



**ecre**

European Council  
on Refugees and Exiles

# SCREENING OUT RIGHTS? DELAYS, DETENTION, DATA CONCERNS AND THE EU'S PROPOSAL FOR A PRE-ENTRY SCREENING PROCESS

A SUMMARY OF ECRE'S ASSESSMENT OF THE SCREENING  
REGULATION COM(2020) 612 AND ITS PROPOSED AMENDMENTS

## I. INTRODUCTION

In September 2020, the European Commission proposed a New Pact on Migration and Asylum (the Pact) which it heralded as a new start that would build confidence in EU migration policy with more effective procedures and the right balance between responsibility and solidarity for the Member States. This new approach starts at the borders with a proposed Screening Regulation establishing a pre-entry screening process for (almost) anyone arriving at an EU border irregularly, including following disembarkation after Search and Rescue (SAR). It aims to strengthen control of persons entering the Schengen area and refer them to an appropriate procedure, but rather than amending the existing Schengen Borders Code, a whole new five-day process or procedure (up to ten days in exceptional circumstances) has been proposed to check ID and security threats, register biometrics, and verify health and vulnerabilities. It is widely understood that Member States not at the external border insisted on a screening process to hold people at the borders as a condition for increasing solidarity.

While there are circumstances in which a screening process of some kind could be useful, and certain health and vulnerability checks are essential, the proposal as it stands generates more risks than it provides benefits. Notably, there is significant uncertainty about the rights of those who undergo the screening process for key elements including: use of detention; reception conditions; legal assistance; the thoroughness of health and vulnerability checks; implications of the decision they receive; whether and how the decision can be challenged; the grounds for refusal of entry; and the use of the data collected.

The screening process will also entail more-or-less systematic detention at the border, which the Regulation omits to mention. Neither does the Regulation foresee adequate appeal rights for the persons concerned. The screening is also to be applied to people inside the territory of a Member State under some circumstances, creating the risk of an increase in discriminatory law enforcement. This will all mean considerable resources on the part of the Member States and the EU. A positive element is an independent border monitoring mechanism to monitor violations of fundamental rights at EU borders, long overdue given frequent reports of pushbacks and violence.

In summary, the added value of the Screening Regulation is unclear, also given the potential duplication with checks included in the Schengen Borders Code, but there are clearly high human and financial costs. For these reasons, ECRE believes the Screening Regulation should be withdrawn, apart from the independent border monitoring mechanism, which should be strengthened and developed as a stand-alone mechanism. In the case that the Screening Regulation moves forward in the legislative process, ECRE provides a list of non-exhaustive, minimum safeguards and conditions that should be added to ensure people's rights are upheld during the screening process. For more detailed information, please read ECRE's Comments on the Commission Proposal for a Screening Regulation COM(2020) 612.

## II. ANALYSIS

### RIGHTS AT THE BORDER

The pre-screening will apply to all those who are apprehended in connection with an unauthorised crossing of the external border of a Member State by land, sea or air; who are disembarked in the territory of a Member State following a search and rescue operation; and those who apply for international protection at an external border or in a transit zone and who do not fulfil the entry conditions in the Schengen Borders Code. Except for (rare) cases where the asylum seeker fulfils the entry conditions or presents him/herself to asylum authorities within the territory, all asylum seekers will need to pass through the screening process before having access to an asylum procedure. This creates a delay in access to the asylum procedures and with it the risk of postponement of the entitlements and protections guaranteed to asylum seekers under the Reception Conditions Directive, such as reception condition, restrictions on detention, and procedural safeguards. The Screening Regulation does not set aside the Reception Conditions Directive because, under Article 17(1) of the Directive, Member States should ensure that material reception conditions are available to applicants when they make their application for international protection. ECRE argues that to avoid any ambiguity, it should be clearly stated that as soon as the person expresses his/her wish to receive international protection, he/she should be entitled to rights under the Reception Conditions Directive.

