

# PICUM RECOMMENDATIONS ON SAFEGUARDING CHILDREN'S RIGHTS IN THE MIGRATION AND ASYLUM PACT PROPOSALS

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*PICUM is a network of more than 160 organisations working in more than 30 countries, mostly in the EU, to ensure social justice and human rights for undocumented migrants. The following amendments focus on the area of PICUM's expertise, which is ensuring and protecting human rights for undocumented migrants. Therefore, provisions affecting the right to asylum are outside of the scope of the following analysis.*

*For an overview of our concerns regarding both adults and children, read [More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations](#) and [Immigration detention and returns in the EU Migration Pact: how we can correct course](#). We also endorse the [Joint statement on the impact of the new Pact on Migration and Asylum on children in migration](#), signed by 28 child rights organisations.*

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## »» FOR CONTEXT

Children make up an important part of the migrant and asylum-seeking population: data on [refusals at the border](#) is not age-disaggregated, but roughly [one in three](#) first-time asylum seekers and, according to Eurostat, about [one in ten](#) people found irregularly on the territory is a child. Although the [European Pact on Migration and Asylum](#) and its five legislative proposals and four recommendations are far more recognisant of children in migration and their particular needs and rights than the 2015 Agenda on Migration, the new mechanisms and procedures proposed may end up causing great harm to children.

Children will suffer, as adult migrants will, from the increased use of detention, including *de facto* detention, fewer safeguards, unrealistic timeframes that endanger fair procedures and from being unable to access pathways to regularisation and other residence procedures other than asylum. Although the different legislative proposals tout being child-rights compliant, it is difficult to see when and how children will have their best interests assessed or their well-being safeguarded when they may not have access to a guardian or legal assistance, will not be treated as children when their age is unclear or contested, will be automatically subjected to detention at the border and will not have access to a documented [best interests procedure](#)<sup>1</sup> before a return decision is made.

The proposals do not adequately safeguard or protect children even though it has often been recognized, including by the European Court of Human Rights,<sup>2</sup> that migrant children are highly vulnerable members of our society because of their specific needs, in particular their age and lack of independence. Governments have a positive obligation to protect and take care of migrant children with adequate measures. Not doing so would result in inhuman or degrading treatment.<sup>3</sup>

In this non-exhaustive brief we list **our recommendations on how the safety and well-being of children can be ensured in the five legislative proposals. We focus on undocumented children and children who risk becoming undocumented, whether they be unaccompanied or accompanied by their**

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1 Unicef, IOM, UN Human Rights, Save the Children, PICUM, ECRE and Child Circle developed [guidance](#) for governments on ensuring that return decisions are made and implemented in the best interests of the children concerned. This includes the development of a 'best interests procedure' during which a durable solution is identified for the child: either integration in the country of residence, integration in a third country (eg for family reunification purposes) or integration in the country of origin of the child or their parents. A secure residence status is part and parcel of all three. For more details, please see the joint [guidance](#) and webpage [www.picum.org/durable-solutions](http://www.picum.org/durable-solutions).

2 A.o. in [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#) and [Tarakhel v. Switzerland](#).

3 Considering the absolute nature of the protection offered by Article 3 of the European Convention on Human Rights, member states have a positive obligation to protect and take care of the child with adequate measures ([Rahimi v. Greece](#); [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#)).

**parent(s)**. Provisions affecting the rights to asylum are outside of PICUM's expertise and thus outside the scope of this brief.

## »» **RECOMMENDATIONS ON THE SCREENING REGULATION**<sup>4</sup>

While it would be a step forward to systematically screen migrants' health and assess their vulnerability before referring them away from the border, the current proposal would in fact harm children because of its focus on security and detaining children and families 'at the border'.

Although hundreds of thousands of children will be affected by the Screening Regulation, the proposal **includes very few safeguards for children**. While the proposal acknowledges the need for member states to involve child protection authorities (recital 21, art. 6, art. 9) and for information to be given in an age-appropriate manner (recital 27), it does not guarantee, or even mention, that children would have **access to legal assistance** or that unaccompanied children would **be appointed a guardian**. Alarming, **no provisions are included that safeguard children whose age is disputed**. No 'benefit of the doubt' provision is included in the current Eurodac-proposals either, creating an important safeguarding gap. To ensure that the Pact is implemented in the best interests of the child, the Pact regulations should include a provision that ensures that when a child's age is in doubt and no supporting documentation exists proving their age, the benefit of the doubt principle is applied and the person treated as a child.

