PICUM RECOMMENDATIONS ON THE SCREENING REGULATION

AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL INTRODUCING A SCREENING OF THIRD COUNTRY NATIONALS AT THE EXTERNAL BORDERS AND AMENDING REGULATIONS (EC) NO 767/2008, (EU) 2017/2226, (EU) 2018/1240 AND (EU) 2019/817 COM/2020/612 FINAL

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For a Pact-wide overview of our concerns, read More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations.

Maintaining access to existing residence permits regulated at national level:

If the Screening Regulation considers returns or asylum as the only two possible options, several people who would have access to options for regularisation under national legislation (including humanitarian permits) would nonetheless risk deportation, leading to risks of violations of fundamental rights including family life, best interests of the child and non-refoulement.

For instance, in TQ v Staatssecretaris van Justitie en Veiligheid, the CJEU recently found that before returning any unaccompanied child whose asylum application has been rejected, Member States have an obligation to evaluate the adequacy of reception facilities. In addition, more than half of EU member states provide a temporary residence permit on medical grounds; at least five countries have legislation granting special permits for undocumented victims of domestic violence; at least eight countries have regularisation mechanisms for children, young people or families; and at least seven countries have dedicated procedures for stateless people. These permits are based on grounds which

are not assessed in the asylum procedure, and therefore need to be assessed separately.

Moreover, **the adoption of a return decision without analysing whether there are other grounds for non-returnability goes against the objective of efficiency**, as several categories of people who might be non-returnable for different reasons (i.e. non-refoulement, family reasons, best interests of the child) will have to appeal the return decision if this fails to take into consideration all elements that should be analysed under EU and international law in the first place. This would multiply the necessary levels of jurisdiction and cause backlogs in higher courts.

We recommend:

- Clarifying that people can only be subjected to return procedures if they do not fulfil the conditions to apply for a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons under Member States legislation and that their return would not lead to risks of violations of the principle of non- refoulement and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations (recital 5 and article 14).
- Adding a reference to "the principle of non-refoulement and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations and without prejudice to Article 6(4) of Directive 2008/115." (article 14).
- Amending article 14 clarifying that "in cases affecting children, the best interests of the child shall be a primary consideration. This requires that procedures respecting Directive (EU) 2008/115/EC (Return Directive) may only be applied after a documented best interests of the child procedure is carried out. If return is considered to be in the best interests of the child, priority should be given to implementation through voluntary departure with child-specific assistance."
- Adding "(g) the applicable rules on the conditions of stay for third-country nationals in accordance to national law and the related residence procedures of the relevant Member State" to article 8§2 (provision of information).

Preventing the automatic detention of asylum seekers and undocumented people at the external borders:

The Commission proposal would lead to the automatic detention of individuals under the pre-entry screening. In FMS v. Others, the CJEU considered that the conditions of border centres with a closed perimeter and no right to leave

amount to detention (para. 231)[1]. This matches the long-standing case law of the ECtHR (Amuur v France, para. 49). It is essential to ensure that the pre-entry screening does not amount to automatic detention and that third country nationals are provided with adequate accommodation and services instead of being detained. As the current proposals also apply to children, this is also key to ensure compliance with international standards and global commitments to end child immigration detention.

The screening practice appears to be based on the practice of detention of third country nationals in the zones d'attente in France. The exponential expansion of this practice is even more concerning in light of the ample criticism by French civil society organisations over the years, which noted the lack of transparency, high level of physical and verbal abuses, impunity and lack of access to legal aid and health care.

We recommend:

- Amending the text removing references to migrants being "held" and introducing instead a provision ensuring that third country nationals should be provided with adequate accommodation and access to appropriate services. Unaccompanied children and children in families should never be detained (recital 12, art. 4).
- Remove the fiction of non-entry (art. 4§2).

Ensuring NGOs access to border areas and preventing criminalisation:

International and non-governmental organisations play a key role as watchdogs of fundamental rights and should therefore be granted access to border areas. This is even more necessary at times in which human rights defenders and NGOs face increasing criminalisation and intimidation for their work denouncing pushbacks. To prevent further instances of criminalisation, it is key to set a clear right for human right defenders and NGOs to access border areas, monitor and report on fundamental rights violations and provide information to migrants.