### SCREENING ON THE TERRITORY

Member States should also apply screening to third-country nationals "found" or "apprehended" within their territory where there is no indication that they have crossed an external border to enter the territory of the Member States in an authorised manner, or if they eluded border checks at the external border on entry. There are several concerns here. "Apprehension" indicates proactive measures on the part of authorities and may encourage discriminatory policing. It is unclear what criteria will be used to assess whether the apprehended person should be subject to screening. The term "found" raises other concerns as, in practice, it may not be possible to tell whether the person has been found by the authorities or found the authorities themselves while seeking to apply for asylum, leading to a lack of clarity and likely inconsistent application of the Regulation. The screening within the territory also leads to referral to a return procedure or in-county asylum procedure but not to a border asylum procedure or refusal of entry. With watered down health and vulnerability checks compared to the border, this screening serves only to delay the referral to a relevant procedure and should be withdrawn.

### LENGTH OF SCREENING PROCEDURE

There are five days to complete screening at the border including checks on ID, security, health and biometrics. This may not be enough time. In exceptional circumstances it can be extended to ten days with notification to the Commission. This should not be an option because the screening delays access to rights. If it is retained, it is important that the five-day limit is only extended in "crisis situations" and that any extension requires formal notification and a reasoned request to the Commission in line with other legislative proposals. After the five-day period all persons should be referred without delay to the relevant procedure as is the case for the on-territory procedure (after three days).

## DETENTION

The procedure is to take place at or near the external border. This should be at official border points only to ensure there is sufficient infrastructure in place. The “fiction of non-entry”, does not release states from their obligations under international law – including on detention – and should be removed. If the person applies for asylum, he or she should not be detained on grounds other than those under Article 8(3) of the Reception Conditions Directive. Detention should always be a measure of last resort and formally defined as such so that safeguards apply. The Regulation is silent on detention, but it is difficult to imagine how screening every third-country national without authorised entry could be implemented without it. In practice, Member States use formal or de facto detention for almost all applicants when a border procedure is applied. There is a strong risk that Member States will call this “reception” or “accommodation” leading to the worst-case scenario from a fundamental rights perspective: de facto detention with detainees deprived of the safeguards that apply in formal detention regimes. Detention should only take place if other sufficient, less coercive measures cannot be applied and it should be based on a written decision and subject to judicial review. Clear provisions should be included in the Regulation to ensure detention accompanying screening complies with the requirements of lawfulness, necessity, proportionality, is subject to procedural guarantees, and is carried out in adequate facilities.

## INVOLVEMENT OF ASYLUM AUTHORITIES AND EU AGENCIES

Although the Regulation frequently refers to there being two possible outcomes of the screening – asylum or return procedure – there are in fact four possible outcomes: 1) refusal of entry, 2) return, 3) asylum, or 4) relocation. Given the weight of the debriefing decision and its implications, Member States’ asylum authorities should always be involved in the screening procedure, even where an individual has not specifically asked for asylum. The Regulation also provides for assistance from Frontex and EASO in all tasks related to the screening. Although executive powers formally rest with the host Member State both agencies will influence individual decision making, which creates an accountability gap. Their role and competencies should be clearly defined and open to external scrutiny. The proposal should also clearly allocate the respective responsibilities for the processing of personal data by Member States and these agencies, which is essential for the attribution of controllership pursuant to Regulation 2018/1725 (EUDPR) and the General Data Protection Regulation (GDPR).

## RISK OF REFUSAL OF ENTRY WITHOUT A PROCEDURE

As mentioned above refusal of entry is also a potential outcome of the screening. The Regulation does not clarify this procedure. The risk is that upon screening, the person would be issued a debriefing form and be directly refused entry without even the safeguards laid down in the Schengen Borders Code whereby entry may only be refused by a substantiated decision stating the precise reasons for the refusal. Any refusal of entry should fall within the scope of existing provisions in this area, and include the right to appeal a decision.

## HEALTH AND VULNERABILITY CHECKS

Screening should be carried out in full respect of fundamental rights including the right to human dignity. There are four main elements to the screening: health and vulnerability checks; identify check; registration of biometric data in the appropriate database; and security check. Whilst there is no information on the right to refuse a medical check for the person involved, for the authorities the examination does not need to take place if the person’s health appears “very good”. Weaker provisions regulate screening on the territory according to which people are offered medical screening if they so wish. Vulnerability checks are supposed to ensure that special procedural or reception needs are identified at an early stage and can be taken into account. In the Regulation, this is only applied at the border when checks to identify vulnerabilities should be carried for any person subject to the screening. To ensure consistency within the CEAS as a whole, anyone identified as vulnerable should have the same level of support as applicants for international protection have under the Reception Conditions Directive.