The proposed Screening Regulation also does not offer the concerned third country national the chance to proofread and sign off on the de-briefing form or receive a copy. Nor does it ensure that they can correct the data relating to them, even though accuracy is key and the right to rectify and/or supplement the personal data should always be ensured, as underlined by the European Data Protection Supervisor in his [opinion](#) on the Migration and Asylum Pact proposals.

All of these provisions are the most basic preconditions to safeguard the fairness of the proceedings, the effective exercise of the rights of the child and the right to effective remedy.

If the Screening Regulation considers returns or asylum as the only two possible options, children and their families **would not have access to residence procedures on other grounds**, including family life, best interests of the child and non-refoulement. And yet, at least [eight](#) countries have regularisation

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<sup>4</sup> [The 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](#)

mechanisms for children, young people or families, 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, 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.

In addition, before any child can be returned, it **must be assessed whether the return would be in the best interests of the child**. For instance, the ECtHR found that article 3 was violated when governments let an unaccompanied child travel/return alone, did not ensure that a returned child would be properly looked after upon return, and when governments did not have regard for the situation the child was likely to find upon return.<sup>5</sup> In addition, in [TQ v Staatssecretaris van Justitie en Veiligheid](#), the CJEU recently confirmed that before returning any unaccompanied child whose asylum application has been rejected, member states have an obligation to evaluate the adequacy of reception facilities. A fully-fledged [best interests procedure](#) should always precede a return decision for it to be in line with international standards and children's needs.<sup>6</sup>

The Commission proposal would **lead to the automatic detention of children**, both unaccompanied and those within families, during the pre-entry screening (up to ten days). Allowing children to be detained [harms children](#), goes against [international standards](#) and [global commitments](#) to end child immigration detention. In addition to creating new vulnerabilities, detention also [exacerbates](#) existing vulnerabilities.

The **health and vulnerability screening should not be optional** for member states, as is currently proposed. The ECtHR has twice confirmed that a migrant child's inherent vulnerability<sup>7</sup> takes precedence over considerations relating to their irregular residence status ([Abdullahi Elmi and Aweys Abubakar v. Malta](#); [Popov v. France](#)).

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5 See: [Rahimi v. Greece](#); [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#)

6 Unicef, IOM, UN Human Rights, Save the Children, PICUM, ECRE and Child Circle developed [guidance](#) for governments on ensuring that return decisions are made and implemented in the best interests of the children concerned. This includes the development of a 'best interests procedure' during which a durable solution is identified for the child: either integration in the country of residence, integration in a third country (eg for family reunification purposes) or integration in the country of origin of the child or their parents. A secure residence status is part and parcel of all three. For more details, please see the joint [guidance](#) and webpage [www.picum.org/durable-solutions](http://www.picum.org/durable-solutions).

7 Because of their specific needs, in particular their age and lack of independence, the European Court of Human Rights defines migrant children as a category of "*highly vulnerable members of the society*" particularly requiring the authorities' attention ([Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#); [Tarakhel v. Switzerland](#)).

### 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).
- Assuming that children are automatically considered to be vulnerable to health and mental health issues on the short, middle and long term, and always have special reception or procedural needs (art. 9). 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 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 free legal assistance (include this provision in art. 6).
- 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).
- 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).
- 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).
- Amending article 14 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.”
- 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).

- Adding an additional paragraph to article 14 on the outcome of the screening, clarifying that “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.”
- Including a safeguarding provision ensuring that the ‘benefit of the doubt’ applies when a person’s age is unclear or contested and no supporting documentation exists that proves their age. The ‘benefit of the doubt’-principle means that the person is treated as a child in order to ensure that no child is treated as an adult.

## » RECOMMENDATIONS ON THE ASYLUM AND MIGRATION MANAGEMENT REGULATION (RAMM)<sup>8</sup>

The provision that “*the best interests of the child shall be a primary consideration for Member States with respect to all procedures*” is welcome, as are the increased resources for guardians for unaccompanied children.

However, the proposed regulation **continues the trend of granting children in families fewer safeguards than unaccompanied children** on the assumption that having parents sufficiently protects them from harm. While unaccompanied children have specific safeguarding needs, children in families should have their best interests assessed and safeguarded and should enjoy access to housing, education and legal representation to the same degree as unaccompanied children.

The **return sponsorship procedure** proposed by the regulation **would apply to children, families and unaccompanied children who have been living in a member state for some time**. They would have to leave the country where they have been living, where they went to school and where they speak the language only to be transferred to a country to which they have no ties and where they may have to continue living without a secure residence status. Growing up with an insecure residence status is [very difficult](#) and can harm children’s mental and physical well-being and development, but this time, the child would live in the new member state without the crucial formal and informal support networks which may have taken them years to build.

