

# **ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612**

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a 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, COM(2020) 612, 23 September 2020

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# SUMMARY OF VIEWS

ECRE submits the following key observations and recommendations on the Commission Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders. The concrete proposals for amendments can be found throughout the text.

A new and welcome element laid down in the Regulation is independent monitoring mechanism (Article 7), which the Member States are to establish. In order for the mechanism to be an effective tool for monitoring fundamental rights at borders it has to cover all border activities, to be managed by independent actors, to lead to investigations and, where relevant, disciplinary measures, and there should be consequences for the non-compliance of Member States.

The screening process laid down in the Screening Regulation raises fundamental rights concerns:

- 1. Delayed access to asylum procedure (Article 3):** the screening at the external borders is to apply to any person apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air, disembarked in the territory of a Member State following a search and rescue operation, or applying for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions set out in Article 6 of the Schengen Borders Code. The screening is to apply to persons regardless of whether or not they have applied for international protection. Hence, except for (rare) cases where an asylum seeker fulfils the entry conditions or presents him/herself to asylum authorities within the territory, all asylum seekers will need to pass through the screening process before having access to an asylum procedure. With the delayed access to asylum procedure, the entitlements and protections guaranteed to asylum seekers under the CEAS, such as reception condition, restrictions on detention, procedural safeguards, may not be afforded to the person concerned. ECRE argues that to avoid any ambiguity, it should be restated that as soon as the person expresses his/her wish to receive international protection, it should be guaranteed that he/she is entitled to rights under the Reception Conditions Directive.
- 2. Risk of racial profiling (Article 5):** Member States should apply screening to third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner. The provisions on in-country screening raise three sets of concerns. First, the terms “found” and “apprehended” are used interchangeably in the text, and the latter suggests proactive measures on the part of authorities and may encourage discriminatory law enforcement activities. Second, how will the person be able to prove upon apprehension that he/she crossed external borders in an authorised manner? Third, there is a risk that this provision will be applied to people who present themselves to the authorities to apply for international protection, after having evaded border checks. How will their situation be differentiated from the one of a person applying for asylum following apprehension? The screening within the territory leads to referral to either return procedure or in-country asylum procedure, so the screening unnecessarily delays the start of the procedure. In light of these concerns, the applicability of the screening procedure within the territory should be abandoned.
- 3. Systematic detention (Articles 4 and 6(1)):** the screening at the external border is to take place at locations situated at or in proximity to the external border and during the screening at the external border people would not be authorised to enter the territory of a Member State. A combined reading of these provisions implies that the persons undergoing screening will be, as a rule, deprived of their liberty, although the operative part of the Regulation is silent on that point. Recital 12 provides that the measures preventing entry *may* include detention, subject to the national law regulating that matter. The reference to domestic law in Recital 12 is misplaced: since the screening obligation stems from EU law, the modalities of the resulting detention cannot be left to the discretion of the domestic legislator. There is a strong risk that the Member States will simply not qualify

the containment measure required to implement the Regulation as detention, leading to de facto detention with detainees deprived of the fundamental safeguards. ECRE is opposed to the use of detention for asylum and migration purposes except for in the very narrow circumstances in which it is allowed by international and EU law; where it is used it must be a measure of last resort and it must be formally defined as such in order that the safeguards apply.

- 4. Risk of breaches of data protection and privacy rights (Articles 10, 11, and 12):** the Regulation provides for access to EU databases to the authorities in charge of the screening for the purpose of identity and security checks. Expansion of the purposes and uses of EU information systems when interoperability is in place, as well as expanding the range of actors granted access, aggravates long-standing concerns regarding the erosion of the purpose limitation principle and overall the protection of the rights to respect for private life and for the protection of personal data as enshrined in Article 7 and 8 of the EU Charter.
- 5. Absence of a written decision liable to appeal (Articles 13 and 14):** upon completion of the screening process, the authorities in charge fill out a debriefing form and refer the person to a procedure (asylum, return, or refusal of entry). Despite its innocuous title, the debriefing form is the only document issued at the end of the screening and it contains information which may be crucial in both the referral and the procedure that follows. It functions in practice as an administrative act and the information that it contains may affect the interests of the person concerned. Hence, the person should be afforded the rights of defence, including the right to be heard before the debriefing form is filled and referral decided, and the right to access the debriefing form and obtain reasons for the decision. ECRE argues that the referral should be based on a written decision to which the debriefing form is appended. There should be an appeal procedure open to people subject to the screening who wish to contest the decision on referral.
- 6. Risk of refusal of entry without a procedure (Article 14(1)):** besides frequently-quoted return and asylum procedures, an outcome of the screening is also a refusal of entry. The Regulation does not emphasise the *procedure* of refusal of entry as it does for return and asylum and does not specify that entry may be refused *in or as a result of a procedure respecting* Article 14 of the Schengen Borders Code (SBC). The risk is that at the end of the screening process, the person would merely be issued a debriefing form and be directly refused entry without even the safeguards laid down in the SBC. Under Article 14(2) of the SBC, entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision should be given by means of a standard form, as appended to the SBC, filled in by the authority empowered by national law to refuse entry. The completed standard form should be handed to the person concerned, who should acknowledge receipt of the decision to refuse entry by means of that form. Under Article 14(3) of the SBC people refused entry have the right to appeal. ECRE strongly advises that the refusal of entry fall within the scope of existing provisions in this area (which in any case remain part of the legal framework).

In terms of effectiveness, the purpose of the screening is the strengthening of the control of persons who are about to enter the Schengen area and their referral to an appropriate procedure. To this end, the object of the screening is the identification of the persons concerned, verification using the relevant databases that the person does not pose an internal security threat, and assessing health and specific protection needs. In that regard, there does not seem to be much added value of the Regulation as most of these tasks are already carried out by border guards under the Schengen Borders Code or asylum authorities under the Asylum Procedures Directive. The Regulation does not explain how this new procedure would relate to current procedures and the tasks arising of border guards and asylum authorities. To expand the competences and protection mandate of border guards, it would be easier to amend the Schengen Borders Code. These concerns are compounded by the fact that the screening procedure will involve considerable resources from the EU budget – over EUR 400 million for the period 2021-2027. Member States will need to invest in infrastructure and personnel. It is noteworthy that the proposal was not accompanied by an impact assessment.

Given that human rights concerns regarding the Screening Regulation, in particular quasi systematic detention, outweigh its beneficial features, except for the border monitoring mechanism, ECRE does not support the Screening Regulation. If it is to be adopted, then at least the safeguards and conditions described here should be added.

# INTRODUCTION

In September 2020, the European Commission presented a New Pact on Migration and Asylum, involving a comprehensive approach to external borders, asylum and return systems, the Schengen area of free movement and the external dimension. The Communication on a New Pact on Migration and Asylum was accompanied by a set of five legislative proposals, including Proposal for a Regulation of the European Parliament and of the Council introducing a 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 (hereafter the Screening Regulation).<sup>1</sup>

The other legislative proposals are the following: amended proposal for a Regulation establishing a common procedure for international protection in the Union (hereafter Asylum Procedures Regulation),<sup>2</sup> proposal for Regulation on asylum and migration management (which is supposed to replace the Dublin system and lay down the framework for solidarity),<sup>3</sup> amended proposal for a Regulation on the establishment of “Eurodac,”<sup>4</sup> and proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum (hereafter Crisis instrument).<sup>5</sup>

The proposals on the screening and the border procedure are based on the use of the fiction of non-entry, which may undermine the right to asylum under Article 18 of the EU Charter. ECRE recommends that the legal fiction of non-entry is removed from the proposals, and that applicants are legally considered to have entered the territory of the EU Member States. This is the most straightforward way to ensure that the legal situation, and rights and obligations arising, matches the actual physical situation of the person concerned, namely being on the territory of the EU.

The Screening Regulation introduces a screening procedure which would be obligatory in a wide-range of situations at the external borders. Member States will be bound to apply it to any person apprehended at unauthorised external border crossing, disembarked after a search and rescue operation, or seeking international protection at external borders. It will thus be mandatory for practically any third-country national without authorisation to enter the EU, irrespectively of whether the person seeks international protection. Member States will be also bound to apply this procedure with respect to persons found within the territory who cannot prove that they have crossed external borders in a documented manner. The procedure will consist of identity, health, vulnerability, and security check and will lead to a referral to asylum, return, or refusal of entry procedure. As such, the procedure does not have much added value, as these activities are already carried out by the border guards under the Schengen Borders Code or asylum authorities under the Asylum Procedure Directive. Although, the Commission claimed “No more Morias” when launching the Pact, it is unclear how the screening procedure will avoid the procedural and reception/detention-related difficulties experienced in the Greek and Italian hotspots. At the same time, it will involve resources from the EU (over 400 million for the period 2021-2027) and the Member States.

Not only can the effectiveness of the screening procedures be questioned, but it has the potential to violate the fundamental rights of the persons subject to it. First, the procedure will likely result in systematic detention at the border, which the Regulation omits to note. Second, the Regulation does not foresee any appeal rights for the persons concerned, as these are supposed to be guaranteed in

1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN>

2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN>; see ECRE Comments on this proposal.

3 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291110635&uri=COM%3A2020%3A610%3AFIN>. ECRE comments on this proposal are forthcoming. See ECRE comments on the Dublin IV, <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>

4 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295417610&uri=COM%3A2020%3A614%3AFIN>. ECRE comments on this proposal are forthcoming. See also ECRE comments on the previous proposal, <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>

5 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN>

the subsequent procedure to which the person will be referred. The document issued at the end of the screening procedure is called a debriefing form and referral to asylum, return, or refusal of entry procedure is not based on any written decision. On a positive note, the proposal lays down a border monitoring mechanism, which is a long-awaited measure given reported cases of push-backs and violations at the borders.

Given that human rights concerns regarding the Screening Regulation, in particular quasi systematic detention, outweigh its beneficial features, except for border monitoring mechanism, ECRE does not support the Screening Regulation. If it is to be adopted, then ECRE recommends that the safeguards and conditions described here should be added.

# ANALYSIS OF KEY PROVISIONS

## 1. OBJECTIVE OF THE SCREENING (ARTICLE 1)

As Article 1 explains, the purpose of the screening is the strengthening of the control of persons who are about to enter the Schengen area and their referral to an appropriate procedure. To this end, the objective of the screening is the identification of the persons concerned and verification using the relevant databases that the person does not pose an internal security threat. The screening should also include health checks, where appropriate, identify persons vulnerable and in the need of health care, and those posing a threat to public health. These checks should contribute to referring people to the appropriate procedure.

A first point of reference is the procedures that are currently applicable in the context of external border management. On the one hand, the Screening Regulation appears to offer more safeguards to people apprehended at the external borders than the Schengen Border Code (SBC or “the Code”), as the health and vulnerability assessments are more comprehensive than under the Code. In addition, countries carrying out push-backs, which are in any case incompatible with the SBC, or implementing border procedures which are not clearly regulated in law, would be explicitly obliged under the Screening Regulation to identify the person and refer him/her to an appropriate procedure. However, one of these procedures to follow the screening under Screening Regulation is refusal of entry. On the other hand, the Screening Regulation offers fewer safeguards to people who apply for asylum at the border than the Asylum Procedures Directive (including regarding information provision and health and vulnerability checks) and it delays the registration of asylum application.

Second, one could weigh up the additional rights and risks generated by the Regulation. It introduces a border monitoring mechanism which is a welcome novelty. On the other hand, the screening procedure will inexorably lead to detention. While screening focusing on the identification of vulnerabilities and allowing adequate referral, carried out in adequate reception conditions, is a protection measure, the current language of the Regulation is not geared at ensuring this type of screening. Given the human rights concerns, as discussed below, the negative implications of the Screening Regulation currently outweigh its beneficial elements. Options include withdrawing or at least amending the Regulation; proposing a screening process with different objectives and adequate safeguards or amending the Schengen Borders Code.

## 2. PERSONAL SCOPE OF THE SCREENING

The mandatory screening procedure is to be applied in two sets of circumstances: at the external border (2.1) and within the territory of a Member State (2.2).<sup>6</sup>

### 2.1 Screening at the external border (Article 3)

According to Article 3(1)-(2) of the Screening Regulation, the screening at the external borders of the Member States is supposed to apply to all third-country nationals who 1) are apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air (Article 3(1)(a)),<sup>7</sup> 2) are disembarked in the territory of a Member State following a search and rescue operation

<sup>6</sup> Given that those at the border are also on the territory according to EU and international law, ECRE uses the expression “already within the territory” to refer to the second category captured by the Regulation as “within” “in” or “on” the territory can apply to both sets of circumstances.

<sup>7</sup> According to Article 3(1)(a), the screening applies to this category of persons except for people for whom the Member States are not required to take the biometric data under Articles 14(1) and 14(3) of the Eurodac Regulation for reasons other than their age. Thus, by virtue of the aforementioned provisions of the Eurodac Regulation, people excluded from the screening are those who are turned back or who are kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn them back if this period is of maximum 72 hours.



(Article 3(1)(b)), or 3) apply for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions set out in Article 6 of the Schengen Borders Code (Article 3(2)).

