



RSA Comments on the Commission proposal for a Regulation on screening at the external borders

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General Comment*

The European Commission tabled on 23 September 2020 a proposal for a Regulation introducing a screening of third-country nationals at the external borders of the European Union,¹ as part of the package of legislative proposals of the New Pact on Migration and Asylum,² aiming at immediately and rapidly identifying persons irregularly arriving at the external borders or the territory of the Member States.³ The proposal gives rise to critical legal and political concerns both in principle and on substance.

First, the **proposal lacks purpose and added value, as it does not fill legislative gaps** in the institutional and regulatory framework governing the channelling of persons arriving at external borders to asylum or return procedures. The existing European Union (EU) *acquis* on external border control⁴ already foresees the applicability of legal instruments on international protection⁵ and return accordingly,⁶ which contain sufficient provisions on identification, registration of personal details, medical checks and identification of vulnerability. The Explanatory Memorandum clarifies that the proposal does not affect existing procedures in the area of asylum and return and the rights guaranteed therein, but only facilitates their implementation.⁷ However, the establishment of the so-called “pre-entry” procedure appears to create an **ambiguous and dangerous framework for new arrivals**. Through this process, the Commission attempts an arbitrary expansion of the – already controversial – fiction of “non-entry”. In the particular case of persons seeking asylum, the proposal acknowledges their asylum seeker status,⁸ yet unjustifiably delays their access to the asylum procedure and to reception conditions.⁹ In addition, it defers the definition of measures of restriction or

* RSA thanks Prof. Lilian Tsourdi, Assistant Professor of European Law at the Faculty of Law of the University of Maastricht for contributions to the observations developed in this paper.

¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders* (“Screening Regulation proposal”), COM(2020) 612, 23 September 2020.

² European Commission, *New Pact on Migration and Asylum*, COM(2020) 609, 23 September 2020.

³ Screening Regulation proposal, Explanatory Memorandum, 1.

⁴ Articles 13(1) and 14(1) 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) [2016] OJ L77/1.

⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (“Asylum Procedures Directive”) [2013] OJ L180/60; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (“Reception Conditions Directive”) [2013] OJ L180/96; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (“Qualification Directive”) [2011] OJ L337/9.

⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December on common standards and procedures in Member States for returning illegally staying third-country nationals (“Return Directive”) [2008] OJ L348/98.

⁷ Screening Regulation proposal, Explanatory Memorandum, 7.

⁸ Recital 16 Screening Regulation proposal.

⁹ Screening Regulation proposal, Explanatory Memorandum, 5, stating that the registration of asylum claims and provisions of the Reception Conditions Directive only apply upon completion of the screening.

deprivation of liberty at the external borders to national law in such a way as to create new legal bases for detention, in stark contravention of the exhaustive grounds for detaining asylum seekers under EU law.¹⁰ Crucially, the European Court of Human Rights (ECtHR) has affirmed in its constant jurisprudence since the 1990s the full applicability of legal obligations to persons arriving on the territory of a state, without distinction based on the point of arrival or transit zone,¹¹ thereby countering incorrect attempts to establish regimes of exceptionality based on constructs of extraterritoriality.

Second, the spirit and content of the proposal¹² set out processes for collecting information from asylum seekers which will be binding on the asylum procedure following the screening.¹³ These indicate an intention on the part of the Commission to proceed to a **veiled reform of asylum procedural rules, namely on the assessment of admissibility and merits of applications**, through a separate instrument instead of an amendment of the legal framework governing the asylum procedure. Accordingly, **the legal basis of the proposal is incorrect**, given that competence to set standards on procedures for granting international protection at EU level is provided by Article 78(2)(d) and not Article 77(2) of the Treaty on the Functioning of the European Union (TFEU).

Third, whereas the choice of a Regulation as the relevant instrument is presented as necessary to achieve harmonisation of national procedures and to guarantee uniform standards on screening across EU borders,¹⁴ **the proposal affords full discretion to Member States** as to rules on conditions under which screening takes place,¹⁵ the requisite qualifications and training of competent authorities,¹⁶ as well as the monitoring mechanism for fundamental rights compliance during the screening.¹⁷ In light of this, **the Commission in no way justifies its choice of instrument in line with the harmonisation requirements attached to directly applicable Regulations.**

Finally, the proposal not only fails to address but is liable to exacerbate gross violations of fundamental rights stemming from the implementation of hotspots as an EU approach to managing refugee and migration flows in Greece, in particular through the establishment of unduly short deadlines and severe obstacles to the exercise of remedies. Furthermore, the introduction of an additional procedural stage at the external borders amounts to an **attempt at entrenching the failed operational approach tested by the EU in recent years**, resulting in prolonged mass confinement of people in inhuman conditions on the Greek islands and in the consistent dismantling of

¹⁰ Articles 8-11 Reception Conditions Directive, which apply from the moment a person expresses the intention to seek asylum: Court of Justice of the European Union (CJEU), Case C-36/20 *VL v Ministerio Fiscal*, 25 June 2020, paras 104-113.