It’s worth remembering that – although related to a Dublin transfer – the ECtHR has [ruled](#) that transferring a family without having first obtained assurances

<sup>8</sup> [Proposal for a regulation of the European Parliament and of the Council on Asylum and Migration Management](#)

from the receiving (in this case it would be the return-sponsoring) member state that the child and their family would be taken charge of in a way that is age-appropriate and keeps the family together constitutes inhuman and degrading treatment.

Any return should only happen if it is in the [best interest of the child](#).<sup>9</sup> Uprooting children, especially those who have developed ties with their community, [harms them](#) and it is hard to see how intra-European transfers ahead of a voluntary or forced return safeguards children's well-being.

### We recommend:

- Deleting article 45(1)(b) and article 55 on the Return sponsorship, or, *subordinately*:
  - » Excluding children (of all ages and independent on whether they are unaccompanied or with their families) from the scope of art. 55 *and*
  - » Excluding people who are already in the EU territory from the scope of art. 55, to prevent uprooting them from the country in which they might have been living for years and have supporting social networks.
- Ensuring children in families and unaccompanied children alike are adequately protected by:
  - » Amending recital 48 to *"Before transferring an unaccompanied minor to another Member State, the transferring Member State should make sure that that Member State will take all necessary and appropriate measures to ensure the adequate protection of the child, and, in the case of unaccompanied children, in particular the prompt appointment of a representative or representatives tasked with safeguarding respect for all the rights to which they are entitled. Any decision to transfer an unaccompanied minor should be preceded by an assessment of his or her best interests by staff with the necessary qualifications and expertise."*
  - » Amending article 13§5 to *"Before transferring an unaccompanied minor to the Member State responsible or, where applicable, to the Member State of relocation, the transferring Member State shall make sure that the Member State responsible or the Member State of relocation takes the measures referred to in Articles 14 and 23 of Directive XXX/XXX/EU [Reception Conditions Directive] and Article 22 of Regulation (EU) XXX/XXX [Asylum Procedure Regulation] without delay. Any decision to transfer an unaccompanied minor shall be preceded by an assessment of his/her best interests. The assessment*

<sup>9</sup> Unicef, IOM, UN Human Rights, Save the Children, PICUM, ECRE and Child Circle developed [guidance](#) for governments on ensuring that return decisions are made and implemented in the best interests of the children concerned. This includes the development of a 'best interests procedure' during which a durable solution is identified for the child: either integration in the country of residence, integration in a third country (eg for family reunification purposes) or integration in the country of origin of the child or their parents. A secure residence status is part and parcel of all three. For more details, please see the joint [guidance](#) and webpage [www.picum.org/durable-solutions](http://www.picum.org/durable-solutions).

*shall be based on the factors listed in paragraph 4 and the conclusions of the assessment on these factors shall be clearly stated in the transfer decision. The assessment shall be done swiftly by staff with the qualifications and expertise to ensure that the best interests of the minor are taken into consideration."*

- With regards to what member states should take account of in a best interests assessment:
  - » Amending recital 43 to *"In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations **in the short, medium and long term** and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability."*
  - » Amending article 13§4(b) to *"The minor's well-being and social development **in the short, medium and long term**, taking into particular consideration the minor's background;"*

## » RECOMMENDATIONS ON THE ASYLUM PROCEDURES REGULATION<sup>10</sup>

*\*Note that this section focuses on the return border procedure only, in line with PICUM expertise.*

By allowing the **detention** – potentially up to 24 weeks (40 weeks in situations of crisis)<sup>11</sup> – of families with children older than twelve, as well as younger children and unaccompanied children for national security reasons, the proposed Asylum Procedures Regulation would violate international and regional standards that clearly consider child immigration detention as a violation of the rights of the child.

Prohibiting child detention ensures consistence with international legal standards as well as well-established evidence showing that even short periods of detention have a long-lasting impact on children's physical and mental health and their development. This can include behavioural dysregulation, posttraumatic stress, depression and suicidal thoughts, as well as physical symptoms (e.g. headaches, pains, new onset bed wetting, coughing or wheezing) linked to the stress in the

<sup>10</sup> [Amended proposal for a 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](#)

<sup>11</sup> Both the proposed asylum border procedure and the return border procedure allow for the maximum detention of children for 12 weeks, 20 in situations of crisis, and could be accumulated.

child, family and environment. Detention of families also contributes to impairing child development and creating a stressful situation for children and their families, with findings from research in the [UK](#) highlighting that all interviewed parents had symptoms of anxiety, and most had symptoms of depression with suicidal ideation. Detention can also exacerbate [pre-existing vulnerabilities](#). For these reasons, [UN experts](#) agree that detaining children based on the children's or their parents' migration status is a human rights violation and is never in the best interest of a child.