As Article 3(1) clarifies, in the first two scenarios, the screening should apply to the concerned persons regardless of whether they have applied for international protection. Further, Article 6(3) confirms, albeit in a convoluted manner, that the screening applies to people seeking international protection, who do not fulfil conditions of entry under the Schengen Borders Code.<sup>8</sup> These provisions imply that, except for (rare) cases where the asylum seeker fulfils the entry conditions or presents him/herself to asylum authorities within the territory,<sup>9</sup> all asylum seekers will need to pass through the screening procedure before having access to asylum procedure.

As discussed in detail below,<sup>10</sup> with the delayed access to asylum procedure, the entitlements and protections guaranteed to asylum seekers under the CEAS, such as reception condition, restrictions on detention, procedural safeguards, risk being postponed in practice. This raises questions of adequacy in light of the right to asylum guaranteed under Article 18 of the EU Charter, as the Regulation will result in (almost) all people seeking asylum in the EU being temporary deprived of specific rights and protections. However, the Screening Regulation does not set aside the applicability of the Reception Conditions Directive. Under Article 17(1) of the Directive, Member States should ensure that material reception conditions are available to applicants when they make their application for international protection. ECRE argues that to avoid any ambiguity, as soon as the person expresses his or her wish to receive international protection, he or she should be entitled to rights under the Reception Conditions Directive.

ECRE recommends the following amendments:

New Article 3(4)

*As per Article 17 of the Reception Conditions Directive, when the third-country national expresses his or her wish to receive international protection, he or she should be entitled to rights and entitlements spelled out under the Reception Conditions Directive.*

## 2.2 Screening within the territory (Article 5)

Besides screening at external borders, the Regulation prescribes also the screening procedure within the territory. Under Article 5, Member States should apply screening to third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner. The Explanatory Memorandum has slightly different tone. It provides that states should apply screening with regard to third-country nationals apprehended within the territory, where there are indications that they eluded border checks at the external border on entry.<sup>11</sup>

The provisions on in-country screening raise three sets of concerns. First, the terms “found” and “apprehended” do not seem to be exact synonyms. The latter term, used much more often, indicates proactive measures on the part of authorities and may encourage discriminatory policing. Secondly, what criteria will be used by authorities to make an assessment on whether the apprehended persons should be subject to screening? According to the Commission, screening should not be applied towards overstayers.<sup>12</sup>

8 Under Article 3(3), the screening is without prejudice to the application of Article 6(5) of Schengen Borders Code, which lists a few exceptions to entry conditions enumerated in Article 6(1) of the Schengen Borders Codes, except the situation where the person’s entry is authorised by a Member State under Article 6(5)(c) because the person is seeking international protection.

9 Yet, exclusion of in-country asylum seekers from the screening is not entirely certain, see Section 2.2.

10 See the discussion on the referral to asylum procedure in Section 6.2.

11 Explanatory Memorandum, p. 14.

12 Explanatory Memorandum, p. 6.

How will the person be able to prove upon apprehension that he/she had crossed external borders in an authorised manner, especially if that had occurred long time beforehand? According to the Explanatory Memorandum, the screening in such cases should be triggered by the absence of an entry stamp in a travel document or the absence of a travel document altogether, hence, by inability to make a credible case that they crossed an external border in a regular manner. This implies that the person would need to rebut the presumption of his/her unauthorised border crossing.

Thirdly, the term “found,” as used in Article 5, raises distinct concerns. There is a risk that this provision will be applied to people who present themselves to the authorities to apply for international protection, after having evaded border checks. How will their situation be differentiated from the one of a person applying for asylum following apprehension? In practice, it may not be possible to discern whether the person has been first found by the authorities or found authorities to apply for asylum, which will lead to lack of clarity about the rules and inconsistent application of the provisions of the Regulation.

As discussed below, the screening within the territory leads to referral to either return procedure or in-county asylum procedure. There is no option of channelling the person to border asylum procedure or refusal of entry.<sup>13</sup> Hence, the screening unnecessarily delays the begin of the relevant procedure. In light of wide-ranging concerns, the applicability of the screening procedure within the territory should be abandoned.

ECRE recommends the following amendments:

#### Article 1

[...]

~~The screening shall also be carried out within the territory of the Member States where there is no indication that third-country nationals have been subject to controls at external borders.~~

#### Article 5

~~Member States shall apply the screening to third-country nationals found within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner.~~

### 3. PROCEDURE

The key features of the screening procedure which warrant a discussion include the length (3.1), place where it is carried out (3.2), and authorities in charge of it (3.3).

#### 3.1 Length (Articles 6(3), 6(4), and 6(5), Article 14(7), and Recital 19)

Under Article 6(3), screening at the external border<sup>14</sup> should be carried out without delay and should in any case be completed within 5 days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing point. It raises the question whether this time-period, which may fall on the weekend, would be sufficient to carry out the four key elements of the screening (identification, security checks, health checks, and taking biometric data), fill out the debriefing form, and refer the person to the relevant procedure. In particular, health and vulnerability assessment require more time and should continue in the procedure that follows, after the referral.<sup>15</sup> The Regulation does not explicitly say what happens if the screening is not concluded within 5 days. The application of the hotspots approach in Greece and Italy showed that

<sup>13</sup> See the discussion on referral in Section 6.2.

<sup>14</sup> For the categories of persons liable to screening at the external border, see Section 2.1.

<sup>15</sup> See Sections 4.1 and 6.1.

the procedure tends to be much longer.<sup>16</sup> Article 6(3) should unequivocally provide that upon the expiry of the 5-day period, the person is to be referred without any delay to the relevant procedure,<sup>17</sup> even if the elements of the screening have not been completed.

ECRE recommends the following amendments:

#### Article 6(3)

In the cases referred to in Article 3, the screening shall be carried out without delay and shall in any case be completed within 5 days from the apprehension in the external border area, the disembarkation in the territory of the Member State concerned or the presentation at the border crossing point. **Upon the expiry of the 5-day period, the person is to be referred without further delay to the relevant procedure pursuant to Article 14, even if the screening has not been completed, without prejudice to medical and vulnerability checks [...]**

Some hints about the time-lines can be found in Article 14(7). As regards the screening at the external border, it addresses the situation of people undergoing screening following apprehension or disembarkation and provides that when those persons are referred to an appropriate asylum or return procedure, the screening ends. Where not all the checks have been completed within the deadlines referred to in Article 6(3), the screening should nevertheless end and the person should be referred to a relevant procedure. It is not clear why Article 14(7) does not cover the third category of people liable to the screening, i.e. those who apply for asylum at the external borders.<sup>18</sup> By excluding this category, the Regulation implies that the screening applicable to them does not need to end within 5 days, which may mean that the screening and the asylum procedure run in parallel. Article 14(7) thus weakens the language of Article 6(3) and introduces a lack of clarity in the procedure. For the sake of clarity and equal treatment, Article 14(7) should refer to all categories of persons liable to the screening.

ECRE recommends the following amendments:

#### Article 14(7)

Where the third country nationals referred to in ~~Article(s) 3(1) and Article 5~~ **subject to the screening procedure** are referred to an appropriate procedure regarding asylum or return, the screening ends. Where not all the checks have been completed within the deadlines referred to in Article 6(3) and (5), the screening shall nevertheless end with regard to that person, who shall be referred to a relevant procedure.

The Regulation allows states to extend the deadline for completing the screening at external borders. Under Article 6(3), in exceptional circumstances, where a disproportionate number of third-country nationals needs to be subject to the screening at the same time, making it impossible in practice to conclude the screening within the 5-day time-limit, the period of 5 days may be extended by a maximum of an additional 5 days. Under Recital 19, any extension of the 5 days' time-limit should be reserved for exceptional situations at the external borders, where the capacities of the Member State to handle screenings are exceeded for reasons beyond its control such as crisis situations referred to in Article 1 of the proposal for the Crisis Instrument. Arguably, in crisis situation, the screening phase should not apply at all and people should just be referred to the appropriate procedure and continue the screening checks there. Extending the length of screening harms the people subjected to it (since it doubles detention time typically accompanying screening<sup>19</sup>) and does not alleviate pressure on a Member State.

16 Dutch Council for Refugees, Greek Council for Refugees, CIR, ECRE, ProAsyl, The implementation of the hotspots in Italy and Greece: A study, 2016, <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>; European Court of Auditors, EU response to the refugee crisis: the "hotspot" approach, 2017, <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41222>. Indeed, given distress the apprehended or disembarked people may be in, the screening interviews may be delayed.

17 On the referral, see Section 6.2.

18 The categories of persons covered by the screening at the external border are discussed in Section 2.2.

19 See Section 3.2.

ECRE recommends the following amendments:

#### Article 6(3)

[...] In exceptional circumstances, where a disproportionate number of third-country nationals needs to be subject to the screening at the same time, making it impossible in practice to conclude the screening within that time-limit, ~~the period of 5 days may be extended by a maximum of an additional 5 days~~ **screening should not be applied and the third-country nationals should be directly referred to the asylum procedure.**

If this proposition is not pursued, amendments to the current draft provisions are necessary to avoid arbitrary doubling the period of the screening and resulting detention.<sup>20</sup> Article 1(2) of the proposal for the Crisis Instrument defines a situation of crisis as: (a) an exceptional situation of mass influx of persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning the CEAS or the Common Framework as set out in the proposal for the Regulation on Asylum and Migration Management<sup>21</sup> or (b) an imminent risk of such a situation. Recital 19 of the Screening Regulation appears to indicate that the "crisis situations" under the proposal for the crisis instrument are not the only exceptional situations where the Member States may extend the period for the screening as it uses the term "such as." While ECRE does not agree with the extension of the deadline, if it is to be included, for the sake of consistency with the other legislative proposals accompanying the Pact, "crisis situations" for the purposes of the crisis instrument should be the only instances where a Member State may derogate from the 5-day time-line.

Article 6(4) provides that Member States should notify the Commission without delay about these exceptional circumstances and should inform the Commission as soon as the reasons for extending the screening period have ceased to exist. That the obligation on Member States is merely "notification" leave considerable discretion to the Member States. Arguably, the Member States should have the same duties as in "crisis situations," hence, pursuant to Article 3(1) of the proposal for the crisis instrument, they should submit a reasoned request to the Commission.

ECRE recommends the following amendments:

#### Recital 19

[...] Any extension of the 5 days' time limit should be reserved for ~~exceptional situations at the external borders, where the capacities of the Member State to handle screenings are exceeded for reasons beyond its control such as~~ crisis situations referred to in Article 1 of Regulation XXX/XXX [crisis proposal].

#### Article 6(4)

Member States shall ***formally*** notify the Commission without delay about the exceptional circumstances referred to in paragraph 3 ***and shall submit a reasoned request to the Commission for the purpose of extending the time-lines of the screening. The information shall include the number of people liable to screening which the Member State is not able to process and the steps undertaken to alleviate this situation.*** They shall also inform the Commission as soon as the reasons for extending the screening period have ceased to exist.

<sup>20</sup> See Section 3.2.

<sup>21</sup> See ECRE Comments on the Proposal for the Regulation on Asylum and Migration Management (forthcoming).

## 3.2 Place (Articles 4, 6(1), and 6(2), and Recital 12)

According to Article 6(1), the screening at the external border should be conducted at locations situated at or in proximity to the external borders. As regards the first option, it is sensible to expect that solely official border crossing points can fulfil the objectives of the screening laid down in the Regulation. Arguably only official border crossing points can be staffed with adequate personnel<sup>22</sup> and have infrastructure to carry out medical examination and identification and security checks, including access to the relevant databases.<sup>23</sup> To prevent a risk that upon apprehension, disembarkation, or asylum application, people are initially kept in unofficial locations for extended periods of time, awaiting transfer to locations where screening procedure can continue, Article 6(1) should require that the procedure is to be carried out only in centres at official border crossing points.

The second option under Article 6(1) to conduct screening “in proximity” to the external borders, should be interpreted narrowly. Under Article 4, persons undergoing screening are not authorised to enter the territory of the Member State. Since borders are part of the states’ territory, this construct is commonly referred to as a “fiction of non-entry”. States typically rely on this legal fiction to attempt to deny jurisdiction or otherwise deny the applicability of safeguards for the concerned people. This approach underlies the Regulation as it provides for more limited safeguards than other CEAS instruments and is silent on detention, which will typically accompany the screening procedure, as discussed below. Yet, in practice, notwithstanding states’ claims relying on the fiction of non-entry, the border context does not release states from their human rights obligations under international law.<sup>24</sup>

ECRE recommends that the legal fiction of non-entry is removed from the proposal, and that applicants are legally considered to have entered the territory of the EU Member States. This is the most straightforward way to ensure that the legal situation, and rights and obligations arising, matches the actual physical situation of the person concerned, namely being on the territory of the EU. In any case, in order to limit the further intrusion of this misguided construct, the possibility of carrying out the screening “in proximity” to the external borders should be restricted in the Regulation. It should only include cases where a Member State does not have adequate facilities at the border crossing point and is obliged to transfer the person to another location – which should be geographically close to the border and has been identified as an official site for the screening – in order to fulfil its obligations under this Regulation.

