024/1359 - EN - EUR-Lex

supported, i.e. relocations, financial contributions and alternative solidarity measures. Chapter IV is devoted to derogations. Chapter V describes expedited procedure. Chapter VI contains final provisions.

II. Analysis

a. Procedure and time limits

In order to trigger the application of the Regulation, Member States need to **submit a reasoned request** to the Commission, which has to include specific elements. The Commission assesses the situation and within 2 weeks adopts an **implementing decision** that states that the State is in a situation of crisis or force majeure. In parallel, the Commission makes a proposal for a Council decision authorising derogations and establishing solidarity measures. Specific derogations are therefore to be found in this act, as well as solidarity measures, including a Solidarity Response Plan.

In principle, derogations are allowed for **3 months**. This period can be extended once by three months if the Commission confirms that the situation persists. After this period, the Commission may propose a new Council decision amending or extending some measures, and this for maximum 3 months. This can again be extended. The total duration of the application of the measures shall not exceed the duration of the situation of crisis or *force majeure* and shall be a **maximum of 12 months**. It is up to the Commission and Council to monitor if the situation persists.

As there are many procedural and formal requirements related to the application of special measures, it will be important to verify whether the Member States follow these requirements. For instance, if the Member State applies derogations beyond the period allowed, the special measures could potentially be challenged.

It is important to keep in mind that not all special rules are applicable in the three scenarios envisaged by the Regulation. For example, some derogations might only be possible in case of extraordinary mass arrivals while others both in these circumstances and in case of force majeure.

b. Possible derogations

The regulation gives the possibility for Member States to obtain the following derogations, which are set in **Articles 10-13**.

Regarding time limits for **registration of applications**, Member States may derogate from the limit of 5 days set in Article 27 APR to register applications for international protection. Instead, the deadline is **4 weeks**. If immediate action is needed, Member State can decide to apply this derogation without waiting for a Council decision but only for 10 days while waiting for the Council decision.

Regarding asylum border procedures, Member States may **extend the examination of applications** for international protection at the border by maximum additional six weeks

(derogation to the 12 weeks set in Article 51 (2) APR). It is however specified that it cannot be used in addition to the extension to 16 weeks allowed under APR Article 51 (2) if the Member State to which the person is transferred pursuant to Article 67(11) of AMMR is applying the border procedure.

Member States may not be required to examine in the **border procedure** applications by persons who come from third countries where the Union-wide average recognition rate is below 20 % (which is normally mandatory under APR). In order to apply such a derogation, the Council implementing decision should assess whether the measures contained in the contingency plan of the Member State concerned, referred to in Article 32 of Directive (EU) 2024/1346 are sufficient to address the situation.

Member States may also **lower the threshold for the mandatory application of the border procedure** provided in APR in relation to third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20 % or lower. This threshold can be lowered to **5 %**, derogating to APR Article 42(1), point (j).

It is also possible to **broaden the scope of the application** of the border procedure and to allow a Member State to take a decision in the framework of a border procedure also **on the merits** of an application in cases where the applicant is a national or, in the case of stateless persons, a former habitual resident, of a third country, for which the proportion of decisions granting international protection Union-wide is **50 %** or lower (derogation to Article 44(1) APR).

Another possible derogation is in case of instrumentalisation situation, in a border procedure, to take decisions on the merits of all applications that are made by any third-country national or stateless person who is subject to instrumentalisation and that are registered within the period during which this provision is applied.

Member States can also be allowed to **extend the time limits set out in AMMR** (Dublin rules) regarding submission of a take charge request, reply to a take charge request, submission of a take back notification and the transfer where it is impossible to comply with those time limits due to a situation of mass arrival or *force majeure*. There are also derogations from the obligation to take back an applicant in a situation of extraordinary mass arrivals.