**Differentiating between children under and above 12 years old** conflicts with the internationally [recognised](#) definition of children being every person until the age of eighteen, and with the Commission's [recognition](#) that anyone below 18 is a child. Moreover, in [TQ v Staatssecretaris van Justitie en Veiligheid](#), the CJEU found that member states may not distinguish between children solely on the basis of their age.

Even when a significant proportion of arrivals at the border would be families with children above 12, this should not be an argument to subject children to the border procedures as **general migration control arguments should not override best interests considerations**.<sup>12</sup> As confirmed by the ECtHR,<sup>13</sup> migrant children are inherently vulnerable, both because they are children and because they are migrants, and member states have a positive obligation to protect them.

In addition, the obligation to issue a return decision with the rejection of an asylum application **closes the access to residence permits outside asylum** which are currently available under national law, including those based on [children's rights](#) and family unity. Consequently, people who would have access to options for regularisation under national legislation (including humanitarian permits) would risk being deported nonetheless, leading to risks of violations of fundamental rights including family life and non-refoulement. It also goes against the Pact's stated 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 according to EU and international law. Linked to this, the proposal to issue a return decision at the same time as the rejection of the asylum application appears to limit member states' discretion under Article 6(4) of the [Return Directive](#), which they may need to use to respect the right to family and private life.

<sup>12</sup> The UN Committee on the Rights of the Child, underlined that "non rights-based arguments such as, those relating to general migration control, cannot override best interests considerations." in General Comment no. 6, [Treatment of unaccompanied and separated children outside their country of origin](#).

<sup>13</sup> See: [Popov v. France](#); [Abdullahi Elmi and Aweys Abubakar v. Malta](#); [Rahimi v. Greece](#); [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#).

**Before any child can be returned, it must be assessed whether the return would be in the best interests of the child.** For instance, the ECtHR found that article 3 was violated when governments let an unaccompanied child travel/return alone, did not ensure that a returned child would be properly looked after upon return, and when governments did not have regard for the real situation the child was likely to find upon return.<sup>14</sup> In addition, in [TQ v Staatssecretaris van Justitie en Veiligheid](#), the CJEU recently confirmed that before returning any unaccompanied child whose asylum application has been rejected, member states have an obligation to evaluate the adequacy of reception facilities. A fully-fledged [best interests procedure](#) should always precede a return decision for it to be in line with international standards and children’s needs.<sup>15</sup>

**Voluntary returns** should always be preferred above forced returns: they are more humane, more durable and cheaper. Voluntary departures constitute, according to [Frontex](#), around 50 per cent of the total number of returns in the EU. However, it takes time to prepare one’s return, both physically and mentally – especially when children are involved. For this reason, it is essential to set a minimum time period for voluntary departure.

#### **We recommend:**

- Deleting the return border procedure (art. 41a). If not: *at least excluding all children* (both unaccompanied and with their families, and until the age of 18) from the asylum and return border procedures (art. 41 and 41a).
- Granting a period for voluntary departure of at least 30 days.
- With regards to return decisions:
  - » Deleting recital 31a and article 35a (regarding the issuing of return decisions).
  - » Ensuring that a return decision can only be issued provided that the applicant does 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, be against the best interests of the child(ren) concerned, and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations. When children are concerned, a documented [best interests procedure](#) should precede the return.

14 See: [Rahimi v. Greece](#); [Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#)

15 Unicef, IOM, UN Human Rights, Save the Children, PICUM, ECRE and Child Circle developed [guidance](#) for governments on ensuring that return decisions are made and implemented in the best interests of the children concerned. This includes the development of a ‘best interests procedure’ during which a durable solution is identified for the child: either integration in the country of residence, integration in a third country (eg for family reunification purposes) or integration in the country of origin of the child or their parents. A secure residence status is part and parcel of all three. For more details, please see the joint [guidance](#) and webpage [www.picum.org/durable-solutions](http://www.picum.org/durable-solutions).

» 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.