¹¹ ECtHR, *Amuur v. France*, App No 19776/92, 25 June 1996; *N.D. and N.T. v. Spain*, App Nos 8675/15 and 8697/15, 13 February 2020.

¹² Article 14(2) and Recitals 9, 15, 16 and 24 Screening Regulation proposal. See also European Commission, *Annex to the proposal for a [Border Screening Regulation]*, COM(2020) 612, 23 September 2020, available at: <https://bit.ly/33bbcSj>.

¹³ See in particular point 12 Annex to the Screening Regulation proposal, indicating third countries in which the person has sought and/or received a protection status, with a view to the application of the "safe third country" and "first country of asylum" concepts.

¹⁴ Screening Regulation proposal, Explanatory Memorandum, 10.

¹⁵ Article 7(2) and Recitals 12 and 23 Screening Regulation proposal.

¹⁶ Article 6(7) Screening Regulation proposal.

¹⁷ Article 7(1) Screening Regulation proposal.

procedural guarantees and quality of the asylum procedure, with critical impact on the rights of refugees and the functioning of the Greek administration.¹⁸

With the exception of Article 7 on the monitoring mechanism for human rights compliance – where improvements are proposed – Refugee Support Aegean (RSA) recommends the rejection of the proposal in its entirety, on the ground that it: (i) introduces a dangerous regime of exceptionality and unacceptable restrictions on fundamental rights; (ii) lacks purpose, correct legal basis and the requirements for the use of Regulations; (ii) contravenes the EU asylum *acquis*; and (iv) contributes to the entrenchment of mass confinement of people at the EU external borders.

An analysis of provisions of the Commission proposal can be found below.

Analysis of key provisions

1. Legal status of persons undergoing screening

According to the EU *acquis* in force, namely the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive,¹⁹ as well as the Commission proposals under negotiation,²⁰ **the “applicant for international protection” status is valid from the moment an asylum claim is made i.e. the intention to seek asylum is expressed** by a third-country national or stateless person, until a final decision is taken on the application. Greek law details that the status of “applicant for international protection” is obtained by an oral or written request for asylum or protection from deportation to a country out of fear of persecution or exposure to serious harm.²¹ **Recital 16** of the proposal recalls that such a status applies from the moment an application is made.

In light of the above, **the full set of rights and guarantees bestowed on asylum seekers are applicable during the screening process**, where the person concerned has already made an asylum claim at that stage. These include material reception conditions guaranteeing an adequate standard of living,²² health care covering at least emergency care and necessary treatment of illnesses and serious mental disorders,²³ freedom of movement across the national territory or a specified region,²⁴ and the prohibition of detention except for exceptional circumstances, where necessary and on the basis of an individual assessment, for the reasons exhaustively set out in Article 8(3) of the Reception Conditions Directive e.g. establishing identity or nationality,²⁵ and

¹⁸ RSA & Stiftung PRO ASYL, *Submission in the M.S.S. [Group] and Rahimi cases*, July 2020, available at: <https://bit.ly/3llZefv>.

¹⁹ Article 2(c) Asylum Procedures Directive; Article 2(b) Reception Conditions Directive; Article 2(i) Qualification Directive; CJEU, Case C-179/11 *Cimade and Gisti*, 27 September 2012, para 39. See also Article 14(1) Schengen Borders Code.

²⁰ Article 2(b) Asylum Procedures Regulation proposal.

²¹ Article 2(c) International Protection Act (IPA).

²² Article 17(2) Reception Conditions Directive.

²³ Article 19 Reception Conditions Directive.

²⁴ Article 7(1) Reception Conditions Directive.

²⁵ Article 8(3)(a) Reception Conditions Directive.

where less coercive alternatives cannot be applied.²⁶ Therefore, **the Commission incorrectly attempts to introduce a derogation from the aforementioned rights during the screening process**, as implied by its reference in **Recital 27** to the sole applicability of minimum standards under the Charter of Fundamental Rights. Preventing the applicability of the *acquis* would effectively carve out a separate sub-category of “asylum seekers” to whom the rights attached to their status do not apply, contrary to the **indivisibility of “applicant” status** enshrined in the Reception Conditions Directive, which “provides for only one category of asylum seekers”.²⁷

As regards persons who irregularly cross the external EU borders and do not apply for international protection, the Schengen Borders Code clarifies that the return regime set out in the Return Directive applies immediately.²⁸

