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European Council
on Refugees and Exiles

ECRE COMMENTS ON THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL INTRODUCING THE SCREENING OF THIRD-COUNTRY NATIONALS AT THE EXTERNAL BORDERS AND AMENDING REGULATIONS (EC) NO 767/2008, (EU) 2017/2226, (EU) 2018/1240 AND (EU) 2019/817

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Summary of views

The Screening Regulation ("the Regulation") introduces a new process into the EU's legal framework on asylum and migration. Although primarily intended to manage the arrival of third-country nationals at the EU's external borders, the screening process is also applicable in the interior of EU Member States in certain circumstances. Overall, while the Regulation introduces some stronger safeguards compared to the current system (for example, as regards vulnerability assessments), concerns arise in relation to the Regulation's implications for fundamental rights, the broader respect for procedural guarantees, and the increased administrative burden for Member States at the external borders. These concerns are only partially mitigated by the introduction of a monitoring mechanism dedicated to ensuring of fundamental rights in the screening context.

Following analysis of the key provisions introduced by the Regulation, the following observations can be made:

- **Article 1 – Subject matter**: The Regulation distinguishes between "screening at the external border" (Article 5) and "screening within the territory" (Article 7), but this terminology is misleading since both processes will usually occur on Member State territory. Those undergoing the screening at the external border are not formally authorised to enter, they are still physically present on the state's territory. For people arriving at the border, the Regulation introduces stronger safeguards compared to the Schengen Borders Code (SBC), including more comprehensive health and vulnerability assessments. It could also reduce "pushbacks" by requiring Member States to identify all individuals crossing irregularly and refer them to an appropriate procedure. The independent monitoring mechanism, though limited to the screening context rather than covering broader border practices, is a positive introduction. However, concerns remain. First, the Regulation blurs the legal distinction between asylum seekers and other migrants, as both undergo the same screening. Additionally, it could in fact incentivise pushbacks, if Member States seek to avoid the additional obligations the screening entails. Given these risks, implementation in compliance with international and EU law, including the *non-refoulement* principle, will be essential. Effective oversight by courts, the European Commission, and the monitoring mechanism will be key to ensuring access to protection in the context of and at the conclusion of the screening process.

- **Article 5 and 6 – Screening at the external borders and authorisation to enter the territory**: The Regulation mandates screening for all third country nationals – including asylum seekers – arriving at the EU borders or apprehended in connection with an irregular border crossing, except for those meeting entry conditions under the SBC. A key concern has been the introduction of the mandatory "fiction of non-entry" for third country nationals screened at the external borders. This concept has been applied before, mainly in airport transit zones, to seek to deny jurisdiction or circumvent legal safeguards. However, in the screening context, the fiction of non-entry does not deny that individuals are physically on a Member State's territory, but it rather means they are not authorised to enter until the screening process or border procedure is complete. The withholding of authorisation affects people's rights and treatment, including expanding the possibility of detention under Article 10 of the Reception Conditions Directive (RCD).

- **Article 7 – Screening on the territory**: Screening will also be applied to third-country nationals "illegally staying" in the territory of a Member State. However, the Regulation

does not clearly indicate which rules Member States should follow in identification of people. The provisions for in-country screening raise concerns about racial profiling, and could lead to discriminatory enforcement and unjustified targeting of third-country nationals.

- **Article 8 – Requirements concerning the screening**: The Regulation formalises the so-called “hotspot approach” already used in Greece and Italy. Its implementation will mainly affect states at the external borders, which are required to set up adequate facilities and deploy trained personnel to screen all arrivals. The screening process will, in most cases, take place in “multipurpose” centres near the external borders. At the conclusion of the screening, many people will be channelled into asylum border procedures or return procedures, all while remaining under the "fiction of non-entry." While detention is not explicitly required, it is likely to be used, either in the form of official detention or de facto detention. Screening in the interior may also occur in remote areas, which could hinder access to legal aid and information. Positively, there are strict time limits set for the screening process, although but concerns remain about whether all required checks, especially health and vulnerability assessments, can be completed within these timeframes. The screening process should ideally be led by or managed with the involvement of asylum authorities, to ensure proper case management.

  Some concerns emerge regarding access to procedural safeguards for persons subject to the screening. The screening authorities are obliged to provide information and grant access to organisations providing legal aid, although this can be restricted for reasons of security, public order or administrative management. Evidence shows that some countries use restrictions frequently, especially for detention centres, and they may be so severe that lawyers and NGOs providing legal aid are unable to access centres for days or even weeks. This is particularly concerning because the outcome of the screening has serious consequences for an individual’s access to protection.

- **Article 10 – Monitoring of fundamental rights**: The inclusion of an independent monitoring mechanism is a positive step. However, for this mechanism to be effective, it must ensure comprehensive oversight of border activities, be managed by independent actors, and have enforceable consequences for Member States that fail to comply with fundamental rights obligations. In the implementation of the mechanism, it will be important to ensure a broad scope, independence and sufficient funding and staff, so that it can fulfil its purpose.

- **Article 12 and 13 – Preliminary health and vulnerability checks and guarantees for minors**: The Regulation mandates health checks to identify special healthcare needs, but fails to introduce common standards, which could lead to disparities across the Member States. It is positive that checks must be conducted by qualified medical staff, however broad discretion is given to medical personnel to halt further assessments. Screening at borders, often in high-pressure conditions, may fail to detect certain health issues, particularly mental health challenges. Additionally, the Regulation does not clarify whether individuals can refuse medical examinations, creating further legal uncertainty. Vulnerability checks are now required for all screened individuals; obligations should be read along with the RCD which sets a thirty-day deadline for completion of full vulnerability assessments. While NGOs and medical personnel may assist, their involvement is not mandatory. The introduction of specific guarantees for minors is welcome, but the Regulation’s provisions may not ensure sufficient individualised support. Given how short the screening process is, vulnerability identification will likely continue in later procedures under the APR and

RCD, but early detection of indicators of vulnerability is key, as it could prevent vulnerable individuals from being placed in accelerated or border asylum procedures.

- **Articles 14 and 15 – Identification or verification of identity and security checks**: Expanding access to EU databases for identity and security checks during the screening process increases risks of privacy and data protection violations. These measures challenge the purpose limitation principle and may expose third-country nationals to data protection breaches. The possibility for the screening authorities to search objects in the possession of the persons subject to the screening process raises concerns regarding possible violations of the right to respect for private life laid down in Article 7 of the EU Charter. The potential consequences of security checks are particularly significant because being deemed a threat to national security carries procedural implications. For instance, under the APR, such a designation is one of the criteria for channelling an individual into a border and accelerated procedure. Furthermore, threats to national security are generally assessed by administrative authorities based on classified data which the individual concerned can access only in exceptional cases and even then only partially.

- **Article 17 – Screening form:** The screening form will first determine which procedure the individual is referred to, which could be a return procedure under the Return Directive, an asylum procedure, or a relocation process. Despite this, it is not classified as an official decision, meaning individuals cannot directly challenge the outcome. If inaccuracies are recorded, remedies are only available later in asylum or return proceedings, potentially leading to serious consequences, such as incorrect nationality identification. The involvement of different authorities in registration and assessment may further hinder the possibility of contesting errors, while short appeal deadlines in both asylum and return procedures may limit the possibility to access an effective remedy. Although the screening form is not a decision, the Regulation underlines that the information it contains "shall be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure". This requirement means that the form must be completed in a detailed and rigorous manner.

  The screening form's interaction with the APR reinforces its importance because it records key personal details that will influence the decision on which asylum procedure is applied and which may later affect credibility assessments. Despite not directly including health information, the form documents vulnerability indicators, implying it should also cover health-related details. Given both its practical function as an administrative act and its potential impact on the procedures that follow, in ECRE's view, individuals should be granted the right to appeal or review the screening outcome.

- **Article 18 – Completion of the screening:** The screening process results in three possible outcomes: referral to the authorities responsible for return procedures, referral to the authorities responsible for the asylum procedure, or referral to a relocation mechanism. Referral to the return authorities is the outcome for individuals who do not apply for international protection. Its added value is questionable especially for cases of screening within the territory when the person involved might already have been subjected to unsuccessful return attempts. It raises concerns about resource allocation and the rights of non-returnable individuals, who often remain in legal limbo due to the underuse of regularisation provisions. Those who apply for asylum must be referred to the asylum authorities in charge of registration. At the point of registration, the authorities will then establish whether the individual is channelled into a regular asylum

procedure or into a special procedure, using information from the screening form and additional information gathered during registration. This decision on the procedure to be applied will influence the prospects of the asylum claim. Given the impact of the screening outcome on the asylum case, it is crucial that screening officials receive training to recognise protection requests. The screening process may also result in relocation under the RAMM solidarity mechanism. The final version of the Regulation does not include the issuance of refusals of entry as a direct outcome of screening. Instead, Member States retain the right to issue a refusal of entry under Article 14 of the SBC, provided they comply with the applicable legal conditions.

Screening process	**Location – on the territory?**	**Authorised entry?**	**Location – requirements**	**Maximum duration**	**Outcomes**
At the external border	Yes	No	At or in proximity to the external border	7 days	Referral to return authorities (return procedure under the Return Directive), referral to asylum authorities, referral to relocation process
In the interior of the territory ("within the territory")	Yes	Yes		3 days	Regular asylum procedure or return procedure under Return Directive.

Introduction

The Screening Regulation proposal was introduced by the European Commission in September 2020 as part of the New Pact on Migration and Asylum ("the Pact"). The aim of the Pact was to reform the Common European Asylum System (CEAS) and address migration management challenges with a comprehensive approach, including provisions on border management, asylum procedures, and solidarity mechanisms. The Screening Regulation, alongside the other legislative proposals, constitutes a key element of the reform package.

The Pact builds on earlier reform efforts launched in 2016 and should be read with subsequent proposals introduced in 2020 and 2021. The legislative proposals that form the Pact include the Asylum Procedures Regulation (APR), the Regulation on Asylum and Migration Management (RAMM), the Eurodac Regulation, the Crisis and Force Majeure Regulation, and the Screening Regulation. Together, they aim to streamline migration governance, enhance the efficiency of procedures, and strengthen the EU's external borders. An underlying objective is to limit the number of people seeking and receiving protection in Europe. The measures also raise significant concerns about their impact on fundamental rights, access to asylum, and the workability of the common system.

The Screening Regulation (hereafter "the Regulation") introduces a pre-entry screening process for third-country nationals at the EU's external borders and in the interior of EU Member States' territory for those apprehended in connection with irregular border crossings. The screening process includes identity verification, health and vulnerability checks, biometric registration, and security checks. Following the screening, people are referred to the appropriate procedure, including asylum, return, or relocation procedures.

Purpose and position in the EU's legal framework

Unlike other legal instruments in the Pact, the Screening Regulation does not modify existing rules. Instead, it codifies practices often previously undertaken informally or only formalised in law or policy at the national level and which form part of external border management. While it is presented as a novel legal instrument, its provisions arguably largely reflect existing processes at EU borders,[1] albeit with certain modifications and a standardised legal basis. This allows for an assessment of its potential impact through reviewing current border management practices.

The Regulation is formally deemed a "development of the provisions" of the *Schengen acquis* (Recitals (62) to (64)), thus extending its geographical scope to all Schengen-associated countries (Norway, Iceland, Switzerland, and Liechtenstein) as well as binding all EU Member States except for Ireland and Denmark. Ireland does not participate in Schengen; as such, it is neither involved in the adoption of the Regulation nor bound by its provisions (Recital (61)). Denmark, while formally excluded from the application of the Regulation (Recital (60)), nonetheless voted in favour of implementing it in national law.[2] Cyprus will implement the Regulation as per Recital (65).

Recital (2) outlines the rationale for the creation of the Regulation, emphasising its necessity in situations in which Member States face "unauthorised border crossings by third-country nationals avoiding border checks" despite existing border surveillance measures.

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1 L. Jakulevičienė, *Re-decoration of existing practices? Proposed screening procedures at the EU external borders, October 2020*, available here.

2 Motion for a Parliamentary resolution on Denmark's alignment with Regulation (EU) 2024/1356, Danish Immigration and Integration Committee, available here.

The screening process is designed to either "seamlessly complement" external border checks or to compensate for their absence during border crossings. Additionally, the Regulation establishes rules to support border authorities in managing large-scale arrivals and to prevent absconding and secondary movements of international protection applicants (Recital (5)). The adoption of the Regulation follows years of debate and negotiations among the EU co-legislators. ECRE has consistently voiced concerns about the Regulation's implications for fundamental rights and the protection of vulnerable individuals and has provided detailed recommendations to address these issues and improve the legislative framework.[3]

These Comments analyse the key provisions of the Screening Regulation, highlighting inconsistencies with international and EU standards for the protection of human rights. It builds on ECRE's previous commentary and proposes targeted recommendations to mitigate the Regulation's negative impacts. By focusing on the Regulation's implications for access to asylum, procedural guarantees, and compliance with fundamental rights, the analysis seeks to contribute to a rights-compliant implementation of the Screening Regulation while addressing broader challenges in EU migration governance.