1 "It follows from all of the foregoing considerations that the answer to Question 3(b) and Question 4(a) is that Directives 2008/115 and 2013/33 must be interpreted as meaning that **the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterised by 'detention' within the meaning of those directives." (emphasis added).**

We recommend:

- Clarifying that national, international and non-governmental organisations and bodies **shall be allowed** to participate in the fundamental rights monitoring (recital 23 and article 7).
- Further amendments to art. 7 to ensure that the monitoring of fundamental rights at the external border can assess rights violations during the screening **as well as in connection with any crossing or attempted crossing at or outside official border crossings**; that they assess detention based on the principles of necessity and proportionality, as well as violations of **the best interests of the child, private and family right, the right to health care and other fundamental rights violations**. We also ask to ensure that adequate follow-up and compliance is ensured.
- Ensuring that states **shall** authorise relevant and competent national, international and non-governmental organisations and bodies to provide third country nationals with information during the screening phase (art. 8).
- Amending article 13 and annex 1 to delete the inclusion of "information on assistance provided by a person or a criminal organisation in relation to unauthorised crossing of the border, and any related information in cases of suspected smuggling" in the debriefing form, to prevent the risk that information collected without a lawyer nor proper access to information might be used to initiate criminal proceedings against human rights defenders, NGOs and migrants themselves. This, as well as other elements included in art. 13, could lead to a violation of Directive 2016/680 (art. 4(1)c and 10), Directive 2021/29 and Directive 2013/48.

Upholding the right to effective remedy:

The information obtained during the screening will be collected without access to a lawyer, in circumstances in which people will most likely be detained and not have adequate access to information. Additionally, unaccompanied children would not be appointed a guardian. The European Commission proposal seems to suggest that in this phase the police could both collect information that would strongly affect one's chances to be granted asylum, and information that could potentially be used for criminal justice purposes, both against the person providing the information and third parties.

Surprisingly, no reference is made here (or anywhere in the proposal) to Directive 2016/680 (Law Enforcement Directive), and the current version of the text is worded so vaguely that it is likely to lead to situations where that Directive is breached (notably Article 4§1§c and Article 10). It is also odd that this provision makes no reference to Directive 2012/29 (Victims Directive) or Directive 2013/48 (right of access to a lawyer in criminal proceedings), given that authorities will be asking about criminal offences and so it appears highly likely that one or both Directives will become applicable, giving rise, notably, to the right to a lawyer and

their right to information as victims. Considering how the provision is currently structured, there is a strong chance that Member State authorities will breach these other provisions.

We recommend:

- Ensuring that everyone will receive adequate information in a language and a format they understand, and not only in a language that the authorities "reasonable suppose" to be understood (art. 8).
- The de-briefing form filled in at the end of the procedure should not include (d) information obtained on routes travelled, including the point of departure, the places of previous residence, the third countries of
- transit and those where protection may have been sought or granted as well as the intended destination within the Union; nor (e) information on assistance provided by a person or a criminal organisation in relation to unauthorised crossing of the border, and any related information in cases of suspected smuggling (art. 13).
- Adding two additional paragraphs to article 14 on the outcome of the screening, clarifying that "the de-briefing form shall be signed by the third-country national, or, in the case of minors, their parents, or legally-appointed guardian. In this context, the third country national should be given adequate time to read and understand the form, and should have access to interpretation and legal assistance. The third-country national should be provided with a written copy of the de-briefing form signed by both parties." And "the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of the outcome of the screening before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence."

Compulsory health and vulnerability screening and access to health care:

The International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines the right to the highest attainable standard of health and requires states parties to guarantee enjoyment of this right free from discrimination. The Committee on Economic, Social and Cultural Rights has explicitly affirmed that states parties have an obligation to ensure that all persons, including undocumented migrants, have equal access to preventative, curative and palliative health care, regardless of their residence status and documentation. Similarly, the Committee on the Elimination of Racial Discrimination, which monitors implementation of the International Convention on the Elimination of Racial Discrimination has affirmed that under Article 5(e)(iv) of that Convention states parties may not deny or limit access for non-citizens to preventative, curative and palliative health care.

