ASGI POSITION AND SUGGESTED AMENDMENTS ON THE AMENDED PROPOSAL FOR AN ASYLUM PROCEDURE REGULATION

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The aim of the present document is to underline the most critical provisions of the Commission Proposal, taking into account the impact that they could have on both the Italian legislation and the current asylum system in Italy.

Accordingly, specific amendments will be suggested to article 40, article 41, article 53 and article 54. Article 35 bis and Article 41 bis are not included in the proposal for amendments, as ASGI is of the view that these provisions should not be included in the new Regulation. For the interest of time and conciseness, Recitals will not be included in the proposed amendments.

It is also possible to read about ASGI's position on the new Proposal on the border procedures in the policy note published in October 2021.

Commission Proposal	ASGI Position	ASGI Proposal
<u>Article 40, para 1, point i)</u> (i) the applicant is of a nationality or, in the case of stateless persons, a former habitual resident of a 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, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data ***or*** the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;	ASGI is of the view that this provision is in contrast with the principles set out in the Geneva Convention and in the EU *acquis* on asylum, which provide for the individualised assessment of the asylum application.	**<u>Article 40, para 1, point i)</u>** ***Deleted***
<u>Article 40, para 5, point c)</u> (c) the applicant is of a nationality or, in the case of stateless persons, a former habitual residence of a third country for which the	Italian legislation on the asylum procedures (D. Lgs. 25/2008, D. Lgs. 142/2015) provides for several guarantees for vulnerable categories, including unaccompanied minors, in light	**<u>Article 40, para 5, point c)</u>** ***Deleted***

proportion of decisions granting international protection by the determining authority is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower, unless a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data ***or*** the applicant belongs to a category of persons for whom the proportion of 20% or lower cannot be considered as representative for their protection needs;	of the best interest of the child. **The adoption of the proposed amendment would lower the standard of protection provided for by Italian legislation to unaccompanied minors.**	
Article 41, para 1 1. Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], and provided that the applicant has not yet been authorised to enter Member States' territory, a Member State may 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 in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. The border procedure may take place:	ASGI believes that screening at the border shall not involve minors and vulnerable categories and shall only be conducted when it is not immediately evident that the person is willing to apply for international protection. **ASGI is of the view that the fiction of non-entry is in contrast with the principle of jurisdiction and of States responsibility for protection of fundamental rights** (as pointed out by the ECtHR in its recent case law, see for instance *M.K. and others v. Poland*).	**Article 41, para 1** **[~~1. Following the screening procedure carried out in accordance with Regulation (EU) No XXX/XXX [Screening Regulation], and provided that the applicant has not yet been authorised to enter Member States' territory~~]** A Member State may 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 in the territory of a Member State as set out in Article 6 of Regulation (EU) 2016/399. **The border procedure**

(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 [X] of Regulation (EU) No XXX/XXX [Ex Dublin Regulation].	The fiction is therefore meaningless from a legal perspective and irrational from a practical one. ASGI proposes that border procedure takes place *only* following the apprehension in connection with unauthorized crossing of the external border, in case the applicant eluded or tried to elude border controls.	**shall respect the principles and guarantees of Chapter II**. The border procedure may take place: (a)following an application made at an external border crossing point or in a transit zone; (b)following the apprehension of the applicant **immediately after** he/she crossed the external border without authorisation, **in case there is evidence that the protection seeker eluded border controls**; ~~(c)following disembarkation in the territory of a Member State after a search and rescue operation;~~ ~~(d)following relocation in accordance with Article [X] of Regulation (EU) No XXX/XXX [Ex Dublin Regulation].~~ **The decision to apply the border procedure shall be issued in writing and the reasons for the application of the procedure shall be stated in fact and in law.**