Deprivation of liberty

In relation to the liberty regime governing people undergoing screening, the proposal incorrectly, if implicitly, defers to the national law of Member States for the enactment of measures to prevent entry of persons to their territory during the screening process, which may involve detention.²⁹ This constitutes poor law-making, as it creates a legal gap between the EU regimes on detention of asylum seekers (Reception Conditions Directive) and pre-removal detention (Return Directive) that Member States are liable to exploit through domestic law grounds for depriving individuals of their liberty. Yet, **administrative detention of an asylum seeker, i.e. any person expressing the intention to seek international protection even before an authority other than the competent authority for registering application, is directly and exclusively governed by EU law and is only permissible under the conditions and guarantees set out in Articles 8-11 of the Reception Conditions Directive**. The Court of Justice of the European Union (CJEU) has reached the same conclusion in the recent case of *VL v Ministerio Fiscal*.³⁰

It should also be highlighted that preventing entry of people into the territory of Member States pending the completion of the screening process, as per **Article 4(1)**,³¹ is tantamount to blanket deprivation of liberty. Even though **Recital 12** implies that the screening process may be implemented without detention, **systematic use of detention, whether de jure (e.g. Belgium, France, Portugal) or de facto (e.g. Germany, Hungary) underpins the practice of all countries** applying the fiction of “non-entry”,³² in dereliction of the fundamental right to liberty.

²⁶ Article 8(2) Reception Conditions Directive.

²⁷ CJEU, Case C-179/11 *Cimade and Gisti*, 27 September 2012, para 40.

²⁸ Article 13(1) Schengen Borders Code.

²⁹ Article 7(2) and Recitals 12 and 23 Screening Regulation proposal.

³⁰ CJEU, Case C-36/20 *VL v Ministerio Fiscal*, 25 June 2020, paras 104-113.

³¹ The proposal is contradictory, given that Article 6(3) refers to persons to which Article 14(3) Eurodac Regulation applies (persons “who remain physically on the territory of Member States”). It is also inferred that “non-entry” does not apply to persons undergoing screening on the territory of Member States pursuant to Article 5 Screening Regulation proposal.

³² Asylum Information Database (AIDA), *Boundaries of liberty: Asylum and de facto detention in Europe*, March 2018, available at: <https://bit.ly/361p1EI>; European Asylum Support Office (EASO), *Border procedures for asylum applicants in EU+ countries*, 2020, 11, available at: <https://bit.ly/3kRDLDR>.

2. Interplay of screening in the asylum procedure

Access to the asylum procedure

Contrary to the overall objective of rapid access of refugees to asylum procedures through prompt registration and lodging of their applications,³³ the package of legislative proposals put forward by the Commission suspends the registration of asylum claims until the screening process has been carried out.³⁴ According to **Article 6(3)**, screening takes up to 5 days at the external border, subject to a 5-day extension in case of a disproportionate number of arrivals “making it impossible in practice to conclude the screening within that time-limit”. The extension is to be applied only in exceptional circumstances where needs exceed the capacity of a Member State for reasons beyond its control, as per **Recital 19**.

In light of the observations made above, newly arrived asylum seekers (should) benefit from the rights and carry the obligations set out in the EU asylum *acquis*, **without, however, being permitted immediate access to procedures for the examination of their claim.**

Details of the applicant

As discussed above, the proposal attempts a veiled reform of the *acquis* on asylum procedures, without the necessary guarantees to observe asylum seekers' right to information and right to be heard, as well as to ensure fair processing of their applications. **Article 14(2)**, read in conjunction with **Recitals 9, 15, 16 and 24** and the **Annex** to the proposal, reveals that information provided by newly arrived persons to authorities performing the screening *inter alia* on transit, length of stay, asylum applications and/or grants of a protection status in third countries may be used in the asylum procedure, for the purposes of both referral or not to accelerated or border procedures, and assessment of the admissibility and substance of the claim.

The competent authorities for screening, to be determined by Member States at their discretion,³⁵ thereby become involved in the examination of asylum applications, **without fulfilling the requisite standards to ensure correct recording of applicants' details**, such as: (a) mandatory and specialised training on the legal framework of international protection; (b) provision of information to the applicant on the details which will be requested and the impact thereof on the asylum procedure;³⁶ (c) access of the applicant to interpretation and legal assistance; (d) possibility to request corrections in the de-briefing form provided in **Article 13**; (e) exhaustive definition of authorities granted access to the applicant's personal data stored in databases and of the grounds for such access. Current practice in Greek border procedures, whereby asylum seekers do not have access to crucial stages for the processing of their claim such as nationality screening conducted with support from the European Border and

³³ CJEU, Case C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, para 79.