## »> RECOMMENDATIONS ON THE CRISIS REGULATION<sup>16</sup>

In general, the proposed crisis regulation shortens or extends deadlines and periods without any regard for the children it affects.

As discussed above, the proposed screening, asylum and return border procedures would lead to the automatic detention of individuals, even in circumstances in which this is not openly defined as detention but would fill the conditions considered to amount to detention (cfr. [FMS v. Others](#)). The proposed text of the Screening and Asylum Procedures Regulation (APR) also applies to children (in the APR: above 12 if they are with their families, as well as younger children in families or unaccompanied children for national security reasons).

As the proposed screening phase and asylum and return border procedure would entail *de facto* child detention, and the Crisis Regulation would extend the maximum period of detention under these instruments, we suggest excluding children from the application of the Crisis Regulation.

### **We recommend:**

- Inserting an additional article excluding all children from the different timelines set by the Crisis regulation.
- Deleting recital 10 and article 257 which shorten the timeframe for transfer of undocumented people under the return sponsorship scheme from eight to four months.

<sup>16</sup> [Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum 2013/32/EU](#)

## » RECOMMENDATIONS ON THE EURODAC REGULATION<sup>17</sup>

*\* As the amended Eurodac proposal of 2020 adds to the [2016 proposal](#) and builds on an informal agreement reached in trialogue in 2018, we do not refer to specific articles but raise concerns and make recommendations based on what is currently being discussed.*

While many see Eurodac as the last piece of the interoperability initiative, it is intimately connected to several of the Pact proposals and should be analysed in that context and treated as part of the Pact. The connections with the Screening Regulation are obvious. Several concerns regarding children, both unaccompanied and children in families, come up.

Firstly, **all children older than six would be fingerprinted and photographed**,<sup>18</sup> including for the purpose of (forced) returns. According to the proposals, anyone above six has to comply and allow their biometric data to be taken. This contradicts UN guidance that arguments based on migration control cannot override best interests considerations.<sup>19</sup> And, as the EU Fundamental Rights Agency underlined in its [response](#) to the 2016 Eurodac proposal, children should not be fingerprinted for the purpose of return. **Children’s data should only be collected and retained with a clear child protection purpose in mind, which this regulation does not have.**

It should be underlined that the European Data Protection Supervisor issued an [opinion](#) in 2016 that member states may very well already be collecting biometrics of young children for visas and passports, but that policy makers should not conclude that that proves that it is necessarily efficient, proportionate or useful.

And, to put this duty to comply and this very young age into perspective: under the [GDPR](#), children younger than 16 cannot by themselves [consent](#) to having their personal data processed. Children under 13 cannot consent at all, even with parental approval.<sup>20</sup>

17 [Amended proposal for a regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of regulation \(eu\) xxx/xxx \[regulation on asylum and migration management\] and of regulation \(eu\) xxx/xxx \[resettlement regulation\], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by member states’ law enforcement authorities and Europol for law enforcement purposes and amending regulations \(EU\) 2018/1240 and \(EU\) 2019/818](#)

18 Two types of data would be collected in Eurodac: biometric data and alphanumeric data. ‘Biometric data’ is fingerprint data and facial image data; ‘alphanumeric data’ means data represented by letters, digits, special characters, space and punctuation marks.

19 The UN Committee on the Rights of the Child, underlined that “non rights-based arguments such as, those relating to general migration control, cannot override best interests considerations.” in General Comment no. 6, [Treatment of unaccompanied and separated children outside their country of origin.](#)

20 [General Data Protection Regulation](#), art. 8.

Secondly, the current proposal **allows fingerprinting children under duress**. While a clause would state that no force should be used towards children, this safeguard is immediately undercut by the addition that a proportionate degree of coercion (with respect to the dignity and physical integrity of the minor) would be allowed as a last resort. On top of the obvious gravity of coercing any child, we cannot but notice that ‘force’ and ‘coercion’ are synonyms and – if they are indeed different – their content remains undefined by the proposals. Any form of coercion would constitute a child rights violation. As we, [PICUM, and 22 UN agencies and CSOs](#) and the [EU Fundamental Rights Agency](#) have repeatedly stated: **Eurodac should clearly exempt children from any form of coercion**.

Allowing an exception to this rule will likely cause the use of ‘disproportionate’ force, because it can create a situation of impunity as it puts the onus on children and families without much power to demonstrate somehow that the force used was disproportionate, did not respect the dignity or physical integrity of the child or was not used as a last resort.