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The health and vulnerability screening is a necessary step to ensure that any potential cause of vulnerability, including mental and health care issues, are promptly identified and addressed. For such reason, authorities should not be able to derogate from this obligation.

We recommend:

- Ensuring that health and vulnerability screenings are compulsory and comply with the need for informed consent and data protection regulations (recital 26 and art. 9).
- Ensuring full access to health care during the screening phase (recital 27).
- Ensuring that children, due to the fact that they are physically and cognitively still developing, are automatically considered to be vulnerable to health and mental health issues in the short, middle and long term, and always have special reception or procedural needs (art. 9).

Preventing discriminatory policing and apprehensions:

The expansion of the pre-entry screenings to individuals who are already within the territory is discriminatory and would lead to a "hostile environment" in which undocumented people, including families and children, could be apprehended in any place and at any time and detained for up to 3 days with no judicial review nor access to a lawyer during the screening procedure. People and communities of colour that already face discriminatory policing and police harassment would risk further checks and imprisonment. It is hard to understand how this can be in line with recent EU commitments in the newly released EU Action Plan Against Racism to "countering discrimination by law enforcement authorities" and avoiding "profiling that results in discrimination".

We recommend:

- Ensuring that people who are already with the EU territory are not submitted to screening procedures (are consequent detention for 3 days) (art. 1).
- Article 5 should only refer to people "apprehended or intercepted by the competent authorities in connection with the irregular crossing of external borders, which shall be interpreted in line with the European Commission Return Handbook (chapter 2.1.)". This amendment would limit the application of the article to people who are apprehended in connection with an irregular border crossing, a category clearly defined and limited by the European Commission Return Handbook.
- To avoid the use of violence and coercion against third country nationals at borders, we also suggest amending article 10 to remove the possibility to use data or information "obtained from" the third country national and amending article 11 to ensure that "the law of the Member State concerned

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as well as the principles of proportionality and necessity apply to any searches" and that these are subjected to the scrutiny of the fundamental rights monitoring.

Safeguarding children:

Children make up an important proportion of migrants, both at the EU borders and on the territory. It is positive that the proposed Screening Regulation acknowledges the need for the Member States to involve child protection authorities (recital 21, art. 6, art. 9), for information to be given in an age-appropriate manner (recital 27) and that it should be implemented with particular attention to the best interests of the child (recital 22).

However, all children, whether unaccompanied or living with their families, will be subject to the automatic detention/holding that would result from this regulation and will not have access to residence procedures other than asylum. Moreover, unaccompanied children would not be appointed a guardian nor receive legal assistance during the screening, while being interrogated on several matters which will strongly influence their future opportunities and asylum application.

We recommend:

- Ensuring unaccompanied children are appointed a guardian during the screening procedure by adding "Appointing a guardian when unaccompanied children, or people declaring to be unaccompanied children, are concerned by this regulation" to article 6§7.
- Ensuring all people, including unaccompanied children, receive legal assistance (art. 6).
- Clarifying that children's statements should not form the basis of the de-briefing form unless they are accompanied by (one of) their parents or a legal guardian during that interview. All people should have the right to proofread the information in the de-briefing form, correct any information and receive a copy (include this provision in article 6).
- Clarifying that unaccompanied children and children in families should never be detained (recital 12 and art. 4).
- Amending article 14 by clarifying that "in cases affecting minors, the best interests of the child shall be a primary consideration. This requires that procedures respecting Directive (EU) 2008/115/EC (Return Directive) may only be applied after a documented best interests of the child procedure is carried out. If return is considered to be in the best interests of the child, priority should be given to implementation through voluntary departure with child-specific assistance."
- Clarifying that people can only be subjected to return procedures if they do

not fulfil the conditions to apply for a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons under Member States legislation and that their return would not lead to risks of violations of the principle of non- refoulement and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations (recital 5 and article 14).

- Adding "(g) the applicable rules on the conditions of stay for third-country nationals in accordance to national law and the related residence procedures of the relevant Member State" to article 8§2 (provision of information).

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