Even if a person will not be subject to detention, as discussed below, the screening at external borders implies that the person will be subject to some form of a restriction on freedom of movement. Appealing conditions in Greek hotspots could be a lesson learned for EU decision-makers regarding risks of widespread rights violation in overcrowded reception centres at the EU external borders.<sup>25</sup> Hence, facilities where the people would be placed during the screening should provide for adequate safeguards and material conditions.

ECRE recommends the following amendments:

### Article 4

#### Authorisation to enter the territory of a Member State

~~1. During the screening, the persons referred to in Article 3, paragraphs 1 and 2 shall not be authorised to enter the territory of a Member State.~~

~~2. Where it becomes apparent during the screening that the third-country national concerned fulfils the~~

<sup>22</sup> The personnel in charge of the screening is discussed in Section 3.3.

<sup>23</sup> These elements of the screening are discussed in Section 4.

<sup>24</sup> Persons who are not present on the territory of the State fall within the State’s jurisdiction, in a number of extraterritorial situations. “A State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.” [Ilaşcu and Others v. Moldova and Russia App no 48787/99 (ECtHR, 8 July 2004), para 317.] These include, among others, where persons are present in an international transit zone (Amuur v. France App no 19776/92 (ECtHR, 25 June 1996).)

<sup>25</sup> Greek Council for Refugees, AIDA country report: Greece, 2020, <https://www.asylumineurope.org/reports/country/greece>.



entry conditions set out in Article 6 of Regulation (EU) 2016/399, the screening shall be discontinued and the third-country national concerned shall be authorised to enter the territory, without prejudice to the application of penalties as referred to in Article 5(3) of that Regulation:

#### Article 6(1)

In the cases referred to in Article 3, the screening shall be conducted at locations situated at ***in adequate facilities at official border crossing points or, exceptionally, at other official adequate facilities situated*** in ***close*** proximity to the external borders ***when transfer there is necessary in order for the Member State to meet its obligations under this Regulation. The facilities should offer adequate conditions and safeguards.***

As discussed above, according to Article 4, during the screening at the external border people are not to be authorised to enter the territory of a Member State. Under Recital 12, the Member States should apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening. A combined reading of these provisions implies that the persons undergoing screening will be, as a rule, deprived of their liberty. It is hardly conceivable that a measure to contain the person at or close to the border and to prevent the person's entry to the territory during 5 days, extendable to 10 days, would not qualify as detention. In the joined cases of *FMS and Others*, the CJEU explicitly qualified keeping people at the border or transit zones as detention. The Court held that the obligation for a person to remain permanently in a transit area whose perimeter is restricted and closed, within which the person's movements are limited and monitored, and which the person cannot legally leave voluntarily, in any direction whatsoever, is "detention" within the meaning of the Return Directive and Reception Conditions Directive. To reach this conclusion, the Court relied on the definition of detention in Article 2(h) of the Reception Conditions Directive, according to which "detention" refers to confinement of an applicant within a particular place, where the person is deprived of his/her freedom of movement.<sup>26</sup>

The operational part of the Regulation is silent on detention.<sup>27</sup> Only Recital 12 provides that in individual cases, where required, the measures preventing entry *may* include detention, subject to the national law regulating that matter. Although Recital 12 refers to individual assessment and uses a "may" clause rather than a "shall" clause, the obligation to carry out screening on every third-country national without authorisation of entry, could be read as creating an obligation to detain these people, at least this is akin to an obligation derived purely from text. Even if this is not read into the text of the Regulation, the situation at the borders and research on the use of border procedures, shows that Member States almost always use detention for almost all applicants when a border procedure is applied.<sup>28</sup> That may be formal detention or de facto detention, defined as a situation of detention but one that is not officially classified as such, meaning that the safeguards required when detention is used tend to be absent. There is increasing recourse to de facto detention across Europe. For these two reasons, there is a strong risk that the Regulation if adopted without amendment will bring about the automatic use of detention at the borders, be that formal or de facto detention.

The silence of the operational part of the Regulation demonstrates a refusal on the part of the legislator to acknowledge that the screening procedure will in most cases require detention of the person concerned. The reference to domestic law in Recital 12 is misplaced:<sup>29</sup> since the screening obligation stems from EU law, the modalities of the resulting detention cannot be left to the discretion of the domestic legislator. This opens up the possibility for Member States to provide for new grounds for detention, as showed in the case of discriminatory public health justification for systematic detention in Malta.<sup>30</sup>

26 CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, (May 14, 2020), para. 223-225 and 231.

27 In operational part, detention is referred to en passant, in relation to the monitoring mechanism, see Section 7.

28 EPRS, Asylum procedures at the border: European Implementation Assessment, 2020, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_STU\(2020\)654201](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)654201)

29 In the same line, the Explanatory Memorandum provides that the determination in which situations the screening requires detention and the modalities thereof are left to national law, see, p. 9.

30 Neil Falzon, Op-ed: Detention in Malta Might be the Norm but it is no Solution, ECRE, 27 November 2020, <https://www.ecre.org/op-ed-detention-in-malta-might-be-the-norm-but-it-is-no-solution/>

If the person makes an asylum application, he or she is subject to the limitation on the use of detention in the Reception Conditions Directive. Another risk is that Member States will simply not qualify the containment measure required to implement the Regulation as detention but rather call it “accommodation” or “reception”, leading to the worst case scenario from a fundamental rights perspective, de facto detention with detainees deprived of the fundamental safeguards.<sup>31</sup>

ECRE is opposed to the use of detention for asylum and migration purposes. If states resort to detention, this must be limited to the very narrow circumstances in which it is allowed by international and EU law; where it is used it must be a measure of last resort and it must be formally defined as such in order that the safeguards apply. Under Article 8(2) of the Reception Conditions Directive, Member States may detain an asylum applicant when it proves necessary and bases of an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively. Similarly, under Article 15(1) of the Return Directive, Member States may only detain a person subject of return procedure, unless other sufficient but less coercive measures can be applied effectively in a specific case. Under Article 9 of the Reception Conditions Directive and Article 15 of the Return Directive, detention under both regimes should be based on a written decision, subject to judicial review.<sup>32</sup> Hence, clear and foreseeable provisions should be inserted in Article 6 of the Regulation to align detention accompanying screening with international and EU law requirements. Such detention should comply with the requirements of lawfulness, necessity, proportionality, be subject to procedures guarantees, and be carried out in adequate facilities.

ECRE recommends the following amendments:

#### Article 6(1)

**[...] If the measure amounts to detention, the facility shall offer adequate conditions and regime of detention, which respect Article 10 and Recital 18 of the Reception Conditions Directive.**

#### **New Article 6(6)**

**When it proves necessary and on the basis of an individual assessment of each case, Member States may detain a person undergoing screening who has applied for international protection, if other less coercive alternative measures cannot be applied effectively only on the grounds spelled out in Article 8(3) of the Reception Conditions Directive. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain a person undergoing screening who has not applied for international protection, if other less coercive alternative measures cannot be applied effectively to prevent a person’s unauthorised entry to the territory.**

**Detention should be based on a detention order, translated to the person to a language the person can understand. The person should have access to appeal procedure and legal advice. Requirements concerning detention decision and appeal shall comply with Article 9 of the Reception Conditions Directive and Article 15 of the Return Directive. Children and vulnerable persons should not be subject to detention.**

Pursuant to Article 6(2), in cases of screening already within the territory under Article 5, the screening should be conducted at any appropriate location within the territory of a Member States. Under Article 6(3), such screening can last up to 3 days. Depending on the individual circumstances of the case, such

31 For instance, under the Greece’s law L 4636/2019, people are not allowed to leave the hotspots during the registration and identification procedures which can last up to 29 days, yet this measure is called “restriction on movement,” see also AIDA report on Greece, [https://www.asylumineurope.org/sites/default/files/report-download/aida\\_gr\\_2019update.pdf](https://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2019update.pdf).

32 The CJEU confirmed in the FMS ruling that both the Reception Conditions Directive and Return Directive preclude detention without the necessity and proportionality of that measure having first been examined and without a detention decision having been taken (para. 259 and 275) and without judicial review of the lawfulness of that measures (para. 261 and 277).

measure may amount to detention. Since the person is under the control and authority of law enforcement officials, the location of the person's detention should be required to be an officially recognised facility.

If Article 5 is not deleted as suggested above,<sup>33</sup> ECRE recommends the following amendments:

Article 6(2)

In the cases referred to in Article 5, the screening shall be conducted at any an appropriate and officially recognised location within the territory of a Member State. If the measure amounts to detention, the facility shall offer adequate conditions and regime of detention, which respect Article 10 and Recital 18 of the Reception Conditions Directive.

### 3.3 Authorities and EU agencies (Article 6(7))

According to Article 6(7), Member States should designate competent authorities to carry out the screening. They should deploy appropriate staff and sufficient resources to carry out the screening in an efficient way. This obligation implies resources on part of the Member States, which again raises question about cost-efficiency of the screening procedure. Regarding the competencies of the authorities in charge of screening, they should be able to provide information to the applicant, as specified in Article 8.<sup>34</sup> ECRE argues that since the authorities in charge of screening are responsible for the referral,<sup>35</sup> they should be trained in international human rights and refugee law and the CEAS. They should be trained in recognising the person's need for international protection even the person does not formally apply and should be able to adequately inform the person about the possibility to apply for international protection.<sup>36</sup> The authorities would need to interview the person regarding the first country of asylum and safe third country, so they should be aware of various protection regimes in third countries and barriers to accessing protection there, for instance Turkey. They should thus also have knowledge of the UNHCR and UNRWA mandates. Given these requirements incumbent on the authorities in charge of the screening, ECRE argues that asylum authorities should receive this task.<sup>37</sup>

Article 6(7) further lays down that Member States should designate qualified medical staff to carry out the health check provided for in Article 9 and involve, where appropriate, national child protection authorities and national anti-trafficking rapporteurs. ECRE argues that these two categories should always be involved and, in order to adequately perform their tasks under Articles 9(2)-(3),<sup>38</sup> the authorities should be adequately trained in identification of vulnerable people and referral to adequate procedure and support.

ECRE recommends the following amendments:

Article 6(7)

Member States shall designate competent authorities to carry out the screening. They shall deploy appropriate staff and sufficient resources to carry out the screening in an efficient way. The authorities should be adequately trained in international human rights and refugee law and CEAS to be able to recognise the need for international protection even if the person does not submit an official asylum application. The authorities should have also adequate knowledge of protection regimes in third countries to be able to adequately assess the applicability of the concepts of first country of asylum and safe third country. Asylum authorities should be assigned this mandate.

33 See Section 2.2.

34 See Section 5.

35 This can be implied from Article 6(6).

36 This is also provided for in Article 8(1) of the APD; CJEU, Case C-36/20 VL v Ministerio Fiscal, 25 June 2020, para 78.

37 The question of authorities is further discussed in Section 6.2.

38 See Section 4.1.



Member States shall designate qualified medical staff to carry out the health check provided for in Article 9. National child protection authorities and national anti-trafficking rapporteurs shall also be involved; where appropriate. **To adequately perform their tasks under Articles 9(2)-(3), the authorities should be adequately trained to properly identify vulnerable people as per Article 9(2) and refer them to specific procedure and support.**

Article 6(7) further provides that the competent authorities in charge of the screening may be assisted or supported by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Asylum (EASO) within the limits of their mandates. This is a modest and vague proposition given the extent of the current involvement of both agencies in identification, admissibility procedures, registration of asylum claims and even examination of claims in the hotspots. Although executive powers formally rest with the host Member State, both agencies have an impact on individual decision-making processes, which creates an accountability gap.<sup>39</sup> With the additional powers granted to Frontex in the 2019 Regulation<sup>40</sup> and proposed for the future EU Agency for Asylum (EUAA),<sup>41</sup> the division of competencies between national authorities and the EU agencies will be even more difficult to discern. This concern is aggravated by the statement in the Explanatory Memorandum to the Screening Regulation that the agencies may accompany and support the competent authorities in *all* their tasks related to the screening.<sup>42</sup> The term “all” raises concerns since, for instance, the referral should be decided by the competent authorities, as it affects the rights of the individual. Given that the assistance and support provided by the agencies may have considerable implications for the outcome of the screening, their role and competencies should be clearly defined and open to external scrutiny.<sup>43</sup> Finally, as recommended by the European Data Protection Supervisor (EDPS), the proposal should clearly allocate the respective responsibilities for processing of personal data by these agencies, which is essential for the attribution of controllership pursuant to the Regulation 2018/1725 (EUDPR) and the General Data Protection Regulation (GDPR).<sup>44</sup>

ECRE recommends the following amendments:

#### Article 6(7)

The competent authorities may be assisted or supported in the performance of the screening by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency and the [European Union Agency for Asylum] within the limits of their mandates. **The role, powers, and responsibilities for processing of personal data of Frontex and EASO (EUAA) should be clearly defined, confined to support tasks, and open to external scrutiny, including via effective complaints mechanisms.**

- 39 Dutch Council for Refugees, Greek Council for Refugees, CIR, ECRE, ProASyl, The implementation of the hotspots in Italy and Greece: A study, 2016, <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>, p. 12; ECRE, The Role of EASO Operations in National Asylum Systems, 2019, [https://www.ecre.org/wp-content/uploads/2019/11/EASO-Operations\\_Report.pdf](https://www.ecre.org/wp-content/uploads/2019/11/EASO-Operations_Report.pdf).
- 40 ECRE, ECRE Comments On The Commission Proposal for a Regulation on the European Border And Coast Guard (COM(2018) 631 Final), 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>.
- 41 ECRE, ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010COM(2016) 271, 2016, [https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-EU-Asylum-Agency\\_July-2016-final\\_2.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-EU-Asylum-Agency_July-2016-final_2.pdf).
- 42 Explanatory Memorandum, p. 3.
- 43 The joint report on the implementation of the hotspots in Greece and Italy recommended that clarity be needed with regards to the relationship between national authorities and EU agencies, their legal responsibilities and the procedural rights available for the asylum seekers, see Dutch Council for Refugees, Greek Council for Refugees, CIR, ECRE, ProASyl, The implementation of the hotspots in Italy and Greece: A study, 2016, <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>, p. 54.
- 44 European Data Protection Supervisor, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum 30 November 2020, [https://edps.europa.eu/sites/edp/files/publication/20-11-30\\_opinion\\_new-pact-migration-asylum\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/20-11-30_opinion_new-pact-migration-asylum_en.pdf), para. 10.