Another set of special rules concerns **expedited procedures**. "*Where objective circumstances suggest that applications for international protection from groups of applicants from a specific country of origin or of former habitual residence, or from a part of such a country, or on the basis of the criteria set out in Regulation (EU) 2024/1347 could be well-founded*". This is enacted by a Commission recommendation. If the determining authority decided to omit the personal interview to prioritise the examination of the application because it is likely to be well-founded, it shall ensure, by way of derogation, that the examination of the merits of the application is concluded no later than four weeks from the lodging of the application.

It is relevant to refer to the case S.A. & R.J, where the CJEU had the opportunity to clarify how derogations set in EU law apply. It interpreted the derogation foreseen by Article 18(9) of RCD, regarding possibility for Member States to derogate from rules regarding provision of material assistance in case of exhaustion of housing capacity. Even in such a case, the RCD required MSs to ensure basic needs.

"In situations where the EU legislature has adopted rules intended to define a system imposing certain obligations as to the result to be achieved where events occur which are unforeseeable or unavoidable or are otherwise unknown quantities, whatever the causes may be, it can be seen from the case-law of the Court that those obligations cannot be avoided by relying on the occurrence of such events as covered by the system in question (...)".[78] Therefore, if it was accepted that States may justify a failure to apply the obligations deriving from that derogation system by relying on the occurrence of the event to which the application of that derogation system is subject, it would disregard the very purpose of the derogation system established and deprive it of its practical effect.

If applied to the Crisis Regulation, this reasoning would point to the necessity to apply the derogations strictly while maintaining the safeguards as required by the Regulation, especially those related to rights stemming from the Charter.

c. Applicable safeguards

The Commission shall pay particular attention to the compliance with fundamental rights and humanitarian standards and may request the Asylum Agency to initiate a specific monitoring exercise pursuant to Article 15(2) of Regulation (EU) 2021/2303.

The derogation regarding the extension of the deadline to register applications should be without prejudice to the rights of asylum applicants guaranteed by the Charter, APR and RCD. If the derogation is enacted in the case of mass arrivals, the derogation may only be applied during the time period set out in the initial Council implementing decision and not during any subsequent extensions.

Member States shall ensure that applicants are able to access and exercise their rights under APR and RCD in an effective manner as soon as they make an application, regardless of when the registration takes place.

According to Article 10 (5), the Member State concerned shall duly inform the third-country nationals or stateless persons in a language which they understand, or are reasonably supposed to understand, about the measure applied, the location of the registration points, including the border crossing points accessible for registering and lodging an application for international protection, and the duration of the measure.

Right to information is guaranteed also generally.

Article 15 Specific provisions and guarantees

In a situation of crisis, where a Member State applies a derogation as referred to in Articles 10 to 13, it shall duly inform third-country nationals or stateless persons in a language which they understand or are reasonably supposed to understand about the measures applied, the location of the registration points, including the border crossing points, which are accessible for registering and lodging an application for international protection, and the duration of the measures.

Recital (40)

[78] CJEU, S.A. & R.J, Case C-97/24, ruling of 01.08.2025, available here.

Where a Member State applies one or more of the measures provided for in this Regulation, the Member State should inform third-country nationals and stateless persons in a language which they understand or are reasonably supposed to understand, about the derogations applied and the duration of the measures. Member States are obliged to address any special procedural and special reception needs of the applicants that could arise and provide information in an appropriate manner accordingly. Moreover ***Article 8 on provision of information and Article 36(3) with regard to the information on the possibility to appeal the decision on the application, of the Regulation (EU) 2024/1348 apply****.*

Special safeguards are foreseen for minors (see Article 11(7)). Children under the age of 12 and their family members, and persons with special procedural or special reception needs must be excluded from the border procedure.

The derogation from the asylum procedure cannot be applied or shall cease to apply if there are medical reasons for not applying the border procedure in accordance with Article 53(2)(d) APR, or where the necessary support cannot be provided to applicants with special reception needs in accordance with RCD or with special procedural needs in accordance with Article 53(2)(c) APR.

For expedited procedures, According to Recital (55), applicants whose applications are examined in the context of the expedited procedure provided for in this Regulation enjoy all of the rights and guarantees, to which applicants are entitled in accordance with APR, including the right to information and to an effective remedy.