<u>Article 41, para 3</u> 3. Member State shall examine an application in a border procedure in the cases referred to in paragraph 1 where the circumstances referred to in Article 40(1), point (c), (f) or (i), apply.	ASGI understands that the amendments proposed by the Commission would imply a generalized application of the border procedure to asylum applications. This would pose serious challenges to several fundamental rights of the applicants, including the right to liberty, and to the general principles according to which asylum seekers shall have access to accommodation and have a right to remain on the territory. **ASGI stresses that the border procedure should be the exception and not the general rule of examining asylum applications. Therefore, ASGI proposes that the border procedure is never mandatory and remains optional for Member States**.	**Article 41, para 3** ***Deleted***
<u>Article 41, para 4</u> 4. Member State may decide not to apply paragraph 3 to nationals or stateless persons who are habitual residents of third countries	ASGI points out that, in circumstances where it appears that there is no reasonable prospect of removal, the aim pursued by the Commission – the speed return of third country nationals who are	4. Member State **~~may decide~~ shall** not **~~to~~** apply paragraph 3 to nationals or stateless persons who are habitual residents of third countries for which that Member State has submitted a notification to

for which that Member State has submitted a notification to the Commission in accordance with Article 25a(3) of Regulation (EC) No810/2009. […]	not entitled to international protection – cannot be achieved. Therefore, it would be pointless to implement a border procedure in such cases.	the Commission in accordance with Article 25a(3) of Regulation (EC) No 810/2009. […]
<u>Article 41, para 5</u> 5. The border procedure may only be applied to unaccompanied minors and to minors below the age of 12 and their family members in the cases referred to in Article 40(5) (b).	ASGI reiterates that the minors – both unaccompanied and accompanied – shall be adequately accommodated in the Member State and not at external borders. For the principle of the best interest of the child to be respected, all children shall be taken care of within a reception system and have access to social services within the territory. They shall never be subjected to detention, including detention at borders. **Italian law (D. Lgs. 142/2015) prohibits the detention of children and provide for their accommodation in a child-friendly environment and namely in reception centers for unaccompanied minors or for minors with families.**	5. The border procedure ~~may only~~ **shall never** be applied to unaccompanied minors and to minors ~~below the age of 12~~ and their family members ~~in the cases referred to in Article 40(5) (b).~~

<u>Article 41, para 6 – para 13</u> 6. Applicants subject to the border procedure shall not be authorised to enter the territory of the Member State, without prejudice to paragraphs 9 and 11. 13. During the examination of applications subject to a border procedure, the applicants shall be kept at or in proximity to the external border or transit zones. Each Member State shall notify to the Commission, [*two months after the date of the application of this Regulation]* at the latest, the locations where the border procedure will be carried out, at the external borders, in the proximity to the external border or transit zones, including when applying paragraph 3 and ensure that the capacity of those locations is sufficient to process the applications covered by that paragraph. Any changes in the identification of the locations at which the border procedure is applied, shall be notified to the Commission two months in advance of the changes taking effect.	ASGI reiterates that the fiction of non-entry is in contrast with the principle of jurisdiction and of States responsibility for protection of fundamental rights. The fiction is therefore meaningful from a legal perspective and irrational from a practical one. ASGI stresses that the application of a border procedure, while it may imply a limitation of applicants' freedom of movement, shall not result in the generalized detention of asylum seekers. Therefore, even in the context of border procedure, applicants shall be accommodated in reception centres and detention shall apply as an exceptional measure. If applicants are accommodated in alternative "locations", which differ from ordinary reception locations, the result would be a situation of *de facto* deprivation of personal liberty or unlawful limitation of freedom. ASGI recalls the scenarios envisaged by Euromedrights	6. Applicants subject to the border procedure ~~shall~~ may not be authorised to ~~enter~~ move freely within the territory of the Member State, without prejudice to paragraphs 9 and 11. **13. Applicants subject to the border procedure shall be accommodated in reception facilities located in proximity of external borders or in transit zones, in accordance with article 7 Directive XXX/XXX/EU [Reception Conditions Directive]. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.** **13.a. (new) Where Member states impose restrictions on freedom of movement, a decision in writing should qualify the measures as either detention or restrictions on freedom of movement, and the reasons for the actual restrictions ordered should be stated in fact and in law.** **13.b. (new) Detention can only be imposed based on the legal grounds set out in article 8 Directive XXX/XXX/EU [Reception Conditions Directive]., as a measure of last resort, and when it proves necessary**