## 4. ELEMENTS OF SCREENING

According to Article 6(6), the four mandatory elements of the screening include preliminary health and vulnerability check (4.1), identity check (4.2), registration of biometric data in the appropriate data bases (4.3), and security check (4.4).

### 4.1 Health checks and vulnerabilities (Articles 9 and 6(7), Recital 26)

#### *Health check*

Article 9(1) regulates medical checks as part of the screening at the external borders. The people falling within its scope should be subject to a preliminary medical examination with a view to identifying any needs for immediate care or isolation on public health grounds. While this provision is welcome, it is questionable how much added value it brings. To justify its introduction, the Commission maintains that the Schengen Borders Code does not provide for any specific obligation concerning medical checks on people apprehended during border surveillance. The Commission also stresses that the concerned people might have been exposed to health threats, so it is important to identify at the earliest stage possible all those in need of immediate care. The outbreak of COVID-19 also demonstrates the need for health checks in order to identify persons requiring isolation on public health grounds. Therefore, according to the text, there is a need for uniform rules on preliminary health checks, which would apply to all third-country nationals subjected to the screening.<sup>45</sup> Despite these explanations, in fact similar obligations can be found in the Schengen Border Code, because border control is envisaged to help prevent public health threats (Recital 6) and entry conditions include not posing a public health threat (Article 6(1)(e)). Also, under Article 13 of the Reception Conditions Directive, Member States may require medical screening for asylum applicants on public health grounds.

It appears thus that the key new element in Article 9(1) is the identification of special health care needs. Under Article 6(7), states should designate qualified medical staff to carry out the health checks. Beyond this requirement there is no prescription about the health check procedures to be used. Thus, it is unclear which “uniform rules”<sup>46</sup> the Regulation lays down. Concerning the rights of individuals, it should be determined whether the person can refuse a medical examination. In line with the Explanatory Memorandum, the screening should be carried out in full respect of fundamental rights as enshrined in the EU Charter, including the right to human dignity (Article 1) and a high level of human health protection (Article 35).<sup>47</sup>

Under Article 9(1), the preliminary medical examination is to be carried out unless, based on the circumstances concerning the general state of the individual concerned and the grounds for directing him or her to the screening, the relevant competent authorities are satisfied that no preliminary medical screening is necessary. In that case, they should inform the person accordingly. As detailed in Recital 26, the medical examination should not take place if it is clear from the circumstances that such examination is not needed, in particular because the overall condition of the person appears to be “very good.” This derogation weakens the provision of standard health checks. By employing non-specific terms such as “overall condition” and allowing for derogation when such “overall condition” merely appears sufficient, Article 9(1) leaves a broad discretion to states to dispense from the medical examination. In order to add any value, Article 9(1) should not provide for any derogation.

Even weaker provisions regulate screening in the territory. Under Article 9(4), where it is deemed necessary based on the circumstances, the person should be subject to a preliminary medical examination, notably to identify any medical condition requiring immediate care, special assistance or isolation. As Recital 26 details, the medical check should be carried out if it is deemed necessary at first sight. Lower

45 Explanatory Memorandum, p. 4.

46 Explanatory Memorandum, p. 4.

47 Explanatory Memorandum, p. 11.

standard of medical examination applicable to people undergoing screening within the territory is not justifiable. ECRE recommends harmonising these provisions in order for the Regulation to ensure “uniform rules”<sup>48</sup> that the Commission refers to.

ECRE recommends the following amendments:

#### Article 9(1)

~~All~~ third-country nationals submitted to the screening referred to in Article 3 shall be subject to offered a preliminary medical examination with a view to identifying any needs for immediate care or isolation on public health grounds, ~~unless, based on the circumstances concerning the general state of the individual third-country nationals concerned and the grounds for directing them to the screening, the relevant competent authorities are satisfied that no preliminary medical screening is necessary. In that case, they shall inform those persons accordingly.~~

#### Article 9(4)

~~Where it is deemed necessary based on the circumstances, third-country nationals submitted to the screening referred to in Article 5 shall be subject to a preliminary medical examination, notably to identify any medical condition requiring immediate care, special assistance or isolation.~~

#### Recital 26

~~A preliminary health examination should be carried out on all persons submitted to the screening at the external borders with a view to identifying persons in need of immediate care or requiring other measures to be taken, for instance isolation on public health grounds. The specific needs of minors and vulnerable persons should be taken into account. If it is clear from the circumstances that such examination is not needed, in particular because the overall condition of the person appears to be very good, the examination should not take place and the person concerned should be informed of that fact. The preliminary health examination should be carried out by the health authorities of the Member State concerned. With regard to third-country nationals apprehended within the territory, the preliminary medical examination should be carried out where it is deemed necessary at first sight.~~

### **Vulnerability check**

According to Recital 9, the screening should ensure that persons with special needs are identified at an early stage, so that any special reception and procedural needs are fully taken into account in the determination of and the undertaking of the applicable procedure. The identification of vulnerabilities is set out in Article 9(2). It provides that, *where relevant*, it should be checked whether persons subject to the screening at the external borders and who are undergoing a medical examination are in a vulnerable situation, are victims of torture or have special reception or procedural needs within the meaning of Article 20 of the Reception Conditions Directive. The provision of vulnerability check *where relevant* is a lower standard compared to mandatory and systematic assessment of vulnerability of the applicants for international protection under Article 22(1) of the Reception Conditions Directive and Article 24(1)-(2) of the Asylum Procedure Directive. In addition, Article 9(2) benefits only people undergoing screening at the external borders, which is unjustifiable. ECRE argues that an adequate vulnerability check of all people subject to the screening should always be performed.

By virtue of Article 9(2), the scope of the category of people with special reception or procedural needs under the Reception Conditions Directive applies also to the vulnerability assessment during the screening process. Under Article 21 of the Reception Conditions Directive, this category includes children, unaccompanied children, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation. Since it is provided in the operational part

<sup>48</sup> Explanatory Memorandum, p. 4.

of the Regulation, this scope of the category of vulnerable people should apply in the framework of the screening process, rather than a narrower enumeration in Recital 27.<sup>49</sup> Identification of these vulnerabilities will commonly require more time than 5 or 3 days. It should be ensured that the vulnerability and health assessment continue in the subsequent procedure to which the person is referred.<sup>50</sup>

ECRE recommends the following amendments:

#### Article 9(2)

~~Where relevant, it shall be checked~~ Member States shall assess whether persons referred to in paragraph 1 ~~undergoing the screening~~ are in a vulnerable situation, victims of torture or have special reception or procedural needs within the meaning of Article 20 ~~21~~ of the [recast] Reception Conditions Directive.

In terms of the treatment of people identified as vulnerable, Recital 26 provides that the specific needs of children and vulnerable persons should be taken into account. Under Article 9(3), where there are indications of vulnerabilities or special reception or procedural needs, the person concerned should receive timely and adequate support in view of their physical and mental health. In the case of children, support should be given by personnel trained and qualified to deal with children, and in cooperation with child protection authorities. In that regard, Article 6(7) provides that national child protection authorities and national anti-trafficking rapporteurs should also be involved, where appropriate. ECRE argues that in line with the best interests of the child, the personnel referred to in Article 9(3) should include guardians. Further, to ensure consistency with the CEAS as a whole and to follow good practice in management of vulnerabilities in asylum processes,<sup>51</sup> people identified as vulnerable, irrespective of whether they apply or not for international protection, should have access to the same level of support as applicants for international protection under Chapter IV of the Reception Conditions Directive. Further, they should not be placed in detention or, if vulnerability is concluded during the screening, they should be released and granted less coercive measures.

ECRE recommends the following amendments:

#### Article 9(3)

Where there are indications of vulnerabilities or special reception or procedural needs, the third-country national concerned shall receive timely and adequate support in view of their physical and mental health. ***People identified as vulnerable or with special needs should have access to the same level of support as applicants for international protection have under Chapter IV of the Reception Conditions Directive and, if they apply for international protection, they should be channelled to the regular procedure. They should not be subject to detention.***

In the case of minors, support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities. ***In line with the best interests of the child principle, the guardian should be appointed as soon as possible after the age assessment.***

49 According to Recital 27, particular attention should be paid to individuals with vulnerabilities, such as pregnant women, elderly persons, single parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors. In particular, the emphasis on “persons visibly having suffered psychological or physical trauma” may undermine an effective identification of vulnerabilities as not all of them are “visible” (such as victims of torture or human trafficking).

50 See Section 6.1.

51 AIDA, The concept of vulnerability in European asylum procedures, 2017, <http://www.asylumineurope.org/2017-ii>

## 4.2 Identification (Article 10)

A central aim of the screening process is to determine the identity of the person concerned through a search in national databases and the Common Identity Repository (CIR). In particular, Article 10(1) foresees that to the extent that this has not yet occurred during border checks – regulated under Article 8 of the Schengen Borders Code - the identity of third-country nationals subject to the screening process should be verified or established, by using in particular (a) identity, travel or other documents; (b) data or information provided by or obtained from the third-country national concerned; and (c) biometric data in combination with national and European databases.

Furthermore, Article 10(2) prescribes that for the purpose of the identification, the competent authorities shall query any relevant national databases, as well as the CIR, as established by Regulation 2019/817 on the interoperability amongst EU information systems.<sup>52</sup> To that end, authorities should use the biometric data taken during the screening,<sup>53</sup> the identity data, and, where available, travel document data. In addition, according to Recital 30, a verification of identity should be initiated in the CIR in the presence of the person. During the verification, the biometric data of the person should be checked against the data contained in the CIR. Under Article 10(3), if the biometric data of the person concerned cannot be used or if the query with those data fails, the query should be carried out with the identity data of the person concerned, in combination with any identity, travel or other document data or with the identity data provided by that person.<sup>54</sup>

When however the query indicates that data on that person are stored in the CIR, Recital 30 provides that Member State authorities should have access to the CIR to consult the identity data, travel document data, and biometric data of that person, without the CIR providing any indication as to which EU information system the data belong to. According to the Commission, consultation of the CIR enables a reliable and exhaustive identification of persons, by making it possible to consult all identity data present in the five databases in one go, in a fast and reliable manner. Furthermore, the obligation to check the biometric data against the CIR is conceived in such a manner that only those data are accessed that are strictly necessary to identify the person and that there will be no duplication or new collection of data in an information system.<sup>55</sup> Indeed, there is no collection of additional data in the information systems, rather the Screening Regulation provides for new uses of the existing data, as it is shown below.

The CIR constitutes one of the four components of the interoperability framework, which aims to enable identification of TCN's without (proper) travel documents, assist in the detection of individuals with multiple identities and streamline the procedure for consulting databases for law enforcement purposes.<sup>56</sup> To that end, CIR, which will essentially be a new database, will aggregate data from the CIR that will combine data from the Visa Information System (VIS), Eurodac, the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS) and the European Criminal Records Information System for third-country nationals (ECRIS-TCN) – thus not the Schengen Information System (SIS). Article 17 of the Interoperability Regulation lays down the specific categories of personal data stored in CIR, which may be biographical data, travel document data and biometric data recorded in the five aforementioned information systems logically separated (as reiterated also in Recital 29 of the proposal for a Screening Regulation).<sup>57</sup>

52 Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA [2019] OJ L 135/27.

53 See Section 4.3.

54 According to Article 10(4), where possible, the checks should also include the verification of at least one of the biometric identifiers integrated into any identity, travel or other document.

55 Explanatory Memorandum, p. 9.

56 For an appraisal see Niovi Vavoula, 'Interoperability of EU Information Systems: The Deathblow to the Rights to Privacy and Personal Data Protection of Third-Country Nationals?' (2020) 26(1) European Public Law 131-156.

57 Personal data strictly necessary to perform an accurate identity check is stored in the CIR and that the personal data recorded in the CIR is kept for no longer than strictly necessary for the purposes of the underlying systems that feed it and should automatically be deleted when the data are deleted from the underlying systems.