Moreover, applicants whose applications are examined in the context of the expedited procedure provided for in this Regulation, should, in accordance with Article 29 APR, receive a document certifying their status in a language they can understand or can reasonably be supposed to understand (Recital 57).

The relevant Union Agencies, UNHCR and other relevant organisations can be consulted at the different stages of the application of the expedited procedure.

When thinking about safeguards in crisis situations, it is important to recall the case law that concerned similar circumstances.

The ECtHR stated repeatedly in its case law that even in times of migratory pressure, States are obliged to ensure effective access to asylum procedures.

It is a well established case law (see M.S.S. v. Belgium and Greece, Hirsi Jamaa and Others v. Italy, reiterated for example in J.A. and Others versus Italy) that having regard to the absolute character of Article 3, the difficulties deriving from the increased flow of migrants and asylum seekers, in particular for States which form the external borders of the European Union, does not exonerate member States of the Council of Europe from their obligations under Article 3.[79]

These principles were recently reiterated in the context of possibility to apply for asylum at the Polish-Belarus border in case M.K. v. Poland.

"As the Court has stated on many occasions, the prohibition of inhuman or degrading treatment, enshrined in Article 3 of the Convention, is one of the most fundamental values of democratic societies. It is also a value of civilisation closely bound up with respect for human dignity, part of

[79] M.S.S v. Belgium and Greece, judgment of 21.01.2011, application no 30696/09, , available here; ECtHR, Hirsi Jamaa v Italy, judgment of 23.02.2012, application no. 27765/09, available here; ECtHR, J.A. and Others v. Italy, judgment of 30.03.2023, application no. 21329/18, available here.

the very essence of the Convention. ***Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment***.*"*[80]

When it comes to collective expulsions, prohibited by Article 4 of Protocol 4 , the approach of the court was developed in the case N.D. and N.T. v. Spain which concerned the situation on the Spanish-Moroccan border. It established a test that the Court applies in situations where "*individuals cross a land border in an unauthorised manner and are expelled summarily*".[81] The ruling adds another parameter to the two-tier test for compliance with Article 4 (4): that they have made no use of the official entry procedures existing for that purpose and that it had been consequences of their own conduct.[82]

The case law was later applied in for example Shahzad v Hungary, M.H. and others v. Croatia; A.A. v. North Macedonia.[83]

d. Access to the applicants in detention or at border crossings

Article 11 is crucial for lawyers as it guarantees access to the applicants both in detention centres and at border crossing points.

> *Article 11 Measures applicable to the asylum border procedure in a situation of crisis or force majeure*
>
> *(...)*
> *10. For the purpose of applying the derogations referred to in this Article, the basic principles of the right to asylum and the respect of the principle of non-refoulement, as well as the guarantees provided for in Chapters I and II of Regulation (EU) 2024/1348 shall apply to ensure that the rights of those who seek international protection, including the right to an effective remedy, are protected.*
> ***Organisations and persons permitted under national law to provide advice and counselling shall have effective access to applicants held in detention facilities or present at border crossing points.*** *Member States may impose limits to such actions where,*

80 ECtHR, M.K. v Poland, application nos. 40503/17, 42902/17 and 43643/17, judgment of 23.07.2020, available here.

81 ECtHR, Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights, available here.

82 ECtHR, N.D. and N.T. v Spain, judgment of 13.02.2020, application nos. 8675/15 and 8697/15), available here. « *"The applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorised location. They thus chose not to use the legal procedures which existed in order to enter Spanish territory lawfully, thereby failing to abide by the relevant provisions of the Schengen Borders Code regarding the crossing of the external borders of the Schengen Area (see paragraph 45 above) and the domestic legislation on the subject. In so far as the Court has found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla (see paragraph 231 above), it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal."*[82]*"*

83 ECtHR, Shahzad v. Hungary, judgment of 08.07.2021, application no. 12625/17, available here ; ECTHR, M.H. and Others v. Croatia, applications no. 15670/18 and 43115/18, available here; ECtHR, A.A. and Others v. North Macedonia, judgment of 05.04.2022, applications nos. 55798/16 and 4 others, available here.

by virtue of national law, they are objectively necessary for the security, public order or administrative management of a detention facility, ***provided that access is not thereby severely restricted or rendered impossible.***

Recital 50 also states this right of organisations "*entrusted with specific tasks by Member States*" to have effective access to the border under conditions set out in RCD and APR.