[3] *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020*, available here.

Analysis of key provisions

Article 1: Subject Matter

Article 1 sets out the objective and personal scope of application of the screening process established by the Regulation.

As the Article explains, the purpose of the screening process is "to strengthen the control of third-country nationals crossing the external borders, to identify all third-country nationals subject to the screening and to check against the relevant databases whether the persons (…) might pose a threat to internal security."

The screening should also include preliminary health and vulnerability checks, which should contribute to referring people to the appropriate procedure. The subject matter also includes reference to the mandatory independent monitoring mechanism (see below).

The screening process applies both at the external borders and, following integration of amendments proposed by the Council, it also applies in the interior of the territory, but only under specific circumstances.

At the external borders it applies to third-country nationals who do not fulfil the entry conditions set out in Article 6 of the Schengen Borders Code (SBC) and who:

(i) crossed the external border in an unauthorised manner; or

(ii) applied for international protection during border checks; or

(iii) were disembarked in the territory after a search and rescue (SAR) operation.

In the interior, the "screening within the territory" should be applied to third-country nationals "illegally staying" within the territory of the Member States when there is "no indication" they have already been subject to controls at external borders.

Implementation considerations

In terms of definitions, the terminology of the Regulation distinguishes between the "screening at the external border" and the "screening within the territory", the former regulated under Article 5 and the latter under Article 7. The terminology is somewhat misleading, given that both screening processes will usually take place on the territory of the Member State, and both are therefore "within" the territory. In the border context, while the Member States are not allowed to authorise the entry of the people undergoing the screening they will be on the territory of the state (as well as under its jurisdiction).

While it is not explicitly excluded that the screening process at the external border take place extra-territorially, first, most of the people who fall within the scope of the Regulation have crossed the external border of the EU, and, second, there are as yet no plans for extra-territorial application of the Regulation. Thus, to avoid reinforcing the false suggestion that people undergoing the screening are not on the territory, ECRE distinguishes between the two versions of the screening process through reference to screening "in the interior" to describe the screening "within the territory", given that screening at the external border will also be on the territory.

On a positive note, the Regulation offers more robust safeguards to people apprehended at the external borders than those provided under the SBC, such as more comprehensive health and vulnerability assessments. In theory, it could also constitute an improvement in addressing

"pushback" practices.[4] Under the Regulation, Member States are explicitly required to identify every individual irregularly crossing the external borders or reaching external border crossing points, and to refer them to an appropriate procedure. It also introduces an independent monitoring mechanism which, while limited to overseeing the screening process itself rather than covering broader border monitoring (see below, Article 10), can still be regarded as a positive development.

On the other hand, the introduction of the Regulation raises various concerns. First, as highlighted by academic researchers,[5] the Regulation blurs the distinction drawn in international and EU law between individuals seeking international protection and other categories of migrants, as both categories are subject to the same provisions under the screening.

A second challenge is the risk that, instead of ensuring additional guarantees to persons in need of protection reaching the EU's external borders, Member States might be encouraged to scale up pushback practices, in order to avoid the additional obligations that the screening process entails.

In this context, it is important to highlight that, in the application of the Regulation, Member States are always bound by international and EU primary law, including the Charter and in particular the principle of *non-refoulement*, as explicitly stated in Article 3 and Recital (3). The role of the monitoring mechanism, but also oversight by national and European Courts, as well as by the European Commission, will be key to ensure that access to the territory is granted to all persons in need of protection.

Article 4: Relation with other legal instruments

Article 4 defines the interactions of the Regulation with other relevant legal instruments. First, it establishes that, for persons subject to the screening process who have made an asylum application, Article 27 of the APR on registering applications for international protection applies. Second, it refers to Article 3 of the 2024 recast of the Reception Conditions Directive (RCD) on the scope of the RCD, which establishes that all asylum applicants on the territory are entitled to reception conditions, thus also ensuring that the RCD applies to applicants in the screening process (from the point that they make an application).

Article 3 RCD indicates its applicability is limited to those "allowed to remain on the territory". Under the Screening Regulation, persons subject to screening at the external borders (see Articles 5 and 6) are not authorised to be present on the territory, as the "fiction of non-entry" applies. Despite this formulation, because in most cases they will be on the territory, reception conditions under the RCD must apply.

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4 Pushback cases, as well as difficulties in accessing the asylum procedure after irregular entry have been frequently documented in several Member States (see, *inter alia*, ECRE/AIDA, *Asylum in Europe: the situation of applicants for international protection in 2023* , September 2024, pp.9-10, available here; EUAA, *Asylum Report 2024*, June 2024, pp. 61-64, available here; Protecting Rights at Borders (PRAB), *The pushback – disconnect: current and anticipated practice*, January 2025, available here), and have been condemned at the national and European level (see, for example, *M.K. and Others v. Poland*; *M.A. and Others v. Lithuania*; *K.P. v. Hungary; A.R.E. and G.R.J. v. Greece*). In its 2024 ruling on the *X v. Staatssecretaris van Justitie en Veiligheid* case, the CJEU held that the practice of pushbacks at the external borders is contrary to EU law (para. 50).

5 L. Jakulevičienė, *Re-decoration of existing practices? Proposed screening procedures at the EU external borders*, EU Immigration and Asylum Law and Policy, October 2020, available here.

It should be noted that amendments from both co-legislators support this interpretation. The original proposal stated that the RCD would be applicable "at the end of the screening", a reference which was delete in the Council and European Parliament positions.[6]

Article 4(2) further establishes that the Return Directive or national provisions in line with the Return Directive will be applicable only after the end of the screening process, except for cases of screening on the territory where they apply in parallel (see Article 7).

For third-country nationals who have not made an asylum application, the applicable rules on detention during the screening will be those set out in the Return Directive (as per Article 8(7) Screening Regulation).

Article 5: Screening at the external border and Article 6: Authorisation to enter the territory of a Member State

As per Article 1, one of the main objectives of the Regulation is to establish a mandatory screening process for all third-country nationals reaching the EU external borders who do not fulfil entry conditions under the SBC.

According to Article 5, the screening at the external border is applicable for all third-country nationals who do not fulfil entry conditions and:

- are apprehended "in connection with an unauthorised crossing of the external border of a Member State by land, sea or air" (Article 5(1)(a)); or
- are disembarked in the territory of a Member State following a search and rescue operation (Article 5(1)(b)); or
- have made an application for international protection at external border crossing points or in transit zones (Article 5(2)).

The Article indicates two restrictions to the scope of the screening process. First, as per Article 5(1)(a), the screening does not apply to third-country nationals "for whom the Member State concerned is not required to take the biometric data under Eurodac pursuant to Article 22(1) and (4) of Regulation (EU) 2024/1358 [the Eurodac Regulation] for reasons other than their age".

This subclause means that the screening process is not applied when a person who is apprehended does not fall within the scope of Article 22(1) and (4) Eurodac Regulation. Given the wide scope of Article 22, this is a limited category of people, primarily consisting of those turned back on the basis of a refusal of entry under Article 14 SBC.

Article 22(1) provides the list of people for whom the Member States *are* required to take biometric data, as follows:

every third-country national or stateless person of at least six years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State, who comes from a third country, who is not turned back, or who remains physically on the territory of the Member States, and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back.

Thus, if the person apprehended is not in one of the categories listed, the screening process would not apply. In most cases, it is already clear from the Screening Regulation itself that the screening process does not apply. Those beyond the scope of Article 22(1) Eurodac and

6 ECRE, *Reforming EU Asylum Law: The final stage*, August 2023, p.28, available here.

therefore not subject to the screening are inter alia people who do not come from a third country, who are turned back, or who do not remain physically on the territory of the EU.

Article 22(4) Eurodac concerns those in custody, confinement or detention for a period exceeding 72 hours on the basis of a decision to turn back. This category is brought within the scope of the obligation to take biometric data under Eurodac, as Article 22(4) sets a different deadline for Member States to provide the biometric data taken from them. Thus, the screening process should be applied because they are within the scope of the Eurodac clauses in question.

Second, as per an exception set out in Article 5(3), the screening is not applied when third-country nationals are authorised to enter on humanitarian grounds (under Article 6(5)(c) SBC), provided that they do not make an asylum application. If they subsequently make an application, then they become within the scope of the screening process.

Recital (18) clarifies that the fulfilment of entry conditions and the authorisation of entry are "expressed" in an entry stamp in a travel document. The absence of such an entry stamp or of a travel document may be considered as an indication that the holder does not fulfil the entry conditions. Once the Entry/Exit System (EES) established by Regulation (EU) 2017/2226 (EES) starts operating, entry stamps will be substituted by an entry in the EES.

The screening is discontinued if, after it has started, it is then discovered that the person did in fact meet entry conditions under Article 6 SBC, or if the person concerned leaves the territory of the Member State towards either their country of origin or residence, or a third country (Article 5(3)). This is "without prejudice to the application of penalties for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours" (Recital (12)). These penalties can be set by Member States based on Article 5(3) SBC, which established that "Without prejudice to the exceptions provided for in paragraph 2 [requirements of a special nature, emergency situations, specific rules for certain types of borders or certain categories of persons], or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive." The 2024 reform of the SBC included a further subparagraph to Article 5(3), establishing that "Member States may, where a large number of migrants attempt to cross their external borders in an unauthorised manner, en masse and using force, take the necessary measures to preserve security, law and order."

According to Article 6 of the Regulation, persons subject to the screening at the external border are not authorised to enter the territory of the Member State. This means that the screening at the external border takes place in the so-called "fiction of non-entry". Member States are allowed to lay down in national law measures necessary to ensure the persons involved remain available to the authorities responsible for carrying out the screening. These measures are aimed at preventing risks of absconding, threats to internal security or to public health resulting from the person absconding.

Implementation considerations

A first observation is that, in contrast to the current system, all asylum seekers will need to pass through the screening process before having access to an asylum procedure, except for cases where the asylum seeker fulfils the SBC entry conditions.

In certain countries, such as Greece and Italy,[7] procedures closely resembling the screening process are already used in "hotspots". However, for other countries situated at the external borders, the introduction of the screening process will represent a significant change. These states will need to allocate substantial resources to establish suitable facilities and enhance training and capacity-building efforts for personnel. Ensuring that the facilities used for screening respect standards for safeguards and conditions will be a critical requirement.

One of the most widely criticised aspects of the Regulation is its codification of the "fiction of non-entry". It should be noted that this concept is not new. Several countries already treat individuals applying for asylum at their borders or transit zones as not having formally entered their territory. The concept has been primarily used in border control, mainly in airport transit zones. It is often used to claim a denial of jurisdiction or to circumvent the application of safeguards for the individuals concerned.[8] However, the application of this concept during the screening process is now mandatory. Amendments proposed by the European Parliament to render it optional were rejected.

In the Screening Regulation – and the APR – the fiction of non-entry takes a particular form. It is does not create the fiction that the person has not entered the territory of the state carrying out the screening process or the procedure because, in most circumstances, there can be no doubt in law that they have entered the state and are on the territory. There is not an attempt to extra-territorialise or to claim extra-territoriality. There is no explicit claim in the text of either instrument that the person has not entered the territory, indeed, in the case of the APR, the regulation only applies to applicants "in the territory". Instead, both Regulations turn on the issue of "authorisation": the person is not authorised to enter until the completion of the screening process and/or border procedure. Different rules apply to people before authorisation to enter has been granted.

The Screening Regulation does not explicitly exclude the screening process taking place outside EU territory. However, this possibility is neither expressly provided for, nor are there currently any plans to manage it outside the EU. Most of the categories of people within the scope of the screening will have crossed the external border to enter EU territory. In addition, even in the case of a process at the border (or in proximity to it) but outside the EU's territory, the people concerned would still be under the jurisdiction of the Member State managing the process.

Thus, at least for the immediate implementation of the screening process, as for the border procedures, the people affected will be on the territory of the Member State but held in the fiction of non-entry, whereby their entry has not been authorised.

Where the person has not been authorised to enter, the fiction serves its primary purpose of allowing for the use of detention because the applicants who have not been authorised to enter fall within the scope of recast RCD Article 10(d) which allows for the use of detention to assess whether authorisation to enter should be granted. Read with this Article of the RCD, similarly to the APR, the Screening Regulation allows but does not require detention to be used.

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7 ECRE/AIDA, *Country Report on Greece – 2023 Update*, June 2024, available here; ECRE/AIDA, *Country Report on Italy – 2023 Update*, July 2024, available here.

8 See: ECRE/AIDA, *Boundaries of liberty - Asylum and de facto detention in Europe*, November 2020, pp. 16-19, available here; European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Reception conditions across the EU*, November 2023, available here; EPRS, Legal fiction of non-entry in EU asylum policy, April 2024, available here.