Of particular concern regarding the function of CIR has been Article 20, which empowers national *police authorities* to query the CIR with the biometric data of a person over the age of 12 taken during an identity check in presence of the person in question, for the sole purpose of identifying them.<sup>58</sup> Overall, as has been noted elsewhere,<sup>59</sup> interoperability of EU information systems has raised concerns about the rights to respect for private life and the right to personal data protection, enshrined in Articles 7 and 8 of the EU Charter. In particular, the principle of purpose limitation may be at risk. Under Article 5(1) (b) of the GDPR, this principle requires that personal data be collected for specified purpose and not further processed in a manner that is incompatible with that purpose. Interoperability entails that data from information systems may be repurposed quite easily so long as these purposes are not in conflict with the original purpose for which the data have been originally collected. However, this incompatibility is very high threshold that it is difficult to reach.<sup>60</sup>

The proposal for a Screening Regulation expands the purpose of CIR to be used for identification at the external borders, even though such purpose was not originally foreseen in the Interoperability Regulation. Since the use of the CIR for identification purposes is currently limited to facilitating and assisting in the correct identification of persons registered in the five databases during police checks within the territory, Article 19 of the proposal amends the Interoperability Regulation 2019/817 to provide for the additional purpose of using the CIR, namely to identify persons during the screening. This is another example of the trend to erode the purpose limitation principle; one data is collected, they may be used for additional purposes. An eagle's eye would spot a key difference between the two identification procedures. Article 20 of the Interoperability Regulation enables identification checks by national police authorities with biometric data under specific circumstances enlisted therein. Article 10 of the Screening Regulation proposal provides more broadly that identity, travel and biometric data will be used for identification purposes.

A key question in this regard is whether the legal bases of the underlying systems that will be checked through CIR enable such identification. Article 20 of Regulation 787/2008 on the Visa Information System (VIS)<sup>61</sup> foresees the use of fingerprints and facial images for identification at the external borders and within the national territory. However, Article 20 refers to border crossing points, whereas the screening process will take place at designated spaces. Similarly Article 27 of Regulation 2017/2226<sup>62</sup> allows the use of EES data for identification purposes.<sup>63</sup> It could even be argued that Article 7(1) of Regulation 2019/816 on ECRIS-TCN<sup>64</sup> allows consultation of that system broadly for immigration purposes.

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58 For an analysis see Teresa Quintel, 'Interoperability of EU Databases and Access to Personal Data by National Police Authorities under Article 20 of the Commission Proposals' (2018) 4(4) *European Data Protection Law Review* 470-482.

59 Statewatch, The "Point of no return:" Interoperability morphs into the creation of a Big Brother centralised EU state database including all existing and future Justice and Home Affairs databases, July 2018, <https://www.statewatch.org/media/documents/analyses/no-332-eu-interop-morphs-into-central-database-revised.pdf>

60 Niovi Vavoula, Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals' Privacy?, *Immigration and Asylum Law and Policy*, 8 July 2019, <https://eumigrationlawblog.eu/interoperability-of-european-centralised-databases-another-nail-in-the-coffin-of-third-country-nationals-privacy/>

61 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ J 218/60.

62 Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] O L 327/20.

63 In any case, Article 17 foresees a revision in the EES mandate to enable consultation of EES for screening purposes.

64 Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 [2018] OJ L 135/1.

The case of ETIAS however is a bit more controversial; Article 47 of Regulation 2018/1240<sup>65</sup> enables checks for verification of a traveller's identity at the external borders, but according to Article 49 identification is subject to specific safeguards such as prior check to EES. As for Eurodac, identification is not listed among the purposes of the database; identification of individuals falling within its personal scope (asylum applicants and certain categories of irregular migrants) is merely a de facto purpose of Eurodac.

The identification of third-country nationals via CIR during the screening process raises another issue regarding the authorities that will obtain access for screening purposes. As mentioned above, where a query reveals that data of that person are stored in the CIR, *Member State authorities* shall have access to CIR data. This seems to suggest that Frontex or EASO even if they assist Member States in identification will not have access to the CIR data. However, Article 10(2) refers more generally to 'competent authorities'. Furthermore, Article 6(7) enables Frontex and EASO to assist Member States in the screening process, thus increasing the potential number of actors having access to information systems without detailing specific safeguards about such processing. In effect, the screening process magnifies the reach of these agencies to EU information systems through the back door and without further safeguards about such processing.

According to the European Data Protection Supervisor (EDPS), the proposal remains very general when it comes to the methods that can be used to gather data from the third-country nationals for their identification. This approach has the potential to seriously interfere with the rights to data protection and privacy of third country nationals, especially taking into account the wide range of methods used by Member States to support identification and identity verification processes in the absence of documentary evidence of identity.<sup>66</sup>

### 4.3 Registration of biometric data (Articles 6(6)(c) and 14(6))

As per Article 6(6)(c), a further element of the screening procedure involves registration of biometric data in the appropriate databases, to the extent it has not occurred yet. Specifically, under Article 14(6), with respect to people to whom the Eurodac Regulation applies, the competent authorities should take the biometric data referred to Articles 10, 13, 14 and 14c of the Eurodac Regulation and transmit it in accordance with that Regulation.<sup>67</sup> Under these provisions, authorities should promptly take the fingerprints and capture facial images of applicants for international protection, people apprehended at irregular border crossing, found irregularly staying within the territory, or disembarked following a search or rescue operation (if they are at least six years old). Within 72 hours, the data is to be transmitted to the Central System of Eurodac and CIR (as regulated by the Interoperability Regulation 2019/818).<sup>68</sup> As the obligation to collect and transmit the biometric data is set out in the Eurodac Regulation, the Screening Regulation does not have added value in that regard, it merely ensures that the relevant

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65 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 [2018] OJ L 326/1.

66 European Data Protection Supervisor, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum, 30 November 2020, [https://edps.europa.eu/sites/edp/files/publication/20-11-30\\_opinion\\_new-pact-migration-asylum\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/20-11-30_opinion_new-pact-migration-asylum_en.pdf), para. 31

67 The Regulation refers to proposal, part of the Pact package, amending the 2016 proposal for a recast of the Regulation 603/2013 (Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM (2020) 614). For ECRE's comments on the 2016 recast proposal, see ECRE Comments on the Commission Proposal to recast the Eurodac Regulation COM(2016) 272, 2016, <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>.

68 Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

measures are carried out during the screening.<sup>69</sup>

ECRE voiced concerns about expanding the aims of and access to the Eurodac database in the 2016 recast proposal.<sup>70</sup> The 2020 amendment of the 2016 recast proposal further widens the use of the database, far beyond the initial objectives to support the Dublin system, which raises concerns as regards the right to data protection laid down in Article 8 of the EU Charter and particularly, the purpose limitation principle, as spelled out in Article 5(1)(b) of the GDPR. Under the purpose limitation principle, personal data should be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. The Commission recognises that the Screening Regulation would affect the right to data protection yet it stresses that it does not entail any additional data processing, beyond what the Member States are already bound to do under the Eurodac Regulation.<sup>71</sup>

#### 4.4 Security checks (Articles 11 and 12)

Article 11 provides that third country nationals submitted to the screening shall undergo a security check to verify that they do not constitute a threat to internal security. This security check may cover both the third-country nationals and the objects in their possession, which may be searched in accordance with the law of the Member State concerned. This begs the question as to whether authorities are allowed to search, for instance, mobile phones of the persons concerned, which, in turn, raises concerns regarding the right to respect for private life laid down in Article 7 of the EU Charter. Recital 41 provides that such measures should be proportionate and should respect the human dignity of the persons subject to the screening. The authorities involved should ensure that the fundamental rights of the individuals concerned are respected, including the right to protection of personal data and freedom of expression. According to the EDPS, Article 11 should clarify the modalities related to the processing of personal data for verifying whether the person constitutes a risk to security.<sup>72</sup>

The security check will entail queries with relevant national and EU databases, in particular the Schengen Information System and to the extent that they have not yet done so during border checks on entry (under Article 8(3)(a)(vi) of the Schengen Borders Code).<sup>73</sup> Furthermore, Article 11(3) provides that the EES, ETIAS – including the ETIAS watchlist –, ECRIS-TCN (as far as convictions related to terrorist offences and other forms of serious criminal offences are concerned) and VIS databases will also be consulted, as well as Europol data processed for the purpose of cross-checking to identify connections in relation to criminal offences (as per Article 18(2)(a) of the Europol Regulation), and the Interpol Travel Documents Associated with Notices database (Interpol TDAWN) are also included in the list of databases for cross-checking. However, Article 11(2) specifies that as regards the consultation of EES, ETIAS and VIS, the retrieved data shall be limited to indicating refusals of a travel authorisation, refusals of entry, or decisions to refuse, annul or revoke a visa or residence permit, which are based on security grounds. These queries should be carried out with identity, travel or other documents; data or information provided by or obtained from the person concerned; and biometric data; and should use at least the biometrics.

Article 12 lays down the modalities for the security checks including that the CIR or the European Search Portal (ESP) should be used for these checks. The ESP is another component of the interoperability framework enable competent authorities to simultaneously query the underlying systems to which they have access and the combined results will be displayed on one single screen. According to Article

69 The Commission calls it “temporary specification” of Member States’ obligations under the Eurodac Regulation, see Explanatory Memorandum, p. 8 and 12.

70 ECRE Comments on the Commission Proposal to recast the Eurodac Regulation COM(2016) 272, 2016, <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>.

71 Explanatory Memorandum, p. 12.

72 European Data Protection Supervisor, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum 30 November 2020, [https://edps.europa.eu/sites/edp/files/publication/20-11-30\\_opinion\\_new-pact-migration-asylum\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/20-11-30_opinion_new-pact-migration-asylum_en.pdf), para. 31.

73 Article 11(2).



12(2), where a match is obtained following a query against data in one of the information systems, the competent authority should have access to consult the file corresponding to that match in the respective information system in order to determine the risk to internal security. If a query reports a match against Europol data, Article 12(3) provides that the competent authority of the Member State should inform Europol in order to take, if needed, any appropriate follow-up action in accordance with the relevant legislation. If a query reports a match against the Interpol TDawn) under Article 12(4) the competent authority of the Member State should inform the Interpol National Central Bureau of the Member State that launched the query in order to take, if needed, any appropriate follow-up action in accordance with the relevant legislation.

The proposal thus emphasises on the conduct of security checks on third-country nationals at external borders, adding additional powers to the already extensive powers of Member State to process personal data of third country nationals in the EU. Articles 11-12 remind the wording of Article 8(3)(a)(vi) of the Schengen Borders Code on the conduct of security checks at the external borders, which refers to consultation of SIS and other 'relevant Union databases' without further specification. The proposal for a Screening Regulation details the databases to be consulted during security checks, however in the case of EES the legal bases does not support their use for security checks. Hence, Article 17 of the proposal foresees the addition of screening in the purposes of EES. According to Recital 44, since the effective implementation of the screening is dependent upon correct identification of the individuals concerned and of their security background, the consultation of European databases for that purpose is justified by the same objectives for which each of those databases has been established. Whereas one of the overarching purposes of ETIAS is maintaining a high level of security, in the case of VIS the enhancement of internal security has been considered by the Court of Justice of the EU an ancillary, secondary purpose.<sup>74</sup> Overall, the proposal enables to squeeze additional functions and uses of the systems related to screening under the umbrella purpose of security and increase the access rights to additional authorities. In order to enable this new function to EES, ETIAS and VIS to the authorities in charge of the screening, Articles 16-18 amend the Regulations governing these information systems allowing additional competent authorities to access the systems in the framework of security checks. This may result in that the information systems are opened up to law enforcement authorities to check the systems potentially undermining the safeguards foreseen in relation to law enforcement access to databases.

In Opinion 1/15, the Court of Justice of the European Union opined that the processing of PNR data facilitates security checks and border control checks and therefore its retention and use for that purpose may not, on account of its very nature, be restricted to a particular circle of air passengers, nor can it be subject to prior authorisation by a court or by an independent administrative body.<sup>75</sup> Therefore, applying by analogy this pronouncement to the case of security checks on third-country nationals through information systems, access to information retained cannot be subject to prior review. However, the right to information during these checks as envisaged in Article 8 of the proposal should include as a safeguard further obligations to provide applicants information on which EU databases will be consulted and which specific information in these databases will be checked and for which purposes. Importantly, it is unclear as to whether the conduct of security checks will be subject to the General Data Protection Regulation or the Law Enforcement Directive. This is a crucial issue given that the differences in the two legal instruments as regards the restrictions of the right to information and the exercise of individual rights more generally. Finally, it must be stressed that whereas the exchange of personal data between national authorities can be useful, the challenges and limitations stemming from the reliability of data stored in the aforementioned databases must not be overlooked.<sup>76</sup>

There are inconsistencies in the proposal as regards the scope of the security check. On the one hand, according to Articles 1 and 11(1), the security check aims to verify whether the persons undergoing the screening to not constitute a threat to internal security. On the other hand, however, Recital 35 provides

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74 Case C-482/08 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* ECLI:EU:C:2010:631.