	(https://euromedrights.org/wp-content/uploads/2020/11/How-the-EU-Migration-Pact-disadvantages-both-Italy-and-asylum-seekers.pdf), that show that it would be impossible to maintain all applicants subject to a border procedure in detention. It follows that the only alternative possible is the accommodation within the ordinary reception centres.	**and on the basis of an individual assessment of each case, and if other less coercive alternative measures cannot be applied effectively. Detention shall be implemented only in pre-identified detention facilities, that differ from the reception facilities identified according to article 41, para 13.**
Article 41, para 11 - 12 11. The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. It shall encompass the decision referred to in paragraph 2 and 3 and any decision on an appeal if applicable and shall be completed within 12 weeks from when the application is registered. Following that period, the applicant shall be authorised to enter the Member State's territory except when Article 41a(1) is applicable.	ASGI is of the view that the border procedure, since it is deemed to be exceptional and it can have serious implications on the fundamental rights of applicants, shall be subject to strict time limit. **It proposes to re-introduce the provisions set or in Article 43 of Directive 2013/32/UE and that no derogations – as the ones set out in para 12 – can be applied**. Moreover, when a detention measure is applied in the context of border procedure, the asylum application shall	11. The border procedure shall be as short as possible while at the same time enabling a complete and fair examination of the claims. It shall encompass the decision referred to in paragraph 2 and 3 and any decision on an appeal if applicable and shall be completed within ~~12 weeks~~ **4 weeks** from when the application is registered. Following that period, the applicant shall be authorised to ~~enter~~ **move freely within** the Member State's territory ~~except when Article 41a(1) is applicable~~. **11.a. If the applicant is detained to prevent entry on the territory of the Member State, the exam of the asylum application shall be conducted within 7 days from when the application is registered.** Following

By way of derogation from paragraph 11 of this Article, the applicant shall not be authorised to enter the Member State's territory where: (a) the applicant's right to remain has been revoked in accordance with Article 9(3), point (a); (b) the applicant has no right to remain in accordance with Article 54 and has not requested to be allowed to remain for the purposes of an appeal procedure within the applicable time-limit; (c) the applicant has no right to remain in accordance with Article 54 and a court or tribunal has decided that the applicant is not to be allowed to remain pending the outcome of an appeal procedure.	be examined within 7 days. If this is not the case, applicants shall be released and shall be authorized to enter the Member State's territory. A similar provision would comply with the principle recently stated by the Italian Court of Cassation, according to which an asylum seeker can only be detained for as long as the period for the accelerated exam of the asylum application is in place (in Italy the time limit is of 15 days). If the exam of the asylum application is prolonged over the time-limit set for in the law, the applicant shall be released (see Corte di Cassazione, sez. I civile, n. 2458/2021, analysed here: https://www.asgi.it/wp-content/uploads/2021/04/2021330_cassazione_2458_commento.pdf).	that period, the applicant shall be released and shall be authorised to enter the Member State's territory. **[…]** ~~By way of derogation from paragraph 11 of this Article, the applicant shall not be authorised to enter the Member State's territory where~~: ~~(a) the applicant's right to remain has been revoked in accordance with Article 9(3), point (a);~~ ~~(b) the applicant has no right to remain in accordance with Article 54 and has not requested to be allowed to remain for the purposes of an appeal procedure within the applicable time-limit;~~ ~~(c) the applicant has no right to remain in accordance with Article 54 and a court or tribunal has decided that the applicant is not to be allowed to remain pending the outcome of an appeal procedure~~.
Article 53 **1**. Applicants shall have the right to an effective remedy before a court or tribunal against: (a) a decision rejecting an application as inadmissible;	ASGI stresses that the return procedure shall not be part of the present regulation. Therefore, any provisions referring to the return procedure shall be included in the Return Directive and the appeal against a return decision shall not	**1**. Applicants shall have the right to an effective remedy before a court or tribunal against: (a) a decision rejecting an application as inadmissible; (b) a decision rejecting an application as unfounded in relation to both refugee and subsidiary protection status;