Third, the current proposal **does include important safeguards** throughout: personnel that registers the biometric data of children would be trained for that purpose; children would be informed in an adapted way; children would be able to access, rectify and erase their personal data; and an adult family member or guardian would be present throughout the registration process and, where there is no guardian yet, an independent official trained in safeguarding children’s best interests and their general wellbeing would be present. The emphasis on children needing to feel safe throughout the process reflects an awareness of the harm migration procedures and processes can do to children. **However**, this awareness and the **safeguards may be insufficient when duress is allowed**.

Fourth, one important safeguard is completely absent: **the proposals do not include anything on what happens when a child’s age is unclear or contested** even though their age will determine whether they are fingerprinted, and whether the above-mentioned safeguards are put in place. To ensure that the Eurodac regulation is implemented in the best interests of the child, it should include a provision clarifying that when a person’s age is in doubt and no supporting documentation exists proving their age, the benefit of the doubt principle is applied and the person is treated as a child or a child younger than six years old, depending on the case. The **‘benefit of the doubt’-principle** is crucial when doubt about around age exists,<sup>21</sup> even more so because the Eurodac will be filled with data collected during the pre-entry screening which includes little to no procedural safeguards for children (see Screening regulation).

Fifth, fingerprints and facial images of children (≥6 y.o.) and adults would be **kept for several years** – five years where it concerns undocumented children and adults who have never claimed asylum, ten for asylum seekers and resettled

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21 As confirmed by UNCRC General Comment no.6 on unaccompanied children, UNHCR [Guidelines on International Protection](#) regarding child asylum claims, and the EU [recast Asylum Procedures Directive](#) (art. 25), to name a few.

persons. During this time law enforcement would be able to consult data of formerly undocumented people who have a residence permit, and this until their data is deleted.

Sixth, the regulation also includes provisions allowing or mentioning the **detention** for the purpose of determining or verifying a person's identity 'as a last resort' and the liberty to take 'administrative measures' when a person's fingerprints are illegible or the person refuses to have their biometric data registered. It is not clear what constitutes an 'administrative measure' yet as they would be defined in national law, but this is worrying as immigration detention is an administrative measure according to member states' laws. It should be clear that children should never be detained, let alone to determine or verify their identity, and should not be coerced into complying.

Last but not least, the impact of the existing and proposed Eurodac is not being assessed, contrary to the Commission's own [strategy](#) for the effective implementation of the Charter of Fundamental Rights. **Given that Eurodac would affect millions of children, a child rights impact assessment should happen as soon as possible.** The assessment would also help ensure that children's rights are mainstreamed in EU policies, in line with the recent [EU Child Rights Strategy](#), and as recommended by the UN Committee on the Rights of the Child in their recent [general comment](#) on children in the digital environment.

**We recommend:**

- That an ex-ante child rights, fundamental rights and data protection<sup>22</sup> impact assessment is made as soon as possible, in addition to regular impact assessments once the regulation is adopted.
- Making explicit that children's biometric data is not taken or stored for the purpose of forced or voluntary returns or the prevention of secondary movements.
- Making sure children are not forced or coerced to give biometric data by deleting any exceptions to this rule.
- Including a safeguarding provision that the 'benefit of the doubt' applies when a person's age is unclear or contested and no supporting documentation exists that proves their age. The 'benefit of the doubt'-principle means that the person is treated as a child or a child younger than six years old, depending on the case, in order to ensure that all children are treated as such.
- Keeping the following safeguards if biometric data of children older than 6 would be registered:

<sup>22</sup> Also recommended by the European Data Protection Supervisor (EDPS Opinion [07/2016](#) on the First reform package on the Common European Asylum System (Eurodac, EASO and Dublin regulations) and EDPS Opinion [09/2020](#) on the New Pact on Migration and Asylum)

- » The person responsible for taking the biometric data of the child is trained for this purpose and guarantees that the child feels safe throughout the process
- » The child is accompanied by, where present, an adult family member throughout the time their biometric data are taken.
- » An unaccompanied child should be accompanied by a guardian who is trained to safeguard the best interests of the child and their general wellbeing, throughout the time their biometric data are taken.
- » The guardian should not be the person responsible for taking the biometric data, should act independently and should not receive orders from the personnel or the service responsible for taking the biometric data.
- » Informing the child and the accompanying adult or guardian, in whatever form necessary, of the process, its importance and the child's rights to consult and correct their data in the databases
- No child should be detained for any reason, including to determine or verify their identity and independent of their age and whether they are unaccompanied or with their families. Community-based, non-custodial alternatives to detention should always be implemented when children and their families are concerned.