Overall, it should be underlined that, since the people subject to the screening process are on the territory as well as under the jurisdiction of the Member States, the fiction of not entry does not allow Member States to ignore their rights and the procedural safeguards in place.

In the European context, both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have dealt with the issue of migrants' rights at the EU's external borders and the implementation of fictions of non-entry, approaching the topic from different angles.[9] In particular, it appears clear from existing jurisprudence that the fiction of non-entry cannot be used by the Member State to deny responsibility over an individual and the safeguarding of their rights, as European courts have consistently emphasised that states must protect human rights even outside their physical territory (as well as of course on the territory even when the fiction of non-entry is applied). For example, they highlight that removal to a third country must ensure access to fair asylum procedures,[10] and that the right to apply for asylum must always be granted.[11]

Nevertheless, as ECRE has previously argued,[12] several challenges connected to the introduction of the concept emerge, among which the risk of increased cases of detention and mobility restrictions, which in turn would limit possibilities for those reaching the external borders to access information and legal aid, prolong asylum processing times and possibly limit access to national forms of protection.

Article 7: Screening within the territory

Besides screening at external borders, the Regulation also establishes an adapted version of the screening process to take place "within the territory", meaning specifically in the interior of the country rather than at the external borders. Despite opposition from the European Parliament during the negotiations, the Council's position that this element of the proposal should be maintained prevailed.

Under Article 7, Member States should apply screening to third-country nationals "illegally staying" within their territory where they have crossed an external border in an unauthorised manner and they have not previously been subject to the screening in another Member State. As such, the Regulation precludes the conduct of more than one screening process. Recital (18) also underlines that "third-country nationals should not be subjected to repeated screenings."

Member States are required to lay down national rules to ensure that third-country nationals who are screened in the interior / "within the territory" remain available to responsible authorities, to prevent "any risk of absconding" and threats to internal security (Article 7(1)).

According to Article 7(2), Member States can avoid conducting this screening if the person, immediately after apprehension, is sent back to another Member State under bilateral agreements or bilateral cooperation frameworks. In that case, the Member State to which the

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9 For further analysis, see: L. Jakuleviciene, EU Screening Regulation: closing gaps in border control while opening new protection challenges?, EU Immigration and Asylum Law and Policy, June 2024, available here; ECRE, Dr K. Soderstrom, *An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation*, September 2022, available here; F. Rondine, Between physical and legal borders: the fiction of non-entry and its impact on fundamental rights of migrants at the borders between EU law and the ECHR. August 2022, available here.

10 ECtHR, 23 July 2020, *M.K.and Others v. Poland* (Application Nos. 40503/17, 42902/17, 43643/17).

11 CJEU*, Commission v. Hungary*, para. 43; *X v. Staatssecretaris van Justitie en Veiligheid*, para. 51. The necessity to guarantee access to asylum procedures was underlined by the CJEU in the recent judgment in Case C-134/23. The Court emphasized that under the "safe third country" concept, Member States must ensure the right to apply for asylum, especially when the third country denies the applicant entry. CJEU, *Somateio 'Elliniko Symvoulio gia tous Prosfyges'*, Case C-134/23, para. 42.

12 ECRE, Dr K. Soderstrom, *An Analysis of the Fiction of Non-entry as Appears in the Screening Regulation*, September 2022, available here.

third-country national concerned has been returned shall carry out the screening "without delay" (Recital (19)).

As in cases of screening at the external borders, screening conducted in the interior / "within the territory" must also be discontinued if it is established that the individual meets the entry conditions or if they leave the EU territory (Article 7(3)).

Recital (20) establishes that the rules of the Regulation should be applied without prejudice to "provisions of national law covering the identification of third-country nationals suspected of staying in a Member State illegally where such identification is in order to research, within a brief but reasonable time, the information enabling the determination of the illegality or legality of the stay."

Recital (21) clarifies that people irregularly crossing internal borders will be screened under the rules for screening within the territory, rather than the external border screening, even if internal border checks under the SBC are in place.

As discussed below, the screening within the territory also leads to referral to either a return procedure or a regular asylum procedure.

Implementation considerations

One of the primary concerns regarding screening in the interior / "within the territory" is the risk that it may be applied to visa overstayers, despite this category being excluded from the scope of the Regulation, which is applicable only to those who do not fulfil SBC entry conditions. Recital (18) clarifies that indications of non-fulfilment of entry conditions or unauthorised entry may include the absence of an entry stamp or a travel document. The Recital also highlights that the planned operation of the EES,[13] leading to the substitution of the stamps with an entry in the EES, should guarantee more certainty in assessing whether entry was authorised. However, the EES, initially scheduled to begin operating in 2022,[14] was further delayed in November 2024, with no new implementation date set.[15] Additionally, the system has faced criticism for potential violations of the right to personal data protection.[16]

An important consideration is that persons subject to screening in the territory, especially in the initial phases of implementation of the Regulation, will likely face difficulties in proving that they accessed the EU in an authorised manner especially if it was long ago and before the existence of the European Travel Information and Authorization System (ETIAS) employing stamps. It should therefore be considered that, in such situations, the burden of proof regarding unauthorised entry lies on the screening authorities, which should consider the absence of a stamp a mere indication – rather than proof – of the lack of authorised entry.

Article 7 does not clearly indicate which rules Member States should follow in the identification of third country nationals "illegally staying" within their territory to be subjected to screening, and there might be a risk it is interpreted in the sense of allowing authorities to apply this provision to people who present themselves to the authorities to apply for international protection, after having evaded border checks. Article 7(2) instead refers to persons who have

13 Established by Regulation (EU) 2017/2226 of the European Parliament and of the Council.

14 Statewatch, *EU: Biometric borders: half the member states see "high risks" for Entry/Exit System plans*, April 2022, available here.

15 EMN, *The launch of the Entry-Exit System is delayed again*, April 2022, available here.

16 Open Society Foundations, *No Good Reason for a Schengen Entry/Exit System*, April 2013, available here; FRA, Fundamental rights and the interoperability of EU information systems: borders and security, July 2017, available here; EDRi, Smart Borders: the challenges remain a year after its adoption, Kuly 2018, available here.

been “apprehended”, thus suggesting a more formal process. ECRE and other organisations[17] previously warned of the risks of racial profiling and discriminatory policing brought by the introduction of screening within the territory, which has the potential to be highly harmful to migrants’ rights.

Another critical issue is the potential overlap between the provisions in Article 5 and Article 7, due to the lack of definition of an apprehension "in connection with" an irregular border crossing. For example, it remains unclear how far from the border an individual can be apprehended and still fall under Article 5 rather than being considered as “illegally staying” under Article 7. This ambiguity raises concerns that individuals apprehended deep within the territory could still be processed under Article 5. This appears particularly relevant both due to the different duration (seven and three days respectively) of the screening at the border and “within the territory”, but also – and primarily – as the former takes place in the fiction of non-entry and the latter does not.

Article 8: Requirements concerning the screening

Article 8 sets out rules on various features of the screening process, namely its:

- Location – Article 8(1) and (2)
- Length – Article 8(3) and (4)
- Responsible authorities – Article 8(9)

It also sets out the elements of the screening (Article 8(5)), and standards in terms of access to organisations, detention and standard of living (Article 8(6) to (8)). Some of the rules differ between the screening process at the external border and the process in the interior, “within the territory”.

Location of the screening

The screening at the external borders described in Article 5 of the Screening Regulation can be conducted at any “adequate and appropriate location” designated by the Member State. The location should be “generally” be “situated at or in proximity to” the external borders. Nonetheless, following amendments and compromises during the negotiation of the instrument, the screening “at the external borders” can also take place “in other locations” within the territory of the Member State.

Both Recital (10) and Article 8 specify that screening at the external borders should “generally” be conducted at or in proximity to the external borders, and further clarify that, when deciding on alternative locations within the territory, Member States should take into account “geography and existing infrastructures”, and ensure that the screening can be carried out without delay.

The screening “within the territory” provided for by Article 7, can take place at “any adequate or appropriate location designated by each Member State within its territory”.

If detention is used, Article 8(7) establishes that, during the screening, the rules on detention set out in the Return Directive will apply to third-country nationals who have not made an asylum application. Asylum applicants will instead be subject to the rules on detention set out in the RCD. Regardless of whether or not they are detained, Member States will have to ensure that all persons subject to the screening are granted a standard of living “which

[17] *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020*, available here, PICUM, *Analysis of the Screening Regulation*, October 2024, available here; *Joint Civil Society Statement on Article 5 of the EU Screening Regulation*, available here.

guarantees their subsistence, protects their physical and mental health and respects their rights under the Charter" (Article 8(8)).

Length of the screening

The length of the screening process is different for screening at the border and in the interior / within the territory. For the former, it has to be carried out "without delay" and can last for a maximum of seven days from the moment the person involved is apprehended, disembarked or arrives at the border crossing point. For cases of unaccompanied minors, however, if they are physically at the external border for more than 72 hours, they have to be screened in a reduced period of four days (Article 8(3)). For screening on the territory, it has to be completed within three days of apprehension (Article 8(4)).

Responsible authorities

Under Article 8(9), Member States have to designate "screening authorities" – the national authorities responsible for screening process – and ensure that their staff have the appropriate knowledge and have received the necessary training. Article 8 refers to the SBC obligation that training should take into account common core curricula developed by Frontex and include specialised training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking.

Each country will also have to ensure that the medical personnel deployed to conduct the preliminary health checks are qualified and that vulnerability checks are conducted by qualified specialised personnel from the screening authorities. "Where appropriate", national child protection authorities and national authorities in charge of detecting and identifying victims of trafficking in human beings or equivalent mechanisms should be involved in vulnerability checks.

Member States also have an obligation to deploy staff and allocate resources in a manner that allows them to carry out the screening in an efficient way. Screening authorities can be assisted or supported in their activities by Frontex experts or liaison officers, provided they have relevant training and their activities remain within the limits of the Agency's mandate.

Recital (24) of the Regulation further indicates that a framework for close cooperation should be developed between the competent national authorities responsible for implementing SBC controls, for asylum, reception, public health, and return. Beyond support from Frontex, Member States are also allowed to request support from the EUAA.

Other screening requirements

Article 8(5) sets out the practical scope of the screening process then further described in the following articles of the Regulation.

The screening is comprised of:

(a) a preliminary health check (see Article 12);

(b) a preliminary vulnerability check (see Article 12);

(c) identification or verification of identity (see Article 14);

(d) the registration of biometric data in accordance with the Eurodac Regulation, if it has not already occurred;

(e) a security check (see Articles 15 and 16);

(f) the filling out of a screening form (see Article 17);

(g) referral to the appropriate procedure (see Article 18).

Organisations and persons providing advice and counselling must be allowed effective access to third-country nationals during the screening. However, Member States are allowed to "impose limits" where considered necessary for reasons of security, public order or administrative management (the latter two connected to management of a border crossing point or of a screening facility). These limits cannot be arbitrarily established, but have to be enshrined in national law, and access cannot in any case be "severely restricted or rendered impossible" (Article 8(6)).

Implementation considerations

Screening process	Location – on the territory?	Authorised entry?	Location – requirements	Maximum duration	Outcomes
At the external border	Yes	No	At or in proximity to the external border	7 days	Referral to return authorities (return procedure under the Return Directive), referral to asylum authorities, referral to relocation process
In the interior of the territory ("within the territory")	Yes	Yes		3 days	Regular asylum procedure or return procedure under Return Directive.

Location of the screening and detention

Regarding locations situated "at" the border, it is reasonable to assume that only official border crossing points can effectively meet the objectives of the screening process as outlined in the Regulation. Official border crossing points are more likely to be equipped with the necessary personnel and infrastructure to conduct medical examinations, identification procedures, and security checks, including access to relevant databases. However, the Regulation does not explicitly require the screening to be conducted in centres located at border crossing points, which may lead to the risk that, following apprehension, disembarkation, or asylum applications, individuals may initially be held in unofficial locations before being transferred to facilities where the screening process can formally take place. Regardless, the Regulation also allows for screening to be conducted "in proximity" – to the border, a broad term lacking a clear definition.

With regard to the designated locations for the screening process, it is clear that the Regulation seeks to formalise the "hotspot approach" previously adopted in Greece and Italy. However, this approach has faced considerable criticism over the years, particularly due to the treatment of individuals in hotspots, which are often plagued by overcrowding and substandard, inhumane living conditions.[18]

[18] ECRE and Others, *The implementation of the hotspots in Italy and Greece*, December 2016, available here; EPRS, The hotspot approach in Greece and Italy, October 2023, pp. 8-10, available here; European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Reception conditions across the EU*, November 2023, available here; ECRE/AIDA, *Country Report on Greece – 2023 Update*, June 2024, available here; ECRE/AIDA, *Country Report on Italy – 2023 Update*, July 2024, available here.