³⁴ Articles 26(3) and 27(5) Asylum Procedures Regulation proposal.

³⁵ Article 6(7) Screening Regulation proposal. Note that Recital 6 specifically refers to border guards.

³⁶ Article 12(1)(a) Reception Conditions Directive; CJEU, Case C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, para 78. The duty to inform individuals during screening pursuant to Article 8(2)(b) Screening Regulation proposal is more restricted in scope.

Coast Guard (Frontex) to the Greek authorities, as well as in countries like Germany, demonstrates the serious implications of the above approach for the fairness of the procedure, the quality of asylum decisions and the respect of the *non-refoulement* principle.³⁷

Identification of vulnerability

Although it refers to the categories of vulnerable groups of asylum seekers listed in the Reception Conditions Directive, **Article (2)** foresees identification of vulnerability only “where relevant”. This provision introduces lower standards compared to the mandatory, systematic assessment of vulnerability set out in the *asylum acquis*,³⁸ which directly applies to newly arrived persons who express the intention to seek international protection.

Furthermore, according to **Recital 27**, particular attention should be paid *inter alia* to persons “visibly having suffered psychological or physical trauma”. Such a restrictive interpretation of vulnerability categories is liable to lead to **severe omissions with regard to timely identification of groups such as victims of torture, violence or trafficking**, whose particular circumstances are frequently **not visible**, as illustrated by the failure of Greek authorities to identify and offer the necessary support to victims of torture in the context of asylum and reception and identification procedures to date.³⁹

3. Monitoring mechanism for fundamental rights compliance

Article 7 of the proposal, relating to fundamental rights monitoring, foresees the creation of an independent mechanism at national level, responsible for monitoring compliance with EU, international and domestic law during the screening, and for ensuring that allegations of non-respect of fundamental rights during the screening are examined.⁴⁰ The European Commission defers the entire regulation of the composition and functioning of such a mechanism to the national law of Member States, with the sole possibility for the Fundamental Rights Agency (FRA) to adopt non-binding general guidance on the set-up and functioning of the mechanism, and the possibility for Member States to seek FRA support to that end.⁴¹

While it constitutes a positive indication of the Commission’s intention to acknowledge Member States’ institutional responsibility to investigate allegations of EU and international law violations, particularly in the context of push backs, the suggested provision requires substantial improvement in order to offer effective measures.

First, based on the observations outlined above regarding the lack of added value of the screening procedure, fundamental rights monitoring should in no way be circumscribed to the screening stage but should **cover the full range of border**

³⁷ European Council on Refugees and (ECRE), *Airport procedures in Germany: Gaps in quality and compliance with guarantees*, May 2019, available at: <https://bit.ly/33VmeE3y>.

³⁸ Article 22(1) Reception Conditions Directive; Article 24(1)-(2) Asylum Procedures Directive.

³⁹ See ECtHR, *M.A. v. Greece*, App No 18179/20, 6 May 2020, granting interim measures to safeguard the health of an asylum-seeking victim of torture, who had been identified as non-vulnerable by the Reception and Identification Service (RIS).

⁴⁰ Article 7(2) Screening Regulation proposal.

⁴¹ *Ibid.*

surveillance activities under the Schengen Borders Code, where the majority of violations of human rights and the EU asylum *acquis* are observed. **Clear provisions should be laid down on the composition and responsibilities of the independent mechanism to ensure that it monitors the activities of national border management authorities** e.g. Hellenic Coast Guard and Hellenic Police, **with full institutional and functional independence, power to conduct on-side visits and to publish findings.**

Second, the mechanism must have **jurisdiction**. This requires the enactment of a **specific appeal procedure before the mechanism** which will fulfil the requisite guarantees for real and effective examination of individual cases, **protection of victims and redress of violations**, to constitute an effective remedy pursuant to Article 13 ECHR and Article 47 of the Charter.⁴²

Third, the text should clarify the binding effect of decisions on individual appeals, of findings and positions of the independent mechanism on monitoring and enforcement of EU law, with an express and specific referral thereof to the European Commission as guardian of the Charter and secondary EU legislation on asylum, so as to **enable effective contribution of the mechanism to the initiation of infringement proceedings.**

⁴² Minimum standards for the protection of those rights have been laid down in mechanisms such as the National Preventive Mechanism for torture and ill-treatment, under the Optional Protocol to the Convention against Torture: Greek Ombudsman, *Special report OPCAT 2018*, December 2019, available at: <https://bit.ly/37u4pWe>.



Refugee Support Aegean (RSA)

Efstratiou Argenti 7
82100 Chios, Greece
+30 22711 03721
info@rsaegean.org
<http://rsaegean.org/>