75 Opinion 1/15 ECLI:EU:C:2017:592, para. 197.

76 On the data quality issues of information systems see among others European Court of Auditors, 'EU information systems supporting border control - a strong tool, but more focus needed on timely and complete data' (Special Report No 20/2019).

that the screening should also assess whether the entry of the person concerned into the EU could pose a threat to internal security or public policy. Also, under Recital 42, access to EES, ETIAS, VIS, and ECRIS-TCN is necessary for the authorities designated to carry out the screening in order to establish whether the person could pose a threat to the internal security or to public policy. Both concepts are traditionally broad and leave discretion to states, yet they have been defined in the Luxembourg jurisprudence. According to the CJEU, ‘public security’ covers both the internal security and external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.<sup>77</sup> Risk to public policy, for its part, presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.<sup>78</sup> While both concepts are broad, the risk to public policy appears to be wider. The Regulation should avoid this lack of clarity and precise that the security check aims at verifying threats to internal security.

ECRE recommends the following amendments:

#### Recital 35

The screening should also assess whether the entry of the third-country nationals into the Union could pose a threat to internal security ~~or to public policy~~.

#### Recital 42

Since access to EES, ETIAS, VIS and ECRIS-TCN is necessary for the authorities designated to carry out the screening in order to establish whether the person could pose a threat to the internal security ~~or to public policy~~, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226, Regulation (EU) 2018/1240 and Regulation (EC) No 2019/816, respectively, should be amended to provide for this additional access right which is currently not provided by those Regulations.[...]

#### Article 11(1)

Third country nationals submitted to the screening pursuant to Article 3 or Article 5 shall undergo a security check to verify that they do not constitute a threat to internal security, **understood as a threat to the functioning of institutions and essential public services and the survival of the population.**

This precision is all the more important as, besides match against Europol or Interpol data, the Regulation does not clarify what happens when the security check establishes that the person concerned represents the relevant threat. Under Article 6(1)(d)-(f) of the Schengen Borders Code, the entry conditions include not being subject of an alert in the SIS for the purposes of refusing entry and not posing a threat to public policy, internal security, public health or the international relations of any of the Member States. Under Article 14(1) of the Schengen Borders Code, a person who does not fulfil all the entry conditions laid down in Article 6(1) should be refused entry to the territories of the Member States. However, this should be without prejudice to the application of special provisions concerning the right of asylum and to international protection. Hence, despite being considered a threat to internal security, people wishing to apply for international protection should have access to asylum procedure. This will likely have an impact on the choice of asylum procedure. As mentioned below,<sup>79</sup> Article 14(2) of the Screening Regulation provides that authorities conducting the screening should point in the de-briefing form to any elements which seem at “first sight” to be relevant to refer the person concerned into the accelerated examination procedure or the border procedure. Under Article 41(3) of the draft Asylum Procedure Regulation one of these elements is risk to national security or public order.<sup>80</sup>

<sup>77</sup> CJEU, J.N, C-601/15, para 66-67.

<sup>78</sup> CJEU, Zh and O, C-554/13, para 60.

<sup>79</sup> See Section 6.1.

<sup>80</sup> See further discussion on this point in Section 6.2.

## 5. PROVISION OF INFORMATION (ARTICLE 8)

Article 8 regulates information duties on the part of the authorities. Under Article 8(1), the persons subject to the screening should be succinctly informed about the purpose and the modalities of the screening: (a) the steps and modalities of the screening as well as possible outcomes of the screening; (b) their rights and obligations during the screening, including the obligation on them to remain in the designated facilities during the screening. This provision has two key shortcomings. First, the person should be informed about the possibility to seek international protection. Secondly, in order for the person to understand the process, often “succinct” information may not be sufficient.

ECRE recommends the following amendments:

### Article 8(1)

Third-country nationals subject to the screening shall be succinctly *adequately* informed about the purpose and the modalities of the screening *as well as the right to seek asylum*:

*(a) the possibility to apply for international protection*

~~(a)~~ (b) [...]

~~(b)~~ (c) [...]

Under Article 8(2), during the screening, people should also, as appropriate, receive information on: (a) the applicable rules on the conditions of entry under the Schengen Border Code; (b) where they have applied, or there are indications that they wish to apply, for international protection, information on the obligation to apply for international protection in the Member State of first entry or legal stay, the consequences of non-compliance with that requirement,<sup>81</sup> and the information as well as on the procedures that follow the making of an application for international protection; (c) the obligation for irregularly staying third-country nationals to return in accordance with the Return Directive; (d) the possibilities to enrol in a programme providing logistical, financial and other material or in-kind assistance for the purpose of supporting voluntary departure; (e) the conditions of participation in relocation; and (f) the information as regards data collection required under Article 13 the General Data Protection Regulation (GDPR).<sup>82</sup> ECRE argues that Article 8 should reflect information duties under Article 5 of the Reception Conditions Directive and people subject to the screening should also be informed about organisations or individuals which provide legal assistance or information.

81 The Reception Conditions Directive is applicable to all applicants for international protection who have a right to remain on the territory of Member States so ECRE is opposed to proposal to exclude asylum seekers who are not in the Member State designated as responsible under the Dublin Regulation from reception conditions, see ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive COM(2016) 465, October 2016, <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf>.

82 Under Article 13(1) of the GDPR, Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information: (a) the identity and the contact details of the controller and, where applicable, of the controller’s representative; (b) the contact details of the data protection officer, where applicable; (c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing; (d) if processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, the legitimate interests pursued by the controller or by a third party; (e) the recipients or categories of recipients of the personal data, if any; (f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission. Under Article 13(2) of the GDPR, in addition, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing: (a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period; (b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability; (c) where the processing is based on consent given by the data subject for specific purpose, the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal; (d) the right to lodge a complaint with a supervisory authority; (e) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data; (f) the existence of automated decision-making, including profiling and at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

ECRE recommends the following amendments:

Article 8(2)

During the screening, they shall also, as appropriate, receive information on:

[...]

**(g) the possibility to contact and be visited by organisations, bodies, and individuals, as referred to in Article 8(4) which provide information and legal assistance.**

According to Article 8(3), the information provided during the screening should be given in a language which the person understands or is reasonably supposed to understand. The information should be given in writing and, in exceptional circumstances, where necessary, orally using interpretation services. Experience shows that written information is often insufficient for the person to understand it, hence it should also be conveyed and explained to the person concerned.

ECRE recommends the following amendments:

Article 8(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 given in writing and, ~~in exceptional circumstances, where necessary,~~ orally using interpretation services. It should be provided in an appropriate manner taking into account the age and the gender of the person.

Under Article 8(4), Member States may authorise relevant and competent national, international and non-governmental organisations and bodies to provide persons with information in Article 8 during the screening according to the provisions established by national law. Given the crucial role played by independent bodies, the authorities should not hinder their access to the persons concerned.

ECRE recommends the following amendments:

Article 8(4)

Member States ~~may~~ ***should*** authorise relevant and competent national, international and non-governmental organisations and bodies to provide third country nationals with information under this article during the screening according to the provisions established by national law.

## 6. COMPLETION OF THE SCREENING

Upon completion of the screening, the competent authorities should fill out the de-briefing form (5.1) and refer the person to an appropriate procedure (5.2).

### 6.1 De-briefing form (Article 13)

Article 13 provides that upon completion of the screening, the authorities should fill out the debriefing form, appended to the Regulation. The debriefing form comprises five sets of information: (a) name, date and place of birth and sex; (b) initial indication of nationalities, countries of residence prior to arrival and languages spoken; (c) reason for unauthorised arrival, entry, and, where appropriate illegal stay or residence, including information on whether the person made an application for international protection; (d) information obtained on routes travelled, including the point of departure, the places of previous residence, the third countries of transit and those where protection may have been sought or granted as well as the intended destination within the Union; and (e) information on assistance provided by a person or a criminal organisation in relation to unauthorised crossing of the border, and any related information in cases of suspected smuggling. Although not listed in Article 13, further information to be included in the de-briefing form is provided in Article 14(2). Accordingly, the form should include any elements which seem “at first sight” to be relevant for the referral to accelerated or border asylum procedure.<sup>83</sup>

None of the five sets of information under Article 13 includes information gathered from health and vulnerability checks, in particular identification of vulnerabilities or medical condition requiring special assistance or care.<sup>84</sup> However, the standard de-briefing form, appended to the Regulation, contains some health-related information, namely the question whether immediate care was provided and whether the person was isolated on public health grounds and details of such isolation. It is unclear why results from vulnerability checks are not listed neither in Article 13 nor in the form. The omission of the results of health and vulnerability checks in the list in Article 13 shows double standards on the part of the Commission, as this list includes results of other elements of the screening, such as identity and security checks. For the sake of coherency, this set of information should be enumerated in Article 13 and include, beyond the aforementioned information headings provided in the form, also information on the vulnerabilities of the person which result in specific reception and procedural needs. Crucially, the form should also indicate that the health and vulnerability checks have not been completed so that this assessment continues after the referral.<sup>85</sup>

ECRE recommends the following amendments:

#### Article 13

On completion of the screening, the competent authorities shall, with regard to the persons referred to in Article 3 and in Article 5, complete the form in Annex I containing:

(a) name, date and place of birth and sex;

(b) initial indication of nationalities, countries of residence prior to arrival and languages spoken;

**(c) the results of health and vulnerability checks under Article 9 which entail particular reception or procedural needs or/and the fact that those checks have not been completed during the screening procedure ;**

(d) ...

(e) ...

(f) ...

<sup>83</sup> This is discussed in Section 6.2.

<sup>84</sup> Health and vulnerability checks are discussed in Section 4.1.

<sup>85</sup> As mentioned above (Sections 3.1 and 4.1), vulnerability and health checks typically require more time than 5 or 3 days.



The authorities in charge of the screening should transmit the de-briefing form to the relevant authorities to whom they refer the person for the subsequent procedure, namely return or asylum procedures<sup>86</sup> (Article 14(1)-(2)), or another Member State, in case of relocation procedure (Article 14(3)). Calling the document a “de-briefing form” indicates that it does not amount to an official decision. Consequently, the Regulation does not foresee any rights of the individual to contest the information included in the form. However, despite the innocuous title, the de-briefing form is the only document issued at the end of the screening and it contains information which may be crucial in both the referral and the procedure that follows. As the Commission’s proposal explicitly acknowledges, the de-briefing form contains information which is “necessary to enable the Member States’ authorities to refer the persons concerned to the appropriate procedure”<sup>87</sup> and authorities carrying out the procedure that follows make decisions “using the information collected during the screening in the debriefing form.”<sup>88</sup> Both forms of use of the information collected during the screening raise concerns.

Using the information provided in the de-briefing form to decide on referral implies that the de-briefing form may affect the interests of the person concerned. Despite the title, the de-briefing form functions in practice as an administrative act. Hence, the person should be afforded the rights of the defence, as a general principle of EU law, including the right to be heard before the de-briefing is filled out and referral decided and the right to access to the de-briefing form and to obtain reasons for the decision.<sup>89</sup> Further, by virtue of Article 47 of the EU Charter, the person has the right to an effective remedy. There should thus be an appropriate appeal or review procedure available to people subject to the screening who wish to contest the decision on referral. Alternatively, the debriefing form could be classified as an administrative act, meaning that it can then be appealed. According to the EDPS, the accuracy of the information is crucial as it will to great extent determine the situation of the data subject, including their procedural rights and the person should be entitled to rectify and/or supplement the personal data about them.<sup>90</sup> Hence, the de-briefing form should be an administrative decision amenable to appeal.

Using the information collected during the screening in the following procedure raises specific concerns. Will people be bound by declarations made apprehension or disembarkation regarding reasons for entering the country? In practice, differences in declarations can be explained by many factors, including different authorities involved. There is a risk that based on such differences, the authorities will consider the person’s application not credible.<sup>91</sup> Some information collected during the screening such as protection sought or obtained in a third country relates to asylum procedure and should not be collected during the screening at all.

ECRE recommends the following amendment:

#### New Article 13(2)

**The procedure should ensure that the person exercises his or her right to be heard and to an adequate remedy. The de-briefing form should be an administrative decision amenable to appeal. The person should receive a copy of the de-briefing form and be able to comment on the information contained therein. The person should be assisted by an interpreter. The person should also have access to an appeal procedure to contest any information provided in the form and should be advised about appeal channels.**

<sup>86</sup> See Section 6.2.

<sup>87</sup> Explanatory Memorandum, p. 12.

<sup>88</sup> Legislative Financial Statement, p. 40.

<sup>89</sup> The rights of the defence are codified in Article 41 of the EU Charter, which is applicable to the EU institutions and agencies. Applicants in domestic proceedings derive these rights from the general principles of EU law, see CJEU, *Sophie Mukarubega v. Préfet de Police and Préfet de La Seine-Saint-Denis*, C-166/13, (November 5, 2014), para. 50.

<sup>90</sup> European Data Protection Supervisor, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum 30 November 2020, [https://edps.europa.eu/sites/edp/files/publication/20-11-30\\_opinion\\_new-pact-migration-asylum\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/20-11-30_opinion_new-pact-migration-asylum_en.pdf), para. 32-33.