In practice, the screening process will be strongly linked to border and return procedures. It is likely that Member States at the external borders will establish multi-purpose centres close to their borders, where, following the screening, people will be directly channelled into either a return procedure or an asylum border procedure, with the latter also taking place in the fiction of non-entry. Even in the absence of *de jure* detention, screening centres will likely be located in border regions and remote areas of the territory. In practice, there is a high risk of the use of closed, controlled screening centres and *de facto* detention for all new arrivals.[19]

As for screening on the territory, it will be particularly important to monitor where centres are placed, as there is a risk that they will be placed in remote locations where applicants experience difficulties in accessing services and legal assistance.

As previously mentioned, according to Article 6, during the screening at the external border people are not to be authorised to enter the territory of a Member State. Under Recital (11), the Member State should apply measures pursuant to national law to prevent the persons concerned from entering the territory during the screening. The standard rules on the use of detention derived from international law apply and are restated. Only if it proves necessary and on the basis of an individual assessment, will Member States be able to detain a person during the screening process, and only if less coercive measures cannot be effectively applied. The Recital further stresses that detention should only be applied as a measure of last resort, in accordance with the principles of necessity and proportionality and should be subject to an effective remedy. If the person makes an asylum application, he or she is subject to the conditions for the use of detention in the RCD.

The European Commission has often contended that Member States are not obliged to employ detention measures during the screening process and could instead implement alternative measures that merely restrict a person's freedom of movement. However, it is difficult to envision a measure that confines a person at or near the border, preventing their entry into the territory for up to seven days, that would not amount to detention. In the joined cases of *FMS and Others*,[20] the CJEU explicitly classified the practice of holding individuals at borders or in transit zones as detention. The Court determined that requiring a person to remain permanently within a restricted and closed transit area – where movements are limited and monitored, and departure in any direction is legally prohibited – constitutes detention as defined under both the Return Directive and the RCD.

In practice, it is likely that the majority of individuals subject to the screening will be in a situation of formal detention or *de facto* detention, meaning a situation of detention but one that is not officially classified as such, often because the safeguards required when detention is formally used tend to be absent. There is increasing recourse to *de facto* detention across Europe.

For cases of screening in the interior/ within the territory, it is established that the screening which lasts for up to 3 days, should be conducted at any appropriate location within the territory of the Member State. Depending on the individual circumstances of the case, such measure may amount to detention. Since the person is under the control and authority of law enforcement officials, the location of detention should be required to be an officially recognised facility.

Overall, 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

19 *Joint policy paper: The EU Screening Regulation*, November 2023, available here.

20 CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, 14 May 2020.

be formally defined as such in order that the safeguards apply. Under Article 10(2) of the RCD, Member States may detain an asylum applicant when it proves necessary and on the basis 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 to a return procedure so long as other sufficient but less coercive measures cannot be applied effectively in the specific case. ECRE's analysis of the relevant jurisprudence from both the ECtHR and the CJEU on detention and *de facto* detention of international protection applicants appears in its comments on the RCD.[21]

Regarding treatment standards, the Regulation requires that Member States "ensure that all persons subject to screening are provided with a standard of living that guarantees their subsistence, protects their physical and mental health, and respects their rights under the Charter" (Recital (38)). For asylum seekers, these provisions overlap with the more detailed requirements set out in the RCD. However, for non-asylum seekers, the Regulation potentially offers broader protections than those under the Return Directive.[22]

Length of the screening

On one hand, it is positive that the period for the screening has very strict time limits, as the process, will likely be carried out in detention or in detention-like conditions, including sub-standard facilities. On the other, the question remains as to whether this time is sufficient to carry out all mandatory checks (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 will likely require more time. For this reason, it will be important they are continued in the procedure that follows. In any case, if it is not possible to complete the screening within the established deadline or to refer the individual to the appropriate procedure, the person must be released.

Screening authorities

Given the consequences for the asylum claim of decisions taken in the screening process, and the close links between the screening process and procedures, ECRE maintains its recommendation that the screening process should be carried out by the asylum authorities, and specifically by the determining authority.[23]

If this is not the case, it is crucial to at least ensure the presence of staff from the determining authority at the border so that people seeking protection are channelled into the correct procedure. Member States should also be encouraged to seek operational and training support for their personnel from the EUAA.

The obligation for Member States to provide screening authorities with the necessary staff and resources, while positive, also places additional financial burdens on countries at the external borders. In February 2024, the European Council revised the EU's long-term budget (the

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21 *ECRE Comments on the Directive (Eu) 2024/1346 of the European Parliament and of the Council of 14 May 2024 Laying Down Standards for the Reception of Applicants for International Protection (Recast)*, Articles 9 and 10, September 2024, available here.

22 The Returns Directive includes general provisions on the treatment of third-country nationals in detention in a humane and dignified manner with respect for their fundamental rights (rec.17). The CJEU, on several occasions found violations of those provisions and underlined that: detention must be strictly limited and promptly ended if there is no reasonable prospect of removal (Case C-357/09, paras. 56, 60, 65); detention must be subject to effective ex officio judicial review, ensuring compliance with fundamental rights, particularly the right to liberty (Case C-704/20); detention must not occur in prison unless the conditions of the Return Directive are met (Case C-519/20, par. 103). Additionally, return decisions must not expose individuals to health risks that could result in inhuman or degrading treatment (Case C-69/21, par. 76).

23 *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020*, available here.

'Multiannual Financial Framework' (MFF) 2021-2027), increasing the MFF Heading 4 (Migration and Border Management) by 2 billion euros.[24] Despite this, it remains unclear how much of this funding will be allocated to support the infrastructure and personnel essential for the screening procedure. These funds should not be primarily directed towards border management initiatives, such as purchasing surveillance equipment. Instead, the focus should be on ensuring humane and adequate conditions in screening centres, with sufficient and well-trained personnel, particularly those responsible for conducting vulnerability and health assessments.

Member States should also designate qualified medical staff to carry out the health check provided for in Article 12 and involve, where appropriate, national child protection authorities and national anti-trafficking mechanisms. Given the particular vulnerabilities of many people reaching the EU at its external borders, ECRE recommends that these two categories should always be involved.

Access to organisations and legal aid

The practical implementation of the obligation for Member States to ensure that persons subject to the screening have access to organisations and legal aid will be crucial to ensure the overall fairness of the screening process. As discussed below, a challenge is that the Regulation does not consider the result of the screening process as a decision that should be subject to an appeal. ECRE argues that, given the procedural consequences it entails, there should in fact be a possibility for the individual concerned to appeal against the result of the screening. To this end, but also to ensure the person is aware of their rights in the context of the screening, and notably the right to make an asylum application, legal aid and representation are fundamental.

This topic is linked to the location of the screening. As observed, there is a high likelihood the screening process will mainly take place in detention or in detention-like conditions. Access to asylum seekers in detention centres is difficult in a number of countries. For instance, in some cases, lawyers are only allowed to request meetings with the individuals they represent, which creates a barrier for new asylum seekers seeking legal assistance. In other cases, restrictions on the number of asylum seekers who can be seen in a single day or on the duration of allowed visits prevent lawyers and organisations from meeting the existing needs.[25] Finally, the remoteness of the screening locations might result in difficulties for organisations in deploying the necessary personnel, and for individual lawyers that wish to reach the individuals in need of assistance in the centres.

Given the significance of this issue, it is crucial that access is granted effectively. Adequate resources are also essential. From a funding perspective, organisations will require increased financial support, ideally through EU funding.

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[24] Special meeting of the European Council conclusions, 1 February 2024, available here.

[25] ECRE/AIDA, *Country Report on Malta – 2023 Update*, September 2024, available here; ECRE/AIDA, *Country Report on Poland – 2023 Update*, June 2024, available here; European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Reception conditions across the EU*, pp.60-61, November 2023, available here; ECRE/AIDA, *Asylum in Europe: the situation of applicants for international protection in 2023*, September 2024, pp.5-6, available here.

ECRE's recommendations

Location of the screening and use of detention

- Screening activities should be carried out, as far as possible, at official border crossing points. Centres dedicated to the screening should ensure adequate living conditions, taking into account various factors such as gender and child-appropriate spaces.
- Member States should avoid placing screening centres in remote locations, where access to independent organisations and lawyers would be more challenging for the persons involved.
- Member States should avoid placing screening centres for screening within the territory in border locations.
- Member States should not consider detaining applicants during the screening as an obligation, and cannot apply it automatically, as all guarantees regarding the use of detention apply.
- Civil society organisations should monitor requests for BMVI funding, which is explicitly mentioned as possible support for the screening process.

Length of the screening

- The screening should never exceed the maximum deadlines set in the Regulation. If that is the case, even if the person subject to the screening has not yet been allocated to the dedicated procedure, they should be released from the screening process.

Responsible authorities

- The determining authorities should be responsible for the screening process Member States should respect the obligation to ensure close cooperation between all relevant authorities in the context of the screening.
- Member States should to request assistance, in terms of personnel and training, from Frontex and the EUAA.

Access to applicants

- Member States should ensure access and sufficient resources to organisations providing legal aid and counselling in the context of the screening, to meet the obligation to ensure effective access.

Article 9: Obligations of third-country nationals subjected to the screening

Article 9 establishes three main obligations for third-country nationals in the screening process. They should:

- Remain available to the screening authorities (Article 9(1));
- Indicate their name, date of birth, gender and nationality, and provide documents and information, where available, that prove those data (Article 9(2)(a));
- Provide biometric data as referred to in the Eurodac Regulation ((Article 9(2)(b)).

Article 10: Monitoring of fundamental rights

Article 10 establishes the obligation for each Member State to establish an independent monitoring mechanism tasked with investigating allegations of breaches of fundamental rights in relation to the screening process. Member States are requested, "where appropriate", to ensure referral to civil or criminal justice proceedings, in accordance with national law (Article 10(1)).

The national mechanisms will be tasked with monitoring compliance with EU and international law, including the CFREU, with a particular focus on access to the asylum procedure, the principle of *non-refoulement*, the best interest of the child principle, and rules on detention as apply to the screening process (Article 10(2)(a)). The mechanism should ensure that

allegations of fundamental rights violations are properly "dealt with", through investigations and monitoring progress on such investigations conducted at the national level (Article 10(2)(b)). The mechanism will have the power to issue annual recommendations to the Member State.

Member States are required to put in place adequate safeguards to guarantee the independence of the monitoring mechanism (Article 10(2)) and to equip it with sufficient financial means (Article 10(4)). Recital (29) clarifies that "the mere existence of judicial remedies in individual cases or national systems that supervise the efficiency of the screening is not sufficient to comply with the requirements concerning the monitoring of fundamental rights" under the Regulation.

In terms of the composition of the mechanism, national Ombudspersons and national human rights institutions (NHRIs), including national preventive mechanisms established under the OPCAT, have to be involved in the operation of the mechanism. These institutions may be appointed to carry out all or some of the mechanism's tasks. Other actors that may be involved in the monitoring are international and non-governmental organisations, as well as public bodies, on condition that they are independent from the authorities carrying out the screening. Even if these actors are not directly involved in the operation of the mechanism, the Regulation prescribes that the mechanism should maintain "close links" with them, as well as with the national data protection authorities and the European Data Protection Supervisor (EDPS) (Article 10(2)).

The Regulation provides some guidance on the monitoring methodology the mechanism should follow, in particular mentioning that its tasks should be carried out based on on-the-spot checks and random and unannounced checks. In addition, Member States will have to ensure access to all relevant locations for the screening process, including both detention and reception centres. However, a limitation is in place, as only individuals acting on behalf of the mechanism and holding a security clearance will be permitted to access screening locations. Furthermore, the mechanism should have the ability to access both individuals and relevant documents.

Article 10(3) of the Regulation establishes that the findings of the independent monitoring mechanism have to be "taken into account" in its assessment of the effective application of the CFREU, as foreseen by the Common Provision Regulation,[26] which could have an impact on access to EU funding. The mechanism is set to operate "without prejudice to" the EUAA monitoring mechanism[27] and to the role of Frontex fundamental rights monitors.[28]

The Regulation allocates a specific role to the European Union Agency for Fundamental Rights (FRA) in providing guidance to Member States in the establishment of the mechanisms.[29] FRA has already published its guidelines on the subject, including recommendations on the scope of the mechanism, the guarantees of its independence, funding, and relevant actors. Member States are further encouraged to request support from the FRA in developing their mechanisms (Article 10(2)).

The FRA guidance outlines best practices and comprehensive strategies that Member States should adopt. For instance, it emphasises that, to ensure independence, monitoring mechanisms should be free from any institutional ties to the responsible authorities and

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26 Article 15(1) (Enabling Conditions) and Annex III of Regulation (EU) 2021/1060 of the European Parliament and of the Council.

27 As set out in Article 14 of Regulation (EU) 2021/2303.

28 Article 80 of Regulation (EU) 2019/1896.

29 FRA, *Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms*, September 2024, available here.

specifically recommends prioritising ombudspersons and national human rights institutions. In addition, the guidance encourages states to broaden the scope beyond the screening process to also include border management and return border procedures.