(b) a decision rejecting an application as 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. Return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as decisions referred to in points (a), (b), (c) and (d). […] **4.** Applicants shall be provided with interpretation for the purpose of a hearing before the competent court or tribunal where such a hearing takes place and where appropriate communication cannot otherwise be ensured. […] 7. Member States shall lay down the following time-limits in their national law for applicants	be unified with the appeal on the asylum application. Moreover, ASGI recalls its position on the implicit withdrawal of the asylum application, calling for the amendment of article 39 of the asylum procedure regulation in the sense of erasing the provisions on implicit withdrawal. ASGI is of the view that applicants shall always have the right to be heard in front of the competent court of tribunal. Moreover, interpretation shall be granted to applicants free of charge. As for the time limits to submit an appeal, **ASGI notes that the ordinary limit (of 30 days) shall be the general rule. This is in accordance with the general time limits for appeals in civil procedures**. Therefore, ASGI suggests that a shorter time limit can be envisaged only in exceptional circumstances, and namely	(c) a decision rejecting an application as implicitly withdrawn; (d) a decision withdrawing international protection; **(e) a decision to apply the border procedure;** **(f) a decision to apply, within the border procedure, restrictions to the freedom of movement.** ~~(e) a return decision.~~ ~~Return decisions shall be appealed before the same court or tribunal and within the same judicial proceedings and the same time-limits as decisions referred to in points (a), (b), (c) and (d).~~ […] **4.** Applicants shall be provided with interpretation for the purpose of a hearing before the competent court or tribunal ~~where such a hearing takes place and where appropriate communication cannot otherwise be ensured.~~ […] 7. Member States shall lay down the following time-limits in their national law for applicants to lodge appeals against the decisions referred to in paragraph 1:

to lodge appeals against the decisions referred to in paragraph 1: (a) at least one week in the case of a decision rejecting an application as inadmissible, as implicitly withdrawn or as unfounded if at the time of the decision any of the circumstances listed in Article 40(1) or (5) apply; (b) between a minimum of two weeks and a maximum of two months in all other cases. 8. The time-limits referred to in paragraph 7 shall start to run from the date when the decision of the determining authority is notified to the applicant or his or her representative or legal adviser. The procedure for notification shall be laid down in national law. 9. Member States shall provide for only one level of appeal in relation to a decision taken in the context of the border procedure.	for accelerated and for border procedures. **The time limit cannot, under any circumstances, be shorter than 15 days, provided that the Court of Justice considered (in Samba Diouf case) that the time limit for lodging an appeal against a negative asylum decision *"must be sufficient in practical terms to enable the applicant to prepare and bring an effective action*".** Finally, ASGI founds that the provision laid down in para 9 introduced an unfounded discrimination among asylum seekers and that it would be in contrast with article 3 of the Italian Constitution.	**(a) at least 15 days in procedures regulated by Article 40 and 41;** **(b) at least a month in all other cases.** **If the time limits set out in articles 36, 40 and 41 are not respected by the competent authorities, the appeals can be lodged according to the provision of let. b).** 8. The time-limits referred to in paragraph 7 shall start to run from the date when the decision of the determining authority is notified to the applicant or his or her representative or legal adviser. The procedure for notification shall be laid down in national law. ~~9. Member States shall provide for only one level of appeal in relation to a decision taken in the context of the border procedure.~~
<u>Article 54</u> […] 3. The applicant shall not have the right to remain pursuant to paragraph 2 where the	ASGI stresses that being able to remain in the country is an essential part of the right to effective remedy. Therefore, the suspensive effect shall be granted at least until a final decision on the first appeal is made, irrespectively	3. The applicant shall not have the right to remain pursuant to paragraph 2 where the competent authority has taken one a decision which rejects a **second or further subsequent application as inadmissible pursuant to Article 36, lett.c) or as explicitly withdrawn in accordance with Article 38**.