Although Article 11 allows imposing some limits on this access, these limits must meet certain conditions: be anchored in national law and be necessary for the limited reasons listed, i.e. security, public order or administrative management. Moreover, the limits are constrained by the fact that they cannot restrict access severely or make it impossible.

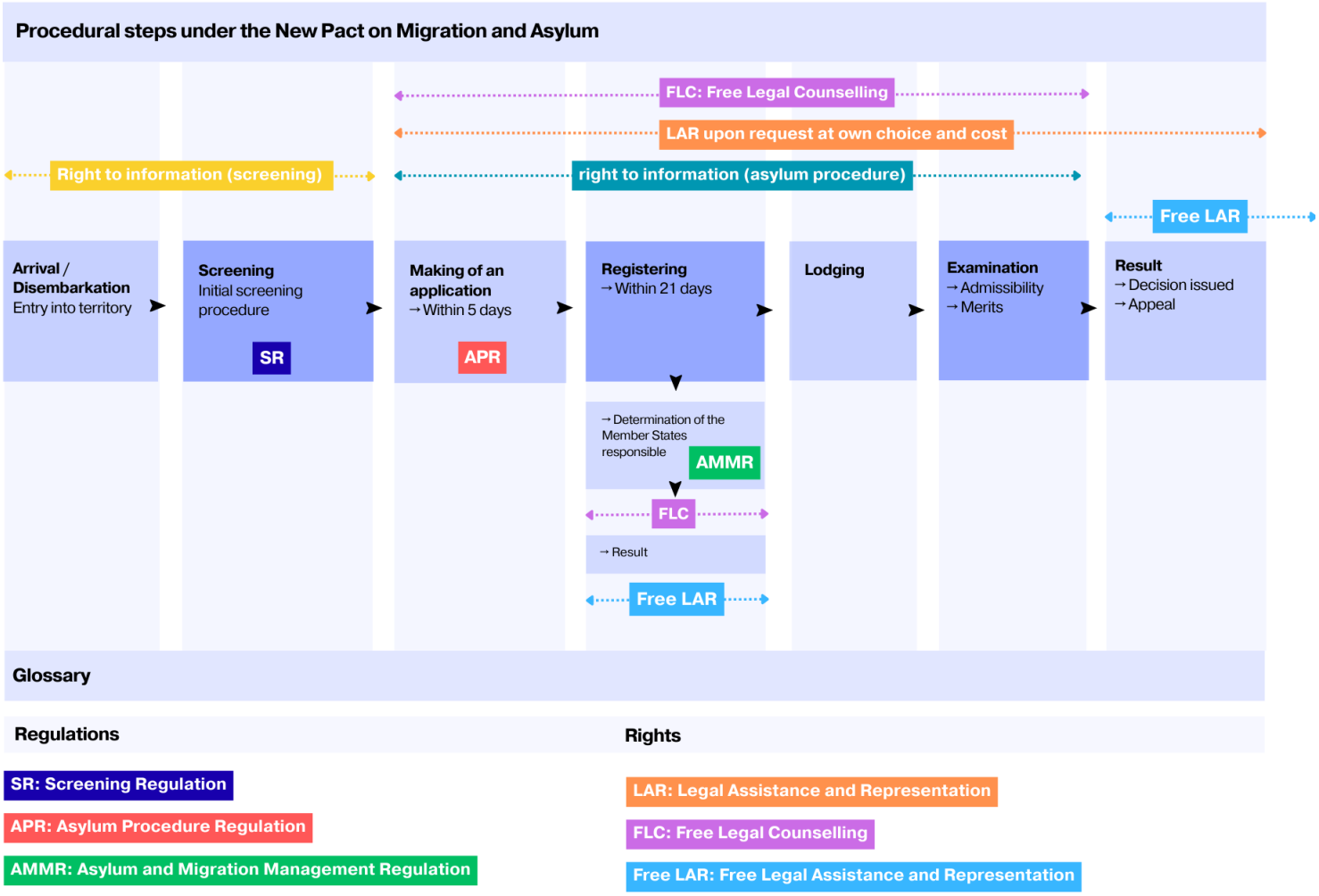
III. Summary of points for attention for lawyers