Implementation considerations

Scope of the mechanism

The mechanism was introduced in the Regulation partly as a response to the numerous allegations of fundamental rights violations at the EU external borders. Monitoring activities at the external borders have been conducted in various forms over many years. Often they have taken the form of tripartite agreements between UNHCR, civil society, and border authorities as part of the Schengen Borders monitoring mechanism, or they have been led by NHRIs.[30] Nonetheless, ECRE welcomes the introduction of a dedicated mechanism, that will cover – at a minimum – the screening process and asylum border procedure.[31]

It is important to note however that the scope of the monitoring mechanism is limited, as it is confined to "activities undertaken by the Member States in implementing this Regulation" (Article 10(2)), and does not mandatorily extend to border monitoring. This poses a concrete risk because the mechanism might be unable to respond to incidents of collective expulsions that take place outside official border crossings and before a person manages to access the screening process. Research indicates that many violations occur near the border but prior to the initiation of any formal procedure.[32] Nevertheless, Member States have the option to broaden the scope of the mechanism to encompass all activities related to border monitoring, which would be crucial for addressing these gaps effectively.

The ability to conduct unannounced visits is particularly significant to ensure the mechanism maintains its effectiveness. Equally important is the mechanism's access to all relevant locations where the screening is conducted.

Composition and functioning of the mechanism

It is welcome that the Regulation obliges Member States to involve National Ombudspersons and NHRIs in the functioning of the mechanism, and prescribes that it should maintain links with relevant international and civil society organisations, even if they are not directly involved in its operations. In many countries, Ombudspersons and NHRIs already conduct visits at the borders, making them well-suited to serve as the primary actors operating the monitoring mechanisms at the national level. However, in cases where no direct conflict of interest exists – such as situations where an organisation has not been sub-contracted by national authorities to provide services related to the screening process – it would be advantageous to involve civil society organisations and independent experts directly in the mechanism. Their participation would help strengthen the mechanism's capacity, ensuring it can carry out frequent and effective monitoring activities.

30 Dr T. Molnár, *Monitoring fundamental rights compliance in the context of screening and the asylum border procedure: putting bricks back into the EU house of rule of law?*, EU Immigration and Asylum Law and Policy, September 2024, available here.

31 *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, October 2024, available here.

32 CoE Commissioner for Human Rights, Pushed beyond the limits. Urgent action needed to stop pushbacks at Europe's borders, April 2022, available here; EPRS, Addressing pushbacks at the EU's external borders, October 2022, available here; 11.11.11 - Koepel van Internationale Solidariteit, *Illegality without borders – Pushback report 2023*, February 2024, available here.

There are however some concerns arising. First, previous experiments with monitoring mechanism have not always proven successful[33] in effectively ensuring accountability against fundamental rights violations. In this respect, it will be of the upmost importance that the mechanisms are free of any institutional affiliation with the authorities responsible for asylum, border and migration management.

Secondly, as reported by ENNHRI,[34] despite the rapid developments regarding the implementation of Pact instruments, some NHRIs have not yet been consulted in discussions about the establishment of the monitoring mechanisms during the drafting of national implementation plans. This lack of engagement is concerning, as it may hinder the mechanism's ability to roll out its monitoring activities from the entry into applicability of the Screening Regulation.

Another key aspect of the mechanism regards its independence. As highlighted by other stakeholders[35] and mandated by Recital (27) of the Regulation, Member States should draw from established international and regional standards for NHRIs, Ombudspersons and NPMs, including the UN Paris Principles for national human rights institutions,[36] the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),[37] and the Council of Europe Venice Principles.[38] Furthermore, the mechanism should be defined and designated by national legislation, ensuring operational autonomy and freedom from any undue external influence. It is essential that the mechanism remains institutionally unaffiliated with authorities responsible for asylum, border, and migration management. Recital (29) of the Screening Regulation provides an important safeguard by explicitly stating what does not qualify as a monitoring mechanism: judicial remedies in individual cases or systems supervising the efficiency of screening and border procedures. By adhering to these principles and drawing on existing standards, the mechanism can achieve the degree of independence required to fulfil its mandate effectively.

Funding

In terms of funding for activities under the Regulation, Recital (28) and Article 10(4) require the Member States to support the monitoring mechanisms with “appropriate financial means”.

Considering the budget constraints faced by many Member States, there is a significant risk that monitoring mechanisms may suffer from insufficient financial resources, thereby undermining their effectiveness. Additionally, logistical challenges and difficulties in accessing border areas must be addressed. Enhanced training for personnel responsible for the monitoring will be crucial, along with ensuring adequate funding and resources—including sufficient and qualified personnel—to enable the mechanisms to carry out their activities

33 ECRE/AIDA, *Country Report on Croatia – 2023 Update*, July 2024, available here; ECRE/AIDA, *Country Report on Greece – 2023 Update*, June 2024, available here.

34 *ENNHRI’s updated common position on establishing independent Monitoring Mechanisms under the EU Pact on Migration & Asylum*, p.4, December 2024, available here.

35 FRA, *Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms*, September 2024, available here; Dr T. Molnár, *Monitoring fundamental rights compliance in the context of screening and the asylum border procedure: putting bricks back into the EU house of rule of law?*, EU Immigration and Asylum Law and Policy, September 2024, available here; *ENNHRI’s updated common position on establishing independent Monitoring Mechanisms under the EU Pact on Migration & Asylu*m, December 2024, available here.

36 OHCHR, Principles relating to the Status of National Institutions (The Paris Principles).

37 OHCHR, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

38 Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019).

effectively. As noted by ENNHRI[39] and FRA, if NHRIs are granted this additional mandate, it must be accompanied by a corresponding increase in their funding and must not undermine their other work. As underlined by FRA in its guidance, funding must also comply with the principle of independence.[40]

An important way to ensure independence would be to support the mechanism with EU funding. Recital (23) stipulates that as the screening process is part of European Integrated Border Management, actions of Member States falling under the Regulation may be supported by Border Management and Visa Instrument (BMVI)[41] under the Integrated Border Management Fund (IBMF). In this regard, following the consent of the Parliament, the Council recently adopted a mid-term revision of the EU Multiannual Financial Framework (2021-2027) increasing the share of resources available for migration and border management inside the EU. Heading 4 "Migration and Border Management" was expanded by 2 billion euros in total, with 1 billion euros of those resources should be dedicated to the BMVI specifically, resulting in an increase of 16% compared to the current allocations. As previously recommended by ECRE,[42] this budgetary increase should be dedicated to a comprehensive implementation of all elements of the Pact, which, in line with Article 10(4) of the Screening Regulation, includes adequate resourcing of fundamental rights monitoring mechanisms. 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.

Results of the monitoring

Ensuring transparency and accountability within the monitoring mechanism is another essential aspect, as it will only have an impact if consequences follow.

The mechanism will issue yearly recommendations, but the Regulation is silent on the response to findings expected from the Member States and on the consequences of non-compliance. Given the current political context and recurring instances of non-compliance with existing rules under the asylum and Schengen *acquis* – coupled with the limited response to violations from the European Commission[43] - it is difficult to envision the mechanism significantly advancing adherence to fundamental rights principles or reducing violations at the borders. Moreover, as ECRE has previously highlighted,[44] the new rules introduced by the Pact could exacerbate existing violations, for example leading to an increase in collective expulsions due to the strengthened provisions on responsibilities at external borders.

Some positive aspects should still be highlighted. First, the existence of a monitoring mechanism could serve as a deterrent, helping to reduce fundamental rights violations, at least in relation to the screening process. In addition, Article 10 explicitly clarifies that the European Commission must consider the findings of the monitoring mechanism when assessing the Member States' effective application and implementation of the Charter of fundamental rights in the use of EU funds. This means that the Commission would be able to

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39 FRA, Strong and Effective National Human Rights Institutions, 2020, available here; ENNHRI's Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum, March 2021, available here.

40 FRA, *Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms*, September 2024, available here.

41 Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy.

42 ECRE *Op-Ed, Revision of the long-term EU budget: What implications for migration and asylum policy 2024-2027?*, February 2024, available here.

43 J. Rijpma, A. Fotiadis, study for the Greens/EFA, *Addressing the Violation of Fundamental Rights at the External Borders of the European Union Infringement Proceedings and Conditionality in EU Funding Instruments*, June 2022, available here.

44 ECRE, *Editorial: All Pact-ed up and ready to go: EU asylum law reforms*, February 2024, available here.

withhold funding to Member States who are found to be violating fundamental rights in the context of the screening process.[45]

ECRE's Recommendations

For the new monitoring mechanism to genuinely protect migrants' rights, it is crucial that Member States not only allocate the necessary resources but also ensure the independence and effectiveness of these bodies. Engaging a wide range of relevant actors, including international organisations, civil society, and independent experts, is equally important. However, the success of such mechanisms also depends on the political will of Member States to commit to upholding the rights of migrants and refugees. Regarding civil society's role, ensuring that legal rights translate into actual protection for migrants will likely require ongoing advocacy, awareness-raising, and litigation. In this regard, ECRE recommends the following:

- Member States should expand the scope of the monitoring mechanism to cover both border monitoring and the return border procedure above all. The mechanism should also include reviewing whether authorities respect obligations to receive and register applications and references to evaluation of decision-making and assessments.
- MS should ensure the independence of the national monitoring, in respect of established international and European standards.
- Sufficient resources will have to be allocated to ensure the functioning of the mechanism. Funding from the BMVI, including additional national allocations in the context of the mid-term evaluation, should be allocated to fundamental rights monitoring mechanisms to reinforce the accountability system and to ensure that fundamental rights protected under the Charter are respected.

- MS should lay down provisions of national law giving access to non-governmental organisations to get involved directly in the carrying out the monitoring activities by the monitoring mechanism to ensure the independence of the mechanism in accordance with international and European standards.

Article 11: Provision of information

Article 11 sets out rules on information provision to persons subject to the screening, to include information on:

- the purpose, duration and elements of the screening, the procedure to be followed, and possible outcomes of the screening (Article 11(1)(a);

- the right to apply for international protection and the applicable rules on making an application for international protection. The section also covers the situation if the person is detained or at a border crossing point, the possibility to make their application in such context, as prescribed by Article 30 of the APR.

- the obligations of asylum applicants and the consequences of non-compliance laid down in Articles 17 and 18 of the AMMR (Article 11(1)(b));

- their rights and obligations during the screening, including the obligations under Article 9 (see above) and the possibility to contact and be contacted by the organisations and persons providing advice and counselling (Article 11(1)(c));

[45] Common Provision Regulation COM/2018/375 final - 2018/0196 (COD) Annex III. For further analysis on the topic, see: ECRE/PICUM, *Fundamental rights compliance of funding supporting migrants, asylum applicants and refugees inside the European Union*, March 2023, available here.

- their rights on data protection (Article 11(1)(d)).

People subject to the screening should also be informed, where necessary, about rules on entry in accordance with the SBC, about rules on returns according to the Return Directive, and about relocations based on Article 67 RAMM (Article 11(2)).

According to Article 11(3), information has to be provided "in a language which the third-country national understands or is reasonably supposed to understand", and should be provided in writing as a rule, and where necessary orally using the services of an interpreter. An additional guarantee is provided for minors, that have to receive child-friendly and age-appropriate information, with the involvement and with the involvement of the representative or a person trained to safeguard the best interests and general wellbeing of the minor, as per Article 13 of the Screening Regulation (see below). Cultural mediation services also have to be available in order to facilitate access to the asylum procedure.

It is for the Member State to decide (a "may" clause is used) whether competent national, international and non-governmental organisations and bodies are authorised to provide third-country nationals with information on the screening process (Article 11(4)).

Implementation considerations

As ECRE noted in its Comments on the APR and RAMM,[46] information provision regarding the functioning of national asylum systems remains a persistent and significant challenge in some Member States. The implementation of Article 11 requires addressing these shortcomings to ensure that individuals subject to the screening process fully comprehend their rights, obligations, and the procedures they are undergoing.

Experience has consistently demonstrated that relying solely on written information is often insufficient, as linguistic, cultural, and educational barriers may hinder the individual's ability to understand the content. Consequently, information should not only be provided in writing but also explained in a clear, accessible manner, tailored to the needs of the individual. This may involve the use of qualified interpreters, visual aids, or in-person briefings delivered by trained professionals.

Independent bodies, such as NGOs or legal aid organisations, play a crucial role in providing supplementary support to individuals undergoing the screening process, especially in light of the procedural consequences of the results of the screening on individual cases (see Article 18). It is then crucial that Member State authorities facilitate access for these independent actors. Restricting access undermines the procedural safeguards which are integral parts of the Regulation.

[46] *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Article 8, October 2024, available here; *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, Article 19, May 2024, available here.