<sup>91</sup> AIDA, Airport procedures in Germany: Gaps in quality and compliance with guarantees, 2019, <https://www.asylumineurope.org/news/23-05-2019/ecre-report-airport-procedure-germany>

## 6.2 Referral (Article 14)

Article 14 regulates the outcome of the screening, i.e. the referral of the person to the “appropriate” procedure (as per Article 6(6)(f)). Although the Regulation frequently refers to two possible outcomes of the screening – asylum or return procedure<sup>92</sup> – in fact, there are four possible procedures or at least outcomes to which the person could be channelled, namely 1) refusal of entry, 2) return, 3) asylum, or 4) relocation. Each will be examined in turn, however as a general recommendation, as the decision at the end of the screening process has wide-ranging implications for the person, ECRE argues it should both involve asylum authorities<sup>93</sup> and be subject to appeal.

### **Outcome 1) Refusal of entry**

The outcome of refusal of entry is dealt with, albeit *en passant*, in provisions of Article 14(1), which is primarily dedicated to referral to the return procedure. As discussed below, the return procedure is foreseen for people apprehended at unauthorised border crossing or disembarked after a search and rescue operation who do not apply for international protection and do not fulfil the entry conditions under Article 6 of the Schengen Borders Code. Alinea 2 of Article 14(1) of the Screening Regulation lays down that in cases not related to search and rescue operations, entry may be refused in accordance with Article 14 of the Schengen Borders Code. This *a contrario* wording implies that people subject to the screening at the external border following their apprehension in connection with an unauthorised border crossing<sup>94</sup> may be refused entry pursuant to Article 14 of the Schengen Borders Code rather than referred to a return procedure. This raises the question of added value of the screening. What does it add to the procedures and activities of border guards at the external borders which are already regulated under the Schengen Border Code?

Crucially, the unclear relationship between the screening procedure and refusal of entry may lead to serious gaps in human rights protection. The Regulation does not emphasise the *procedure* of refusal of entry as it does as regard return or asylum *procedure*. In particular, alinea 2 of Article 14(1) does not specify that entry may be refused *in or as a result of a procedure respecting* Article 14 of the Schengen Borders Code. To compare the language, regarding the applicability of the return procedure, alinea 1 of the Article 14(1) says that the person concerned should be referred to the competent authorities to apply *procedures respecting* the Return Directive. Likewise, Article 14(7) explains that that the screening ends when the person is referred to return or asylum procedure. It begs that question why refusal of entry procedure is not included in that provision. As discussed above, the only document issued at the end of the screening is the de-briefing form which, under the current wording of the Regulation, is not subject to either procedural requirements or appeal.<sup>95</sup> The lack of a possibility to review the de-briefing form under the Regulation is justified by the Commission by the fact that in the subsequent *procedure* – return or asylum – the person has the possibility to submit the relevant decision to judicial review.<sup>96</sup> As regards people refused entry, the Commission does not explicitly mention the procedure of refusal of entry nor a decision of refusal of entry and highlights that refusal of entry can be contested before a judicial authority. The language is thus much weaker. The risk is that upon the screening procedure, the person would merely be issued a de-briefing form and be directly refused entry.

There a number of implications. First, if the Regulation does not explicitly foresee that the person would have access to procedural protections accompanying a refusal of entry, including the right to review, then an inconsistency with EU law arises.<sup>97</sup> Unlike in the outcomes that lead to the asylum or return procedure, the person would not then enter a procedure which includes a review, which is the

92 For instance Article 14(7) and Recitals 6, 18, and 24.

93 See respectively, Section 3.3.

94 For a discussion on the categories of people subject to the screening at the external borders, see Section 2.1.

95 See Section 6.1.

96 Explanatory Memorandum, p. 13.

97 CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, <https://www.asylumlawdatabase.eu/en/content/cjeu-c-6910-brahim-samba-diouf-v-ministre-du-travail-de-l%E2%80%99emploi-et-de-l%E2%80%99immigration>

only circumstances in which the absence of availability of the first review would be lawful. Second, there is thus a risk that the person is directly refused entry without even the safeguards laid down in the Schengen Borders Code. Under Article 14(2) of the Schengen Borders Code, entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision should be given by means of a standard form, as appended to the Schengen Borders Code, filled in by the authority empowered by national law to refuse entry. The completed standard form should be handed to the person concerned, who should acknowledge receipt of the decision to refuse entry by means of that form. Under Article 14(3) of the Schengen Borders Code, people refused entry should have the right to appeal.

It appears that a new means of refusing entry which seeks to circumvent the (already limited) protections that existing under the Schengen Borders Code is proposed. The proposal is to refuse entry on the basis of Article 14 SBC but without necessarily respecting the procedure laid down in that provision, including procedural safeguards envisaged in the SBC. Instead the debriefing form risks substituting for the “substantiated decision” under the SBC and there is no right to appeal foreseen in the Regulation. ECRE strongly advises that the refusal of entry fall within the scope of existing provisions in this area (which in any case remain part of the legal framework).

ECRE recommends the following amendments:

Article 14(1)

[...]

In cases not related to search and rescue operations **of third-country nationals who were apprehended in connection with an unauthorised crossing of the external border, as per Article 3(1) (a) of the Regulation**, entry may be refused in accordance with the **procedure laid down in** Article 14 of Regulation 2016/399. **As per Article 14(2)-(3) of Regulation 2016/399, the person shall receive a substantiated decision stating the precise reasons for the refusal of entry and should have the right to appeal.**

Article 14(7)

Where the third country nationals referred to in Article(s) 3(1) and Article 5 are referred to an appropriate procedure regarding asylum, or return **or refusal of entry**, the screening ends. Where not all the checks have been completed within the deadlines referred to in Article 6(3) and (5), the screening shall nevertheless end with regard to that person, who shall be referred to a relevant procedure.

## **Outcome 2) Return procedure**

People undergoing screening both at the external borders and screening already within the territory may be referred to the return procedure. Article 14(1) provides for referral to the return procedure following the screening at the external border. Accordingly, people who were apprehended in connection with an unauthorised border crossing or who were disembarked following a search and rescue operation<sup>98</sup> who have not applied for international protection and with regard to whom the screening has not revealed that they fulfil entry conditions under Article 6 of the Schengen Borders Code, should be referred to the competent authorities to apply procedures respecting the Return Directive. As discussed above, Article 14(1) further provides that in cases not related to search and rescue operations, entry may be refused in accordance with Article 14 of the Schengen Borders Code. By implication, Article 14(1) entails that people apprehended at unauthorised border crossing may be either refused entry or channelled to the return procedure and people disembarked following a search and rescue operation fitting into this category should be referred to the return procedure. However, in the former case, it is possible that most

<sup>98</sup> For the categories of persons liable to screening at the external borders, see Section 2.1.



people will be subject to a refusal of entry rather than return. It is notable that the return procedure is to be governed by the Return Directive (as per alinea 1 of the Article 14)(1)), which bars the application of the return border procedure, set out in Article 41a of the proposal for Asylum Procedures Regulation.<sup>99</sup>

Referral to the return procedure following the screening within the territory is regulated in Article 14(4). Accordingly, people “found” already within the territory where there is no indication that they have crossed an external border in an authorised manner,<sup>100</sup> who have not applied for international protection, and with regard to whom the screening has not revealed that they fulfil the conditions for entry or stay should be subject to return procedures in line with the Return Directive.

The Regulation does not have added value with respect to this category of persons as under Article 6(1) of the Return Directive, Member States are already obliged to issue a return decision to any person in an irregular situation (with limited exceptions).<sup>101</sup> If the person has already been subject to a return procedure in the past and was not returned, the risk is that authorities will start a fresh return procedure which may ultimately fail due to the same obstacles as the first one. This raises concerns about the rights of the persons concerned and about efficient use of resources.

With the risk that screening on the territory under the Regulation will increase discriminatory policing and detection of higher numbers of people whose return is not possible, the long-standing call to regularise non-returnable people becomes more pressing. As various studies reveal, non-returnable people are frequently left in a semi-legal limbo, where they are present and typically known to the authorities but do not receive any permit to stay.<sup>102</sup> The Member States have the option under Article 6(4) of the Return Directive to issue a permit to the person in an irregular situation instead of a return decision but it appears that this option is underused in practice.<sup>103</sup> While acknowledging the multiple political sensitivities arising, in order to avoid repetitive screenings of the same person, if the screening shows that the person has already been subject to a return procedure in the past and the obstacles to return are still present, authorities should consider invoking the provisions of the Directive and offering the person a right to stay.

ECRE recommends the following amendments:

ECRE recommends the following amendments:

Article 14(4)

The third-country nationals referred to in Article 5, who

–have not applied for international protection and

–with regard to whom the screening has not revealed that they fulfil the conditions for entry and stay

shall be subject to return procedures respecting Directive 2008/115/EC. **If the screening has revealed that third-country national has already been subject to a return procedure and the obstacle to his or her return persists, the person should be offered a right to stay in accordance with Article 6(4) of the Return Directive.**

99 See ECRE comments on the proposal for Asylum Procedures Regulation.

100 For a discussion on the categories of people subject to the screening within the territory, see Section 2.2.

101 See arguments for removing the provisions on the screening within the territory from the Regulation, Section 2.2.

102 Flemish Refugee Action, Detention Action, Menedék, France terre d’asile, and European Council on Refugees and Exiles. Point of No Return: The Futile Detention of Unreturnable Migrants, 2014, [https://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu\\_wp-content\\_uploads\\_2014\\_01\\_Point\\_of\\_no\\_return.pdf](https://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu_wp-content_uploads_2014_01_Point_of_no_return.pdf).

103 EPRS, The Return Directive 2008/115/EC: European Implementation Assessment, 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS\\_STU\(2020\)642840\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf).

### **Outcome 3) Asylum procedure**

Under Article 14(2), people who made an application for international protection should be referred to “the authorities referred to in Article XY of Regulation (EU) No XXX/XXX [Asylum Procedure Regulation].” At time of writing the Asylum Procedures Regulation is still in draftform, however more precision regarding the authorities in question could be added. At least, this provision should have similar wording to the description of authorities in charge of return under Article 14(1). As Article 14(2) refers to “third-country nationals,” its scope comprises all categories of people who are subject to the screening. Hence, Article 14(5) appears redundant as it confirms that Article 14(2) applies when people undergoing the screening within the territory apply for international protection.

ECRE recommends the following amendments:

#### Article 14(2)

Third-country nationals who made an application for international protection shall be referred to the **competent** authorities **to apply procedures respecting Asylum Procedures Regulation as** referred to in Article XY of Regulation (EU) No XXX/XXX [Asylum Procedure Regulation] [...]

According to Article 14 whether or not the person has applied for international protection, will determine whether they are channelled to return (or refusal of entry) procedure or asylum procedure. This is confirmed in Recital 9, according to which for those who apply for international protection, the screening should be followed by an examination of the need for international protection. This is a critical safeguard, ensuring that screening authorities will not prevent access to the asylum procedure for people subject to the screening.

Under Article 25 of the proposal for the Asylum Procedures Regulation, an application for international protection is made when a person expresses a wish for international protection to the authorities. If the officials have doubt as to whether a declaration is to be understood as an application, they should ask the person expressly whether they wish to receive international protection. Hence, authorities in charge of the screening should be properly trained in recognising implicit ways in which the person may request international protection and, in addition, asylum authorities should be involved.<sup>104</sup>

The timing of the referral to asylum procedure raises specific concerns. According to Recital 16, Articles 26 and 27 of the Asylum Procedures Regulation should apply only after the screening has ended. Current Article 26 spells out the tasks of the authorities when an application is made, including the registration of the application and provision of information, and Article 27 details the registration of the applicants. In particular, under current Article 27(1), the application should be registered no later than three working days from when it is made. The proposal for the Asylum Procedure Regulation amends Articles 26 and 27 and makes them applicable to people covered by Article 3(1) of the Screening Regulation only after the screening has ended. As discussed above, Article 3(1) provides for the screening at the external border for people apprehended at an unauthorised border crossing or disembarked following a search and rescue operation.<sup>105</sup>

ECRE identifies the following concerns. First, there is a lack of consistency which in turn creates legal uncertainty. On the one hand, Recital 16 entails that Articles 26 and 27 of the Asylum Procedures Regulation apply only after the end of the screening with respect to all people who have applied for international protection (who move on into the asylum procedure). On the other hand, amended Articles 26 and 27 still cover people who applied for international protection at external border crossing points or transit zones.

Second, the fact that Articles 26 and 27 of the Asylum Procedures Regulation apply only after the screening ends entails that during 5 days (or 10 days) the person will not be able to register their application for asylum. As a consequence, during this time, the people concerned will not have access

<sup>104</sup> For more detail on authorities, see Section 3.3.