- Although the Regulation allows some derogations, lawyers should be aware that these are limited and when applied in practice, they must respect those limits. Any treatment that goes beyond those limits, is potentially challengeable before courts.
- There are rights from which States cannot derogate even in the situation of instrumentalisation. Article 2 and 3 of the ECHR are non-derogable, all the cases where those rights could be a stake can potentially be challenged.
- The international and European safeguards are still applying to this piece of legislation, such as the right to information or the access of lawyers providing legal assistance to the applicants.

Final conclusions and points of attention for lawyers

- Vigilance is required at every stage of **administrative and judicial procedures**, especially at the beginning of the implementation of the New Pact. Many details must be checked in the national legislation, for example, who is entitled to provide free legal counselling in a given State. It is important for the bars and lawyers to understand their role in the **new regulatory landscape** after the Pact is implemented in their country.
- Lawyers should be careful to **make connections** between the various instruments of the New Pact (e.g. the vulnerability assessment made during screening may be relevant afterwards during the asylum procedure).
- Lawyers should keep in mind (and remind all other actors and stakeholders, including administrations and judges) **the hierarchy of norms** i.e. Charter and international human rights instruments to which the EU is committed directly or indirectly (including the Geneva Convention) have a higher value than EU secondary law and the New Pact must be interpreted and implemented in compliance with those higher ranking norms.
- Legal professionals must be aware of the **procedural safeguards that the Pacts offers for the asylum seekers**, but also about the **guarantees that apply to themselves**: e.g. access to the areas where their clients are placed or access to the file.

Annex I –
Overview of various steps in the NPMA



Right to information: Article 11 SR, Article 8 APR & Article 19 AMMR
Right to FLC: Article 15 & 16 APR, Article 21 AMMR
Right to Free LAR: Article 15 & 17 APR, Article 43 AMMR
Right to LAR at your own cost: Article 15 APR

Annex II – Additional materials & further reading

Council of Bars and Law Societies of Europe, CCBE recommendations on a framework on legal aid in the field of migration and international protection

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Position_papers/EN_20221125-CCBE-recommendations-on-a-framework-on-legal-aid-in-the-field-of-migration-and-international-protection.pdf

European Commission, Questions and answers on the Pact on Migration and Asylum

https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum/questions-and-answers-pact-migration-and-asylum_en

European Union Asylum Agency, Practical Guide on Free Legal Counselling

https://euaa.europa.eu/publications/practical-guide-free-legal-counselling

European Union Asylum Agency, EU Practical Guide on Information Provision in the Asylum Procedure

https://euaa.europa.eu/publications/practical-guide-information-provision-asylum-procedure

ECRE, Legal Note: The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures

https://ecre.org/ecre-legal-note-the-guarantees-of-the-eu-charter-of-fundamental-rights-in-respect-of-legal-counselling-assistance-and-representation-in-asylum-procedures/

Fundamental Rights Agency, Pact on Migration and Asylum: FRA's support in its implementation

https://fra.europa.eu/en/themes/asylum-migration-and-borders/migration-asylum-pact

Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration

https://fra.europa.eu/en/publication/2020/handbook-european-law-relating-asylum-borders-and-immigration-edition-2020

Odysseus Blog, series about the New Pact

https://eumigrationlawblog.eu/category/new-pact-on-migration-and-asylum/