ECRE's Recommendations

- MS should ensure that proper interpretation is provided to all, in the applicant's mother tongue or primary language;
- Member States should make arrangements under their national law and programs for screening to provide cultural mediations service for all persons subject to the screening;
- MS should ensure their staff is qualified and properly trained, in particular when treating vulnerable cases;
- Member states should not hinder this access in particular by non- governmental organisations and international organisations independent from the authorities carrying out the screening in practice and to establish safeguards under their national law to facilitate the access of this organisations to the persons concerned.
- Considering the broad scope of data collected in the procedure, a data protection unit or data protection officer shall supervise the activities carried out under screening and monitor the compliance with the rights of the data subject under the EU data protection law and in particular GDPR.

Article 12: Preliminary health checks and vulnerabilities and Article 13: Guarantees for minors

Article 12 prescribes that health checks should be conducted for all third-country nationals subjected to the screening process, regardless of whether it is carried out at the external border or in the interior / "within territory". The health checks have to be carried out by qualified medical personnel and have the objective of "identifying any needs for health care or isolation on public health grounds". All individuals in the screening process remain entitled to access emergency health care and essential treatment of illness (Article 12(1)).

Beyond health checks, vulnerability checks are also mandated by the Regulation. Article 12(3) establishes that preliminary vulnerability checks have to be conducted for all the individuals who are subject to the screening, both at the external borders and in the interior. The checks will be conducted by "specialised personnel of the screening authorities trained for that purpose", who may be assisted by NGOs and medical personnel.

As reinforced by Recital (37), the objective of the preliminary vulnerability check is to identify whether the person might be stateless, vulnerable or a victim of torture or other inhuman or degrading treatment, or have special needs. For those who have made an asylum application, the health check may be taken into account for the medical examination referred to the APR (Article 12(2)). Preliminary vulnerability checks may form part of the assessments of special reception or procedural needs foreseen respectively by the RCD and APR (Article 12(5)).[47]

If there are indications of vulnerabilities or of special reception or procedural needs, the Regulation establishes that the person concerned has to be provided with "timely and adequate support in adequate facilities". The support provided should take into account both their physical and mental health. In the case of minors, it should be tailored on their needs and provided in cooperation with national child protection authorities (Article 12(4). In the case of minors, support shall be given in a child-friendly and age-appropriate manner by personnel trained and qualified to deal with minors, and in cooperation.

Article 13 establishes specific guarantees for children subject to screening. It explicitly mentions the best interests of the child as a fundamental consideration. During the screening,

[47] Article 25 of Directive (EU) 2024/1346 and Article 20 of Regulation (EU) 2024/1348.

children have to be accompanied by an adult family member if present (Article 13(2)). For unaccompanied minors, Member States have to appoint a representative as soon as possible. If it is not possible to appoint a representative in time, the presence of a person "trained to safeguard the best interests and general wellbeing of the minor" has to be ensured as a substitute throughout the screening. The representative has to possess the necessary skills and expertise and acts according to the minor's best interest and in view of safeguarding their well-being (Article 13(3)). The person appointed has to be independent; in particular, they cannot be responsible for any element of the screening, receive orders from persons responsible of the screening or be part of the screening authorities (Article 13(4)). Even for cases in which the minor is not assigned a representative or responsible person, this should not prevent them from being allowed to make their application for international protection (Article 13(6)). Member States have the obligation to ensure the representative or trained person is only in charge of a "proportionate and limited number of unaccompanied minors". Under normal circumstances, this number should not be superior to thirty children at a time (Article 13(3)).

Implementation considerations

Health check

The obligation on Member States to conduct medical checks as part of the screening process was introduced by the Commission in order to harmonise preliminary health checks, given the particular challenges observed during the pandemic.[48] As previously observed by ECRE, it is unclear whether this obligation has added value, as similar obligations can be found in the SBC and RCD.[49] The clarification that one of the objectives of identification should be the recognition of special health care needs is welcome, as is the requirement that these checks be conducted by qualified medical staff belonging to one of the categories in the ISCO-08 classification of the International Standard Classification of Occupations, under the responsibility of the International Labour Organisation, as outlined in Recital (36). An improvement compared to the 2020 proposal on the Screening Regulation is that the mandated health checks now apply to both border screening and screening within the territory.

However, no common standards are established for the health checks, which is likely to result in significant disparities between countries. It is also concerning that, following the initial check, medical personnel can determine that no further health assessments are necessary during the screening. This decision is based on "medical circumstances concerning the general state of each individual third-country national." However, there are no clear criteria for determining under which "general state" or conditions the medical check should be halted. Given that the primary goal of the medical check is to identify healthcare needs, the use of vague and broad language leaves too much discretion for medical personnel and Member States to deviate from the obligation. It should also be noted that, particularly in cases of screening at borders, checks may occur under conditions where large numbers of people arrive simultaneously, meaning that certain health issues, especially mental health challenges, may not be identified early on. Additionally, it remains unclear as to whether individuals are allowed to refuse a medical examination, as this possibility is not explicitly mentioned, unlike in the case of the medical examination under Article 20 of the APR.

[48] European Commission*, Explanatory Memorandum, 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, available here.

[49] *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020*, available here.

Vulnerability check

It is a positive development that Member States have an obligation to conduct vulnerability checks for all persons subject to the screening, including in screening "within the territory". Recital (38) includes a non-exhaustive list of 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". Persons with vulnerabilities, victims of torture and with special needs should be 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.

It is welcome that NGOs and medical personnel can assist in the vulnerability check, but as their involvement is not mandatory there is a risk it will in practice be only carried out by screening authorities.

Regarding the specific guarantees for minors, the introduction of a dedicated article in the Regulation is also a welcome step. However, for its effective implementation, it will be crucial for Member States to ensure proper funding for national systems to support representatives. The Regulation's limit of thirty children in "normal circumstances" (suggesting that more will be acceptable in exceptional cases) under the responsibility of the same representative or appointed person does not appear sufficient to ensure that minors' views are adequately considered and that each case is properly assessed.

Interaction with the APR and RCD

The provisions on vulnerability assessment in the Screening Regulation should be read in conjunction with the related provisions in the APR and the RCD, and not least because identification of vulnerabilities will usually require more time than the deadlines for the screening process. Article 20 APR requires that all authorities note "preliminary indications" that an applicant may be vulnerable or have special procedural guarantees, after which a full assessment should take place within a thirty-day deadline. Article 25 RCD similar provides that the assessment of special reception needs should start as soon as possible and be completed within the same deadline of thirty days. In practice, the preliminary checks in the screening process will likely mark the start of a process with the screening form noting the indications of special needs required by the APR. A unified fuller assessment to meet the requirements of both APR and RCD will then follow, to be concluded within thirty days.

One of the challenges arising is the interaction with the decision on the asylum procedure to be used. While vulnerable applicants are not automatically exempted from accelerated and border procedures, ECRE argues that there is a strong presumption against their use for applicants with special reception needs, special procedural needs or who are otherwise vulnerable. If strong indications of or certainty about vulnerability is already clear at the screening stage, then applicants should not be channelled into accelerated or border asylum procedures.

ECRE's recommendations

- Member States need to ensure that vulnerable applicants identified in the screening are channelled into the proper procedure.
- A common standard for the best interest assessment based on UNHCR and Committee on the Rights of the Child recommendations should be developed.

- Member States should guarantee that proper funding is provided for the system of representatives for unaccompanied minors to function, that ensure enforcement is in line with rights of children and decisions are taken according to the best interests of the child.
- Member States must allocate sufficient resources and trained personnel to carry out the preliminary health and vulnerability checks, as well as ensure the results of the checks are duly taken into account to channel the person into the appropriate procedure.
- Member States should involve specialised NGOs and medical personnel in all cases to ensure a multi-stakeholder approach is adopted in carrying out the vulnerability checks.

Article 14: Identification or verification of identity

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 view of this objective, identity checks will have to be carried during the screening (be that at the external borders and on the territory) to the extent that it has not occurred during border checks as regulated under Article 8 of the SBC. 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 (Article 14(1)).

Using this data or information, screening authorities will have to query the CIR,[50] search the Schengen Information System (SIS)[51] and, where relevant, search national databases in accordance with national law. Biometric data will be taken once during the screening, both for the purpose of identification or verification of identity, and in view of the registration of the person in Eurodac[52] (Article 14(2)).

Under Article 14(3), screening authorities will have to first launch the CIR query through the European Search Portal (ESP),[53] while retaining the possibility to directly access the SIS (in

50 Established by Regulations (EU) 2019/817 and (EU) 2019/818, introduced to facilitate the interoperability of EU information systems. Recital 40 Screening establishes: "*The Common Identity Repository (CIR) was established by Regulations (EU) 2019/817 (18) and (EU) 2019/818 (19) of the European Parliament and of the Council to facilitate and assist in the correct identification of persons to facilitate and assist in the correct identification of persons registered in the EES, the Visa Information System established by Council Decision 2004/512/EC (20) (VIS), the European Travel Information and Authorisation System established by Regulation (EU) 2018/1240 of the European Parliament and of the Council (21) (ETIAS), Eurodac and the centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons established by Regulation (EU) 2019/816 of the European Parliament and of the Council (22) (ECRIS-TCN), including of unknown persons who are unable to identify themselves. For that purpose, the CIR contains only the identity, travel document and biometric data recorded in the EES, VIS, ETIAS, Eurodac and ECRIS-TCN, logically separated. Only the personal data strictly necessary to perform an accurate identity check is stored in the CIR. The personal data recorded in the CIR are automatically deleted where the data are deleted from the underlying systems. Consultation of the CIR enables a reliable and exhaustive identification or verification of identity of persons, by making it possible to consult all identity data present in the EES, VIS, ETIAS, Eurodac and ECRIS-TCN in one go, in a fast and reliable manner, while ensuring the protection of the data and avoiding the unnecessary processing or duplication of data*."

51 Established by Regulations (EU) 2018/1860, (EU) 2018/1861 and (EU) 2018/1862.

52 In accordance with Articles 15(1)(b), 22, 23 and 24 of Regulation (EU) 2024/1358, as applicable.

53 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

this case, the use of the ESP is optional). Where "technically impossible" to obtain results through the query, the screening authorities would be authorised to access the relevant EU information systems or the CIR directly.

Recital (41) indicates that "to establish the identity or to verify the identity of the person subject to the screening, a verification should be initiated in the CIR in the presence of that person during the screening. During that verification, the biometric data of the person should be checked against the data contained in the CIR." As per Article 14(4), if biometric data of the person under the screening cannot be used or if the query using them fails or returns no hits, the query will be carried out using the identity data of the third-country national, in combination with any identity, travel or other document data, or with any other relevant data or information provided by or obtained from the third-country national concerned.

Implementation considerations

Some observations from ECRE's Comments on the Commission initial proposal of the Screening Regulation remain valid:

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.[54] Indeed, there is no collection of additional data in the information systems, rather the Screening Regulation provides for new uses of the existing data.

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.[55] 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 (…).[56] 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

2004/512/EC and 2008/633/JHA in accordance with Chapter II of Regulation (EU) 2019/817 and Chapter II of Regulation (EU) 2019/818

54 European Commission, Explanatory Memorandum, p. 9.

55 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.

56 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.

purpose of identifying them.[57] Overall, as has been noted elsewhere,[58] 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.[59]

From ECRE's **Comments on the Commission Proposal for a Screening Regulation Com(2020) 612**

The Screening Regulation expands the purpose of the CIR so that that it can now be used for identification at the external borders, even though this purpose was not originally foreseen in the Interoperability Regulation. Since the use of the CIR for identification purposes was previously limited to facilitating and assisting in the correct identification of persons registered in the five databases during police checks within the territory, Article 23 of the Screening Regulation amended the Interoperability Regulation 2019/817 to provide for the additional purpose of using the CIR, namely to identify persons during the screening.

The identification of third-country nationals via the CIR during the screening process raises concerns regarding which authorities will have access for screening purposes. As mentioned earlier, when a query reveals that a person's data is stored in the CIR, screening authorities are granted access to this information. Article 8(9) of the Screening Regulation stipulates that screening authorities may be assisted or supported by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency and the European Union Agency for Asylum. If personnel from these two Agencies is allowed to access the data, this would increase the number of actors with access to information systems without specifying the necessary safeguards for such processing. In effect, the screening process expands the reach of these agencies to EU information systems through indirect means, without additional safeguards governing such processing.

The Regulation also 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,[60] especially taking into account the wide range of methods used by Member States

57 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*, pp. 470-482, 2018, 4(4) European Data Protection Law Review.

58 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, available here.

59 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, available here.