competent authority has taken one of the following decisions: (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision any of the circumstances listed in Article 40(1) and (5) apply [including safe country of origin] or in the cases subject to the border procedure; (b) a decision which rejects an application as inadmissible pursuant to Article 36(1)(a) [first country of asylum] or (c) [subsequent applications without new elements]; (c) a decision which rejects an application as implicitly withdrawn; (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded; (e) a decision to withdraw international protection in accordance with Article 14(1), points (b), (d) and (e), and Article 20(1), point (b), of Regulation No XXX/XXX (Qualification Regulation). […]	from the procedure followed for the assessment of the asylum application. Indeed, when an asylum application is not assessed on the merits or is examined through an accelerated procedure, the risk of violation of the principle of non-refoulement is higher. It follows that the suspensive effect shall be granted in these circumstances too. Finally, ASGI reiterates that when the competent authorities do not respect the time limits set for in articles 36, 40 and 41, the procedures shall be considered as ordinary ones and therefore the derogation to the right to remain shall not be applicable. This principle has been recently affirmed by the Court of Cassation (see for instance Corte di Cassazione, sez. I civile, n. 7520/2020, Corte di Cassazione, sez. II civile, n. 18518/2021, Corte di Cassazione, sez. I civile, n. 6745/2021).	[…] **4. a (new) In the event that for any reason the procedural deadlines set forth in Articles 36, 40, 41, are not met, the procedure shall be considered ordinary and therefore the provisions of paragraphs 3 and 4 of this Article shall not apply.** 5. For the purpose of paragraph 4, the following conditions shall apply: (a) the applicant shall have a time-limit of at ~~least 5 days~~ **at least 7 days** from the date when the decision is notified to him or her to request to be allowed to remain on the territory pending the outcome of the remedy; (b) the applicant shall be provided with interpretation ~~in the event of~~ **during the** hearing before the competent court or tribunal, ~~where appropriate communication cannot otherwise be ensured~~; (c) the applicant shall be provided, upon request, with free legal assistance and representation in accordance with Article 15(4) and (5); ~~(d) the applicant shall have a right to remain:~~ ~~(i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired;~~

5. For the purpose of paragraph 4, the following conditions shall apply: (a) the applicant shall have a time-limit of at least 5 days from the date when the decision is notified to him or her to request to be allowed to remain on the territory pending the outcome of the remedy; (b) the applicant shall be provided with interpretation in the event of a hearing before the competent court or tribunal, where appropriate communication cannot otherwise be ensured; (c) the applicant shall be provided, upon request, with free legal assistance and representation in accordance with Article 15(4) and (5); (d) the applicant shall have a right to remain: (i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired; (ii) where the applicant has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant shall be allowed remain on the territory.		~~(ii) where the applicant has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant shall be allowed remain on the territory.~~ **6. In all cases where derogations to the right to remain are set, the applicant shall maintain the right to remain:** (i) until the time-limit for requesting a court or tribunal to be allowed to remain has expired; **and** (ii) where the applicant has requested to be allowed to remain within the set time-limit, pending the decision of the court or tribunal on whether or not the applicant shall be allowed remain on the territory. In cases of subsequent applications, by way of derogation from paragraph 6, point (d) of this Article, Member States may provide in national law that the applicant shall not have a right to remain, without prejudice to the respect of the principle of non-refoulement, if the appeal has been made 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, in cases where it is immediately

6. In cases of subsequent applications, by way of derogation from paragraph 6, point (d) of this Article, Member States may provide in national law that the applicant shall not have a right to remain, without prejudice to the respect of the principle of non-refoulement, if the appeal has been made 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, in cases where it is immediately clear to the court that no new elements have been presented in accordance with Article 42(4).		clear to the court that no new elements have been presented in accordance with Article 42(4). **The provision applies without prejudice to the possibility that the court, ex officio or following a request from the applicant, allows the applicant to remain.**