<sup>105</sup> The categories of people liable to the screening at the external border are discussed in Section 2.1.

to the rights for asylum applicants spelled out in the Asylum Procedures Regulation which are dependent upon registration. Recital 16 asserts that the postponed application of Articles 26 and 27 of the Asylum Procedures Regulation should be without prejudice to the fact that persons applying for international protection at the moment of apprehension, in the course of border control at the border crossing point, or during the screening should be considered “applicants”. In that regard, as discussed above, even before the registration of the application, as soon as a person expresses his or her wish to receive international protection, the Reception Conditions Directive is applicable.<sup>106</sup>

As mentioned above,<sup>107</sup> Article 14(2) provides that the authorities conducting the screening should indicate in the de-briefing form any elements which appear relevant to whether the person is channelled into the accelerated examination procedure or the border procedure. Article 41(3) of the draft Asylum Procedure Regulation obliges Member States to apply the border procedure if 1) the applicant poses a risk to national security or public order; 2) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity or nationality that could have had a negative impact on the decision; or 3) the applicant is from a third country for which the share of positive asylum decisions in the total number of asylum decisions is below 20 percent (at first instance).<sup>108</sup> Given that border procedures include more limited guarantees for applicants, channelling the person into a border procedure instead of a regular procedure is likely to have a considerable impact on their chances of receiving international protection. Indeed, research confirms that the recognition rate in border procedure is lower than in regular asylum procedure, possibly due to the absence of guarantees as objective factors linked to the caseloads appears not to explain the difference.<sup>109</sup>

ECRE argues that if the form includes elements calling for the application of border procedure it should also include these which would prevent its use. Under Article 41(3) and 41(5) of the proposal for Asylum Procedures Regulation, the border procedure should not be applied to unaccompanied children and accompanied children below the age of 12 and their family unless they represent a danger to national security or public order. According to Article 41(4) of the proposal for Asylum Procedures Regulation, Member States may decide not to apply border procedure in cases where from the outset it is unlikely that readmission following the potential refusal of an asylum claim, would be successful.<sup>110</sup>

ECRE recommends the following amendments:

#### Article 14(2)

[...] On that occasion, the authorities conducting the screening shall point in the de-briefing form to any elements which seem at first sight to be relevant to refer the third-country nationals concerned into the accelerated examination procedure or the border procedure ***and those elements which would preclude the application of the border procedure under Article 41(3)-(5) of the proposed Asylum Procedures Regulation.***

Finally, the Commission argues that the screening does not lead to any decision affecting the rights of the person concerned, and hence no judicial review is foreseen regarding the referral in which it culminates. Once the screening ends, the person who was subject to the screening is subject to a return or asylum procedure, where decisions are taken which can be submitted to judicial review or receives a refusal of entry, which can also be contested before a judicial authority.<sup>111</sup> According to the Regulation,

<sup>106</sup> See CJEU, VL, C-36/20 and Section 2.

<sup>107</sup> See Section 6.1.

<sup>108</sup> ECRE proposed substantial amendments to border procedure laid down in the proposal for Asylum Procedures Regulation, see ECRE Comments on the proposal for Asylum Procedures Regulation.

<sup>109</sup> ECRE Comments on the Asylum Procedures Regulation; European Parliamentary Research Service, Asylum procedures at the border European Implementation Assessment, at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS\\_STU\(2020\)654201\\_EN.pdf?fbclid=IwAR0uIefGxAA3fc4eFUqmLgJpa5p9psO8uJ72mb7m-kqa-dNfwgjs\\_3IRXEJ4](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf?fbclid=IwAR0uIefGxAA3fc4eFUqmLgJpa5p9psO8uJ72mb7m-kqa-dNfwgjs_3IRXEJ4)

<sup>110</sup> For more details on this exception, see ECRE Comments on the proposal for Asylum Procedures Regulation.

<sup>111</sup> Explanatory Memorandum, p. 12-13.

the screening authorities have no choice but to refer to the asylum procedure any person who applies for international protection, they can though have significant influence on the type of asylum procedure applied for the person concerned. This is an additional reason for maintaining that the decision on the referral should be subject to an appeal and that the person should have access to legal assistance in that regard.

Even with a more balanced approach to the elements provided, the key question of the impact on the choice of procedure remains. Will asylum authorities verify by themselves whether the acceleration grounds apply or will they (quasi) automatically rely on the suggestion made in the de-briefing form by the authorities in charge of the screening? In the context of the efficiency and “seamless links” repetitively emphasised by the Commission,<sup>112</sup> the latter can be assumed. Hence, as noted above, the information collected in the de-briefing form is likely to have a considerable impact on the type of procedure to be applied and hence on the prospects for a protection decision. It should therefore be liable to appeal.<sup>113</sup> Likewise, the decision on referral should be provided in writing, with adequate procedural safeguards, as, an administrative act, be subject to an appeal

ECRE recommends the following amendments:

New Article 14(6)

**The decision on referral, as regulated under Article 14(1)-(5), should be provided in a written document, to which the de-briefing form is to be appended. The written referral decision should explain the reasons in fact and law for the choice of a procedure (refusal of entry, return, asylum) and be subject to an appeal. The person concerned should have access to legal assistance to be able to seek a remedy.**

#### **Outcome 4) Relocation**

In line with Recital 17, the screening can also be followed by relocation. According to Article 14(3), if the person concerned is to be relocated under the solidarity mechanism established under the replacement of the Dublin Regulation, the Asylum and Migration Management Regulation, the person should be referred to the relevant authorities of the Member States concerned. The issue is considered in ECRE’s Comments on that Regulation.

## **7. FUNDAMENTAL RIGHTS MONITORING MECHANISM (ARTICLE 7 AND RECITAL 23)**

Partly in response to evidence of widespread violations of fundamental rights at European borders,<sup>114</sup> an independent monitoring mechanism has been proposed and is described in Article 7. ECRE welcomes the mechanism, however in its view, shared by a range of civil society organisations, the proposed monitoring mechanism is too narrow in scope and essential elements concerning independence, accountability and consequences of breaches should be better defined. ECRE thus summarises here its recommendations, developed collectively with other organisations.

First, the scope of the mechanism is currently too narrow. According to the Regulation the mechanism will apply in relation to the screening process, which creates the risk that it will be unable to respond to incidents of collective expulsions that take place outside official border crossings and before a person comes close to accessing the screening process. As recent research highlights, many of the violations take place in the vicinity of the border but before a person accesses a procedure. Any specifications

<sup>112</sup> Explanatory Memorandum, p. 5, 7, 10, Recital 3.

<sup>113</sup> See Section 6.1.

<sup>114</sup> The Asylum Information Database found evidence of collective expulsions in at least 13 countries both at EU internal and external borders. For the EU’s external border, this included: Bulgaria, Hungary, Poland, Cyprus, Spain, Croatia, Romania, Greece and Italy.

which limit when and where the monitoring can take place should be deleted. Instead, it should be clarified that for the mechanism to be an effective tool for monitoring fundamental rights at borders it has to cover all border control activities and be able to consider cross border events, as covered by the Schengen Borders Code.

Second, provisions to ensure the necessary independence should be better defined. The proposal should be amended to ensure that the monitoring mechanism includes independent organisations, such as National Human Rights Institutions or National Ombudspersons if they are regularly assessed for their institutional, functional, and financial independence, and non-governmental and international organisations.<sup>115</sup> The mechanism should also be explicitly enabled to act on information and evidence provided by independent organisations, even if they are not part of the mechanism. An important element of ensuring independence is to support the mechanism with EU funding, which could be provided from the Integrated Border Management Fund's Instrument for financial support for border management and visa (BMVI).<sup>116</sup> The proposed budget for the BMVI in the next MFF has significantly increased compared to the current funding period<sup>117</sup> which means that both the European Commission and individual Member States will have more resources to support border management activities. In view of this reinforced financial support to border management and law enforcement authorities, it is important that fundamental rights monitoring is improved and that a proportionate increase in funding follows.<sup>118</sup>

Third, it is the role of the legislative text itself to ensure that the mechanism leads to accountability, rather than relying on guidance from FRA. This should include ensuring that allegations of violations are investigated and that, where relevant, disciplinary measures follow. Member States should be obliged to respond to the findings and recommendations of the mechanism. In addition, as part of the responsibility to individuals concerned, information about the existence of the monitoring mechanism as well as legal advice and effective access to justice should be provided. Given that the objective of (collective) expulsions is to remove individuals from the territory, the mechanism has to be able to act on information received from individuals who are no longer in the territory of the respective Member State.

To further strengthen the mechanism and ensure relevant oversight, including by parliamentary bodies, the obligation to prepare periodic, public reports on findings and conclusions, including on steps taken to hold those responsible of violations of fundamental rights to account, should be part of the mechanism.

Finally, for the monitoring mechanism to be effective, consequences should be developed in case of non-compliance by Member States, be that a lack of or obstruction of cooperation with the mechanism or failure to investigate and act on its findings. For instance, the European Commission should be able to withhold EU funding by linking the mechanism to the monitoring of the effective application and implementation of the EU Charter of Fundamental Rights, which is an ongoing exercise and suggested precondition for Member States to receive EU funding in the next EU budget as part of the enabling conditions.<sup>119</sup> In addition, the findings of the mechanism should be taken into consideration by the European Commission when assessing a Member State's overall compliance with EU law.

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115 National Human Rights Institutions are subject to a regular accreditation process within which they are *evaluated with reference to the UN Paris Principles*, which are the international standards for NHRIs to promote and protect human rights effectively and in an independent manner. For more information, see here: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf/](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf/). National Ombudsman Institutions adhere to the standards set out in the Venice Principles: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

116 European Commission Proposal 2018/0249(COD) on the establishment of an Integrated Border Management Fund: instrument for financial support for border management and visa 2021–2027

117 For the period 2014-2020, EUR 2.76 billion is available for funding actions under the ISF Borders and Visa instrument. For the period 2021-2027, EUR 5.5 billion is available under the BMVI which is the equivalent instrument.

118 To ensure that allocation of resources is not influenced by national authorities, the funding support should come from the thematic facility managed by the European Commission.

119 See Common Provision Regulation COM/2018/375 final - 2018/0196 (COD) Annex III



## ECRE recommends the following amendments

### Recital 23:

In order to ensure compliance with EU and international law, including the Charter of Fundamental Rights **at European borders**, ~~during the screening~~, each Member State should establish a monitoring mechanism and put in place adequate safeguards for the independence thereof. The monitoring mechanism should cover in particular the respect for fundamental rights ~~in relation to the screening~~, as well as the respect for the applicable national rules regarding detention and compliance with the principle of non-refoulement as referred to in Article 3(b) of Regulation (EU) 2016/399. The Fundamental Rights Agency should establish general guidance as to the establishment and the independent functioning of such monitoring mechanism. Member States should furthermore be allowed to request the support of the Fundamental Rights Agency for developing their national monitoring mechanism. Member States should also be allowed to seek advice from the Fundamental Rights Agency with regard to establishing the methodology for this monitoring mechanism and with regard to appropriate training measures. Member States **shall** ~~should also be allowed to~~ invite relevant and competent **independent** national, international and non-governmental organisations and bodies to participate in the monitoring. The independent monitoring mechanism should be without prejudice to the monitoring of fundamental rights provided by the European Border and Coast Guard Agency's fundamental rights monitors provided for in Regulation (EU) 2019/1896. The Member States should investigate allegations of the breach of the fundamental rights ~~during the screening~~, including by ensuring that complaints are dealt with expeditiously and in an appropriate way.

### Article 7

1. Member States shall adopt relevant provisions to investigate allegations of non-respect for fundamental rights ~~in relation to the screening~~.

2. Each Member State shall establish an independent monitoring mechanism **which shall have unfettered access to the border or places where border control activities are carried out**

to ensure compliance with EU and international law, including the Charter of Fundamental Rights; ~~during the screening~~;

where applicable, to ensure compliance with national rules on detention of the person concerned, in particular concerning the grounds and the duration of the detention;

to ensure that allegations of non-respect for fundamental rights ~~in relation to the screening~~, including in relation to access to the asylum procedure and non-compliance with the principle of non-refoulement, are dealt with effectively and without undue delay **the relevant follow-up processes, including disciplinary procedures and access to justice for affected individuals shall be specified.**

Member States shall put in place adequate safeguards to guarantee the independence of the mechanism **including by ensuring that independent national authorities which are regularly assessed for their independence, non-governmental or international organisations are part of the mechanism.**

The Fundamental Rights Agency shall issue general guidance for Member States on the setting up of such mechanism and its independent functioning. Furthermore, Member States may request the Fundamental Rights Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes.

**New Article 4. Member States shall provide information about the mechanism to potentially affected individuals in a concise, transparent, intelligible and easily accessible form, using clear and plain language**

*New Article 5: The mechanism shall be able to receive and act upon information available in the public domain, received from international organisations, non-governmental organisations, journalists, EU agencies and institutions even if they are not part of the mechanism and affected individuals even if they are not present in the respective Member State.*

*New Article 6: Once independence and functioning of the mechanism has been verified according to guidance developed by the Fundamental Rights Agency, the mechanism should receive funding from the Intergated Border Management Fund: Instrument for financial support for border management and visa (BMVI) and other EU funding sources.*

*New Article 7: The mechanism should annually and publicly report on its findings and recommendations, including on steps taken to hold those responsible of violations of fundamental rights to account. These reports and the ongoing work of the monitoring mechanism should contribute to the assessment of compliance with the EU Charter of Fudamental Rights as per Regulation (EU) 2018/0196 (Common Provisions Regulation) Article 11(1) and Annex III.*

Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring.



**ecre**

European Council  
on Refugees and Exiles

**European Council on Refugees and Exiles**

Avenue des Arts 7/8

Brussels 1210

Belgium

T.+32 232 900 40

[ecre@ecre.org](mailto:ecre@ecre.org)

[www.ecre.org](http://www.ecre.org)