## DATA

Identity checks are to be carried out using national and European interoperable databases, on the basis of identity, travel or other relevant documents; data or information from the third country national; and biometric data. The Regulation not only foresees consultation of the Common Identity Repository (CIR) (one of four components of the interoperability framework) but expands its purpose by using data for identification at the external borders, a purpose not originally foreseen in the Interoperability Regulation. Expansion of the purposes of data processing and of the uses of EU information systems, including widening the range of actors granted access, aggravates long-standing concerns about the erosion of the purpose limitation principle and the protection of the right to private life and the protection of personal data.

Purpose limitation as a safeguard is undermined if new purposes are frequently added by new legislation without first assessing the impact of previous powers.

Wide-ranging methods used by Member States in identification and identity verification processes in the absence of documentary evidence of identity, could also interfere with the rights to data protection and privacy of third country nationals. Security checks, for example, cover both the third-country nationals and the objects in their possession. As the obligation to collect and transmit biometric data is set out in the Eurodac Regulation, the Screening Regulation does not have added value in that regard. However, again, the 2020 amendment of the 2016 recast proposal for Eurodac further widens the use of the database, far beyond the initial objective of supporting the Dublin system.

Finally, despite its title, the debriefing form functions in practice as an administrative act. The accuracy of the information in the debriefing form is, therefore, crucial as it will determine the situation of the data subject (the person), including their procedural rights. They should thus be entitled to rectify and/or supplement the personal data about themselves and their situation.

## INDEPENDENT MONITORING OF FUNDAMENTAL RIGHTS AT THE BORDER

Finally, the proposed independent monitoring of fundamental rights at the border is a welcome part of the proposal, particularly given extensive reports of violations at borders in many Member States. To ensure that this mechanism results in accountability it needs to be expanded beyond the screening procedure; to be independent of national authorities; and to involve independent organisations such as Ombudsmen, National Human Rights Institutions and NGOs. Any limits on when and where the monitoring can take place should be deleted. It should cover all border control activities including cross-border events, as per the Schengen Borders Code. Allegations of violations need to be investigated, with disciplinary measures and individual remedies to follow, as relevant. There should also be oversight, including by parliamentary bodies, and an obligation to prepare periodic, public reports on findings and outcomes of monitoring.

## III. RECOMMENDATIONS

- » The co-legislators should support withdrawal of the Screening Regulation – except for the border monitoring mechanism – as the pre-entry screening process delays access to rights, increases human and financial costs, and has little added value in its current form.
- » The co-legislators should support, first, expanding the scope of the border monitoring mechanism and, second, ensuring its independence through the involvement of independent organisations, oversight, public periodic reporting and disciplinary measures in case of violations.
- » ECRE urges extreme caution in the continual changes to the interoperability framework, in particular trends that erode the purpose limitation principle. The Commission should ensure it undertakes an impact assessment of the already wide-ranging powers before adding new uses of and access to personal data in any screening process.
- » The co-legislators should amend the Screening Regulation to ensure that:
  - a. As soon as a person undergoing screening expresses their wish to seek international protection, it is guaranteed that the rights under the Reception Conditions Directive are applicable.
  - b. On-territory screening is withdrawn as it only delays referral to other procedures.
  - c. After the five-day period all persons undergoing screening at the border should be referred without delay to the relevant procedure with no further extensions. Vulnerability and health checks should be completed in the relevant procedure.
  - d. Clear provisions are included in the Regulation so that detention accompanying screening complies with the requirements of lawfulness, necessity, proportionality, is subject to procedural guarantees, and is carried out in adequate facilities.
  - e. The role and competencies of EU agencies is clearly defined and open to external scrutiny and asylum authorities take part in the screening procedure.
  - f. Checks to identify vulnerabilities are available at any screening location and anyone identified as vulnerable has the same level of support as applicants for international protection under the Reception Conditions Directive.