60 The CJEU has consistently emphasized the need for strict adherence to the principle of proportionality in the processing of personal data and its interference with fundamental rights. In Case C-746/18, the CJEU stressed that access to retained data must balance investigative needs with privacy rights (par. 52). In Tele2 Sverige AB (C-203/15, C-698/15), it confirmed that targeted data retention for serious crime must be limited to what is strictly necessary (par. 102). The Advocate General Opinion 1/15 highlighted that any agreement interfering with privacy must have clear, precise rules and ensure effective data protection (par. 208). Further, in Case C-548/21, the Court underscored that any limitations on Articles 7 and 8 must be necessary and proportional (par. 85) and must respect legal certainty principle (par. 76). The CJEU in Case C-178/22 (par. 36) and C-61/22 (par. 77) affirmed that limitations must be clearly defined by law and cannot be arbitrary, stressing that measures must contribute effectively to public security while minimizing harm to privacy. Lastly, in C-362/14, the CJEU emphasized the necessity of clear, precise rules to prevent unlawful

to support identification and identity verification processes in the absence of documentary evidence of identity.[61]

Another relevant point to consider is that, under Article 14, nationality determination should be considered as part of the screening process, as the Regulation only permits identity checks. While individuals may declare their nationality or statelessness, these claims are not verified at the screening stage. As emphasized by the Greek NGO RSA,[62] this distinction is crucial to prevent arbitrary nationality determinations, as has occurred in Greece, where Reception and Identification Service (RIS) or Frontex officials have made nationality assessments without due process or safeguards. Any doubts regarding an individual's declared nationality or statelessness should be addressed through a separate procedure beyond the screening process. The screening process itself is limited to recording the individual's declared nationality and other identity details, which must be verified in later stages, such as the asylum or return procedure.

Article 15: Security check and Article 16: Arrangements for identification and security checks

Article 15(1) provides that third-country nationals subjected to the screening, both at the border and on the territory, shall undergo a security check to verify whether they might pose a threat to internal security. That security check may cover both the third-country nationals and the objects in their possession, and the search will have to be conducted in line with national law.

The security check entails queries with relevant national and EU databases, in particular the SIS and to the extent that they have not yet done so during border checks on entry (under Article 8(3) of the SBC).[63] Furthermore, Article 15(2) provides that the EES, ETIAS – including the ETIAS watch list[64] –, VIS and ECRIS-TCN databases will also be consulted - only as regards persons convicted in relation to terrorist offences and other forms of serious criminal offences according to Article 15(4). 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 that can be consulted for cross-checking (Article 15(2)).

Article 15(3) specifies that, regarding the consultation of EES, ETIAS – with the exception of the ETIAS watch list - and VIS, the retrieved data shall be limited to indicating refusals of entry, refusals, annulment or revocation of a travel authorisation, or decisions to refuse, annul or revoke a visa, a long-stay visa or a residence permit respectively, 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. The queries should use at least the biometrics.

Article 16 lays down the modalities for the security checks conducted through EU information systems, including when using Europol data, Interpol Databases or the European Search Portal (ESP). The ESP is another component of the interoperability framework, enabling

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access and ensure effective protection against misuse of personal data (par. 91-92). The ECtHR, in Zoltán Varga v. Slovakia, found that surveillance lacked sufficient safeguards against arbitrary interference (par. 162), and in S. and Marper v. UK, it reaffirmed the need for strong safeguards when processing personal data, particularly for police purposes (par. 103).

61 European Data Protection Supervisor, Opinion 9/2020: EDPS Opinion on the New Pact on Migration and Asylum, para. 31, 30 November 2020, available here.

62 RSA, *New Pact on Asylum and Migration - Impermissible regression of standards for asylum seekers*, p.10, July 2024, available here. comment paper on Pact.

63 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

64 Referred to in Article 34 of Regulation (EU) 2018/1240.

competent authorities to simultaneously query the systems to which they have access; the combined results will be displayed on one single screen. According to Article 16(2), where a hit is obtained following a query against data in one of the information systems, the screening authorities should have access to consult the file corresponding to that hit in the respective information system. Article 16(3) provides that, if a query reports a hit against the Schengen Information System (SIS), the screening authorities of the Member State should carry out the relevant procedures set out in the Regulations establishing the SIS,[65] including by consulting the Member State issuing an alert through the national SIRENE (Supplementary Information Request at the National Entries) bureaux.[66] If the personal data result in a match against data recorded in ECRIS-TCN, it can only be used for the purpose of the screening security checks and for consultation of the national criminal records (Article 16(4)).

If a query from the screening authorities in the context of security checks matches against Europol data, Europol will be sent an automated notification containing the data used for the query (Article 16(5)). Queries of Interpol databases will have to be performed in such a way that no information is revealed to the owner of the alert. Where that is not possible, the screening shall not include the query of the Interpol databases (Article 16(6)).

Under Article 16(7), when a hit is obtained in the ETIAS watchlist,[67] Article 35a of the ETIAS Regulation (as amended through Article 22(4) of the Screening Regulation shall apply.

Said Article establishes that, where the ETIAS National unit or Europol considers that the third-country national undergoing the screening might pose a threat to internal security, it shall immediately notify the respective screening authorities and provide a reasoned opinion to the Member State performing the screening, within two days of the receipt of the notification.

Implementation considerations

The possibility for the screening authorities to search objects in the possession of the persons subject to the screening process 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.[68] Recital 51 provides that such measures should be in line with national law, 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.

The Regulation places significant emphasis on conducting security checks on third-country nationals at external borders, granting additional powers to Member States to process the personal data of third-country nationals in the EU.[69] Overall, it introduces new functions and

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65 Regulations (EU) 2018/1860, (EU) 2018/1861 or (EU) 2018/1862.

66 Article 7(2) of Regulation (EU) 2018/1861 and in Article 7(2) of Regulation (EU) 2018/1862. See: European Commission, SIRENE cooperation, available here.

67 Consisting of data related to persons who are suspected of having committed or taken part in a terrorist offence or other serious criminal offence or persons regarding whom there are factual indications or reasonable grounds, based on an overall assessment of the person, to believe that they will commit a terrorist offence or other serious criminal offence. The ETIAS watchlist forms part of the ETIAS Central System, as per Article 34(1), Regulation (EU) 2018/1240.

68 AccessNow, Joint statement – The EU Migration Pact: a dangerous regime of migrant surveillance, April 2024, available here.

69 In the judgment of 30 April 2024, C-178/22 the Court stated that the serious interference with rights under Articles 7 and 8 of the Charter, such as public authorities' access to traffic or location data, can only be justified by objectives related to combating serious crime or preventing serious threats to public security (par. 36). In Case C-362/14, the CJEU underlined that *"[f]urthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52 and the case-law cited)." (par. 92). In*

applications for systems related to screening, framed under the overarching purpose of security, while also expanding access rights to additional authorities. To enable this new function for EES, ETIAS, and VIS, Articles 20-22 amend the Regulations governing these information systems, permitting access by screening authorities for security checks. This expansion risks opening these information systems to law enforcement authorities, potentially undermining the safeguards originally intended to regulate their access to such databases.

The potential consequences of security checks are significant, as being deemed a threat to national security carries procedural implications. For instance, under the Asylum Procedures Regulation, such a designation is one of the criteria for channelling an individual into a border and accelerated procedure. Furthermore, threats to national security are generally assessed by administrative authorities based on classified data, which the individual concerned can access only in exceptional cases and to a limited extent. This limited access to information has a direct impact on the individual's ability to access information on their case and an effective remedy.[70]

Article 17: Screening form

The screening form is provided at the end of the screening process in lieu of a formal decision.

Article 17(1) sets out the content of the screening form, which has to include the following information: (a) name, date and place of birth and gender; (b) indication of nationalities or statelessness, countries of residence prior to arrival and languages spoken; (c) the reason for which the screening was performed; (d) information on the preliminary health check; (e) relevant information from the preliminary vulnerability check, in particular highlighting any vulnerability or special reception or procedural needs identified; (f) information as to whether the person has made an application for international protection; (g) information on family members located on the territory of any Member State; (h) whether the consultation of relevant databases for security purposes resulted in a hit; and (i) whether the person complied with the obligation to cooperate.

The information on personal data, including name, date and place of birth and gender, as well as nationality and previous countries of residence, registered in the form should also specify whether these have been confirmed by the screening authorities or were only self-reported (Article 17(3)).

Additionally, if the information is available, the form should also include the reason for irregular arrival or entry; information on routes travelled, including the point of departure, places of previous residence, third countries of transit, third countries where international protection may

the case C-548/21, the CJEU stresses that while Art. 7, 8 are fundamental, they are not absolute and must be balanced against other rights, such as those related to criminal investigations. However, any limitation on these rights must be "provided for by law" (par. 85), and the legislation must be clear and precise regarding the scope and application of these limitations. "Any limitation on the exercise of those fundamental rights must...respect the essence of those fundamental rights and observe the principle of proportionality."(par. 85). Moreover, the practice of phone confiscation and data analysis by authorities has been deemed unlawful by several national courts. The Regional Administrative Court of Berlin ruled that BAMF's evaluation of an applicant's mobile data violated the fundamental right to IT system confidentiality. Similarly, in the UK, the High Court in *R(HM and MA and KH) v Home Dept* found the blanket policy of searching and seizing migrants' phones unlawful under domestic law and the ECHR. In Italy, the Civil Court of Milan held that confiscating an asylum applicant's phone in detention lacked constitutional basis and infringed on their rights.

70 The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) stipulated certain minimum safeguards concerning these national security cases, in particular with regard to the right to an effective remedy. Despite the safeguards laid out by the courts, national practices of the Member States of the European Union vary and in numerous cases do not align with the jurisprudence of the courts. For more information, see: Hungarian Helsinki Committee, The Right to Know in the European Union, p.16, April 2024, available here.

have been sought or granted, and intended destination within the Union; travel or identity documents carried by the third-country nationals; and other relevant details, including information in cases of suspected smuggling or trafficking in human beings (Article 17(2)).

The Regulation does not specify when the screening form should be filled in, but it has to be ready by the end of the screening process, so it can be transmitted to the competent asylum or return authorities, as per Recital (30). Under Article 17(3), the information has to be recorded in a way that would allow for administrative and judicial review during any ensuing asylum or return procedure, and be made available (either on paper or in electronic format) to the person concerned.

Before the form is transmitted to the competent authorities, the person has the possibility to "indicate" whether the information it contains is incorrect, which will also be included in the form. This important safeguard was accepted by the co-legislators following an amendment to the text proposed by the European Parliament and agreed during the negotiations.[71]

Implementation considerations

An administrative decision?

The authorities conducting the screening are responsible for transmitting the screening form to the authority handling the subsequent procedure, be it a return or asylum procedure. One of ECRE's concerns in relation to the screening process is that the outcome is not classified as an official decision. As a result, the Regulation does not provide for any direct remedy against the screening process outcome. While inconsistencies identified by the individual may be recorded on the form, the person can only access a remedy later, during proceedings with asylum or return authorities. This delay means that critical elements, such as the incorrect identification of nationality, cannot be promptly challenged or corrected. Despite its seemingly innocuous title, the screening form is the sole document issued at the conclusion of the screening process and contains information that could be pivotal in determining both referral decisions and subsequent procedures

On the basis of the screening form, the referral is made to the authorities responsible for the asylum procedure, for the return procedure under the Return Directive or for a relocation process. If the person has made an asylum application, the referral should be to the former, the authorities responsible for the asylum procedure. The asylum authorities will decide on which asylum procedure should be applied. This will usually be at the point of registration, based on information in the screening form and registration form. In this respect, the Regulation underlines that the information it contains "shall be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure". This requirement means that the form must be completed in a detailed and rigorous manner. Registration must be completed five days after the making of the application so in some cases it may occur shortly after or in parallel to the screening process. ECRE argues that the determining authorities should be involved in the screening process and in the registration stage to ensure that people are channelled into the correct process.

Another challenge that might arise in practice regarding this step relates to the fact that the actors responsible for registration may differ from those assessing claims. It may prove difficult to contest an initial assessment made by one administrative authority before another authority that lacks jurisdiction to conduct such reviews or oversight. As a result, issues may remain unresolved until they reach the second stage, that is, a judicial or other independent authority. Second, as highlighted by ECRE and other commentators,[72] the APR sets short and variable

71 ECRE, *Reforming EU Asylum Law: The final stage*, August 2023, p.28, available here.

72 L. Tsourdi, *The New Screening and Border Procedures: Towards a Seamless Migration Process?*, EPC

deadlines for lodging appeals, depending on the specific procedure. Coupled with the lack of remedy against the screening decision itself, the new framework may further restrict the ability of individuals in need of protection to access an effective remedy.

It has also been observed[73] that, despite the absence of explicit procedural rights in the Regulation, based on the right to an effective remedy and access to courts guaranteed under Article 47 of the EU Charter, it should be considered possible to challenge at least some elements of the screening outcome. Such challenges might include questioning the legal basis for the screening process or its duration exceeding permissible limits. However, the absence of express procedural safeguards must be viewed in the context of the screening process, which does not adjudicate the merits of asylum applications.

To consider the impact of the screening form, it is also relevant to consider its interaction with other legal instruments, in particular the APR. Article 27 APR establishes that the authorities competent for registering asylum applications or experts deployed by the EUAA shall include in the registration form information relevant to the application that might come from the screening form, notably (a) the applicant's name, date and place of birth, gender, nationalities or the fact that the applicant is stateless, information on family members, siblings or relatives for minors and other personal details where relevant; (b) identity or travel documents; (c) the date, place and authority to which the application was made. The Article explicitly mentions that information should not be requested for a second time if included in the screening form.

Although individuals undergoing the screening process have the opportunity to correct information on the form before it is transmitted to the relevant authorities, the conditions under which they may find themselves at the time of screening – such as being held in isolated centres, in detention, or facing barriers to accessing legal counsel and organisations providing legal aid – create a significant risk that they may not have the opportunity to thoroughly review and amend the form. This risk is particularly concerning given that inaccuracies or incomplete information recorded on the form could later be used by decision-making authorities to question the individual's credibility, with serious consequences on the treatment of their case.

In conclusion, using the information provided in the form to decide on referral implies that the content of the document may affect the interests of the person concerned. Despite the title, the screening 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,[74] including by being made aware of the reasoning behind the referral. There should also be an appropriate appeal or review procedure available to people subject to the screening who wish to contest the decision to refer them to a particular asylum or return procedure.

The CJEU has emphasised the right to be heard and the right to an effective remedy as fundamental principles of EU law. In Moussa Sacko (C-348/16), the Court underlined that the right to be heard guarantees every individual the opportunity to present their views effectively during administrative procedures before any decision adversely affecting their interests (par. 34). Similarly, in C-36/20 PPU, the Court highlighted that the right to an effective remedy, linked to the principle of non-refoulement, requires Member States to ensure procedures with automatic suspensory effects to protect applicants against unlawful removal (para. 97). Furthermore, in the Grand Chamber Judgment in the case C-548/21, the Court stressed that limitations on the right to an effective remedy must respect the principle of proportionality (Article 52(1) of the Charter) and that data subjects must be informed of their rights, including

Policy Study, June 2024, available here.

73 S. Peers, *The new Screening Regulation – part 5 of the analysis of new EU asylum laws*, EU Law Analysis, April 2024, available here.

74 CJEU, Sophie Mukarubega v. Préfet de Police and Préfet de La Seine-Saint-Denis, C-166/13, (November 5, 2014), para. 50

access to an effective judicial remedy when personal data is processed without their knowledge. These principles are particularly relevant in the context of using data during screening processes that direct individuals to specific procedures (paras 115, 117).

Health information in the form

The information to be included in the screening form does not directly include information derived from the initial health check. However, it specifies that relevant details from the vulnerability check must be recorded, such as those indicating special reception or procedural needs. As such, it can be argued that the wording of the Regulation suggests it should also comprise health-related information.

Article 18: Completion of the screening

Article 18 regulates the outcome of the screening process, i.e. the referral of the person to the "appropriate" procedure (as per Article 8(4)(g)). Although the Regulation frequently refers to two possible outcomes of the screening – eventual referral to an asylum or a return procedure – in fact, there are three possible procedures or at least outcomes to which the person could be channelled, namely 1) a return procedure under the Return Directive, 2) an asylum procedure, or 3) a relocation process.

The possibility to issue a refusal of entry as a result of the screening process is excluded following an amendment proposed by the European Parliament and accepted during the negotiations.

Article 18(1) provides that when the screening is completed or when the time limits to carry out the process expire, third-country nationals apprehended in connection with an irregular crossing or disembarked after a SAR operation who do not make an application for international protection "shall be referred to the authorities competent for applying procedures respecting Directive 2008/115/EC [the Return Directive]". The only exception is persons whose entry is authorised despite them not meeting entry conditions because Article 6(5) of the SBC applies (i.e. authorisation to access the territory for transit purposes, for issuance of a visa or on humanitarian grounds). Third-country nationals subject to the screening on the territory will also be channelled into a return procedure if they do not make an application for international protection (Article 18(4)).

The second possible outcome of the process is outlined in Article 18(2), indicating that third-country nationals subject to the screening who have made an application for international protection will be referred to the authorities competent for registering international protection applications.

Finally, according to Article 18(3), the screening process could also be concluded through the relocation of the person involved. The Article establishes that third-country nationals due to be relocated according to the procedural rules set out in Article 67 RAMM[75] or within any other existing mechanism for solidarity, shall be referred to the authorities of the Member States concerned.

In all cases, the screening form will be transmitted to the relevant authorities to whom the third-country national is being referred. After referral to the relevant procedure, the screening ends. If the deadlines for the process set in Article 8 are not respected, the screening has to end, as stipulated in Article 18(5).

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[75] *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, Article 19, May 2024, available here.

Article 18(6) establishes an exception to the obligation for Member States to conduct the screening, which covers cases in which the person is subject to national criminal law procedures, or to an extradition procedure. However, if the screening has already started for that person, the screening authorities have to prepare a form with the reason for the interruption of the screening, which shall be transmitted to the competent authorities.

Implementation considerations

As a general recommendation, given the broad implications of the decision made at the conclusion of the screening process, ECRE advocates for the involvement of asylum authorities in at least some aspects of the screening. As noted above, Article 17 of the Regulation does not provide for an appeal against the screening form or the decision contained therein or resulting from it. This lack of a remedy may be contested in front of national and European courts. The details for each of the three outcomes of the screening process is examined in turn below.

1) Return procedure

People undergoing both screening at the external borders and screening in the interior must be referred to the return procedure if they do not apply for international protection. Despite the language used in the Regulation (i.e. "…shall be referred to the authorities competent for *applying procedures respecting* Directive 2008/115/EC"), the reference to the Return Directive clarifies that these individuals have to be referred to the return procedure established in that instrument. This was a point of discussion during the negotiations of the instrument and following amendments, the co-legislators agreed on the inclusion of the reference to the Return Directive.

For individuals undergoing screening in the interior/ within the territory, the Regulation does not provide significant added value because, under Article 6(1) of the Return Directive, Member States are already required to issue a return decision to anyone in an irregular situation (with limited exceptions). If the individual has previously been subjected to a return procedure that was unsuccessful, there is a risk that authorities initiate a new return process, which could then fail for the same reasons as the initial attempt. This scenario raises concerns not only about the rights of the individuals affected but also about the efficient allocation of resources.

It has been argued that the implementation of screening in the interior risks exacerbating discriminatory policing practices.[76] It is also likely it will lead to the identification of a higher number of individuals whose return is not feasible. Research indicates that such individuals often remain in a precarious legal limbo – acknowledged by authorities but denied any formal permit to stay.[77] This makes addressing the situation of non-returnable individuals through regularisation policies even more pressing. Although Article 6(4) of the Return Directive allows Member States to grant a residence permit to individuals in an irregular situation as an alternative to issuing a return decision, the provision is underused.[78] While recognising the political complexities involved, when previous return attempts have failed and the underlying obstacles to return persist, the authorities should use this provision to grant a right to stay.

2) Asylum procedure

Individuals subject to the screening process who make an asylum application have to be referred to the authorities in charge of the registration of asylum applications. The registration

[76] PICUM, *Analysis of the Screening Regulation*, p.4, October 2024, available here.
[77] ECRE and Others, *Point of No Return*, January 2014, available here; G. Eckert, *Non-removable migrants in Europe: Researching beyond the 'stay or leave'-binary*, September 2023, available here.
[78] EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, 2020, available here.

stage is regulated by the APR, including Article 4 on competent authorities.[79]

Under Article 26 of the APR, an application for international protection is made when a person expresses a wish to receive international protection. If officials have doubts 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. It will thus be crucial for the screening authorities to be properly trained in recognising ways in which the person may request international protection and for asylum authorities to be involved in the process.

As per Article 4 of the Screening Regulation, if an asylum application is made in the context of the screening process, it is determined according to Article 27 APR which sets a deadline of five days from the making for registering the application, with an extension to fifteen days when there is a "disproportionate" number of people who make applications, making it "unfeasible" to meet the deadline. When the application is made to an authority which is responsible for receiving but not registering the application, then that authority has three days to inform the authority responsible for registration, which in turn has five days to register the application after receiving the information. Further extensions to the registration deadline are foreseen in the Crisis Regulation.[80] Nevertheless, it is positive that the time for registration runs from the moment of making the application instead of from the end of the screening process as was originally proposed by the Commission – in practice this may speed up the screening process, as Member States will have to refer applicants to the registration process rapidly in order to meet the five-day deadline.

At the registration stage, following referral of applicants from the screening, the decision will be made on the type of asylum procedure to be applied. As previously noted, the information in the screening form covers issues that are central for determining whether an individual is directed into a regular asylum procedure or into a special procedure – the accelerated examination procedure and/or the asylum border procedure. This includes the person's nationality, identity information, travel documents, countries of residence and transit, and health and vulnerability information, all of which have a relevant to the decision on the asylum procedure to be applied. As ECRE highlighted in its Comments on the APR, being placed in an accelerated and/or border procedure can significantly affect the examination of an asylum claim.[81] The Regulation states that the applicant should be referred to "the authorities competent to register the asylum application" rather than that the applicant should be channelled into the relevant procedure. While not expressly stated, this choice of language indicates that the responsibility for determining the appropriate asylum procedure lies with the asylum authorities after referral.

To ensure clarity, ECRE recommends that implementing tools, including secondary legislation, national guidelines and Standard Operating Procedures should explicitly state that the assessment and decision on which procedure to be used should be conducted as a separate step, under the sole responsibility of the asylum authorities.

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79 ECRE provided relevant recommendations regarding staffing, resourcing and training of competent authorities designated under the APR, which remain valid. See: *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, p.22, October 2024, available here.

80 *ECRE Comments on the Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (Eu) 2021/1147*, Article 10, May 2024, available here.

81 EPRS, *Asylum Procedures at the Border, European Implementation Assessment*, November 2020, available here; *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, October 2024, available here.

3) Relocation

In line with Recital (17), the screening can also be followed by relocation. According to Article 18(3), if the person concerned is to be relocated under the solidarity mechanism established under RAMM, the person should be referred to the relevant authorities of the Member States concerned. The issue is discussed in ECRE's Comments on the RAMM.[82]

~~4) Refusal of entry~~

In the 2020 proposal for the Screening Regulation, a fourth outcome of the screening process – refusal of entry – was also foreseen. ECRE expressed concerns at the unclear relationship between the screening process and a refusal of entry, and the significant risks attached to allow a refusal of entry after the rather limited screening process.[83]

Following amendments to proposal reflecting these risks, proposed and supported by both co-legislators, the final text reflects the co-legislators' decision that issuing a refusal of entry at the conclusion of the screening process should not be a permitted outcome of the screening process. Member States retain the right to issue a refusal of entry under Article 14 of the SBC, under the conditions set out therein.[84] The applicability of the SBC is reinforced by references in the APR, which states in Recital (70) that if a refusal of entry is issued after a rejection in the asylum border procedure it must comply with the SBC, and in the RBPR, which sets the conditions that apply for people transferred to a return border procedure after a refusal of entry following an asylum border procedure and an application of Article 14 SBC.

ECRE's recommendations

- Legal practitioners and courts should challenge and question the lack of remedy to the decision following the screening form, given its procedural consequences.
- The screening process is not required to determine whether the regular asylum procedure or the asylum border procedure should apply. While the texts are silent on this point, ECRE strongly argues that the determining authority should assess which asylum procedure applies after the completion of the screening, using the information in the screening form and any other relevant information. Consequently, Member States should ensure that workflows and SOPs integrate a filtering process between the screening process and the border procedure, during which the determining authority channels the applicant into the relevant asylum procedure (regular or border asylum procedure).
- Member States will have to ensure that workflows and SOPs indicate the step where the applicant has the right to review the screening form before it is finalised.

Article 24: Evaluation and Article 25: Entry into force

Article 24 establishes that by 12 June 2028, the Commission shall report on the implementation of the measures set out in the Regulation. By 12 June 2031 and then every five years afterwards the Commission will carry out an evaluation of the Regulation, presenting a report to the European Parliament, Council and the European Economic and Social Committee (EESC). According to Article 25, and in line with the other Regulations forming part

82 *ECRE Comments on the Regulation of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013*, Article 19, May 2024, available here.

83 *ECRE Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020*, available here.

84 A provision that is widely used by Member States, that reported to Eurostat between 120,000 and 140,000 refusals of entry each year from 2020 to 2023 (while 2024 data unavailable at the time of writing). See: Eurostat, migr_eirfs, available here.

of the Pact, the Screening Regulation entered into force in June 2024, and will be applicable from 12 June 2026.

The provisions regarding queries to EU information systems laid out in Articles 14 and 16 of the Screening Regulation will only be applicable from the moment in which the relevant information systems, the CIR and ESP respectively, enter into operation. The interoperability framework is expected to be developed from mid-2024 until the end of 2026.[85]

[85] European Council, *IT systems to fight crime and secure EU borders*, available here.

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