PICUM Analysis

New Migration Pact Series

Analysis of the Screening Regulation

October 2024

PICUM

Introduction

PICUM represents a network of 160 organisations across 30 countries working to ensure social justice and human rights for undocumented migrants.

PICUM has been following the EU Pact on Migration and Asylum in recent years through various consultations prior to its launch by the European Commission in September 2020, during the past four years of negotiations at the EU level, and now subsequent to its official adoption in May 2024. PICUM has published a broad range of analyses, statements, and recommendations, often jointly with civil society partners and with our members across EU.

Despite our collective recommendations and warnings on the harmful impact of the proposed reforms on migrants' fundamental rights, the final text of the Pact will normalise the arbitrary use of immigration detention, including for children and families, increase racial profiling, use "crisis" procedures to enable pushbacks, and return individuals to so called "safe third countries" where they are at risk of violence, torture, and arbitrary imprisonment.

It also betrays the spirit of existing EU work, such as the EU Action Plan on Integration and the EU Action Plan Against Racism which recognises the intersectional impacts of racism and the specific vulnerability of migrants and refugees. The Pact, as it stands, risks perpetuating discriminatory practices within the very structures meant to uphold justice and protection for all.

This briefing is part of a series of PICUM publications analysing the different parts of the EU Pact on Migration and Asylum, with a focus on their impact on detention, return, access to regular pathways and the rights of undocumented adults and children.

Note on geographical application: the Screening Regulation builds on the Schengen acquis (recitals 60-65). As such, it is applicable to Schengen associates (Iceland, Norway, Switzerland and Liechtenstein) but not to Ireland and Denmark (the latter has a period of 6 months from the Regulation's adoption to decide whether to implement it).

A new, mandatory screening procedure at the EU external borders and on the territory

The Screening Regulation creates a new mandatory screening procedure, which will now have to be implemented by EU member states to people arriving or having arrived irregularly in the EU. The screening procedure would also apply to people who are already in the EU territory but cannot prove that they have already been subject to controls at external borders (see section 2). The new screening procedure includes:

- **A preliminary health check** (art. 12): The preliminary health check should be implemented by qualified medical personnel (art. 12). However, the medical personnel might also decide that no further health check during the screening is necessary in an individual case, based on "medical circumstances concerning the general state" of the person.
- **A preliminary vulnerability check** (art. 12): The preliminary vulnerability screening should be implemented by specialised personnel and should identify:
    - Stateless people
    - Vulnerable people
    - Victims of torture or ill-treatment
    - Individuals with special needs (art. 9(2) and (3)).

  If there are indications of vulnerabilities or special reception or procedural needs, the person should receive timely and adequate support in adequate facilities. In addition, all authorities should report any situation of vulnerabilities observed or reported to them (rec. 38)

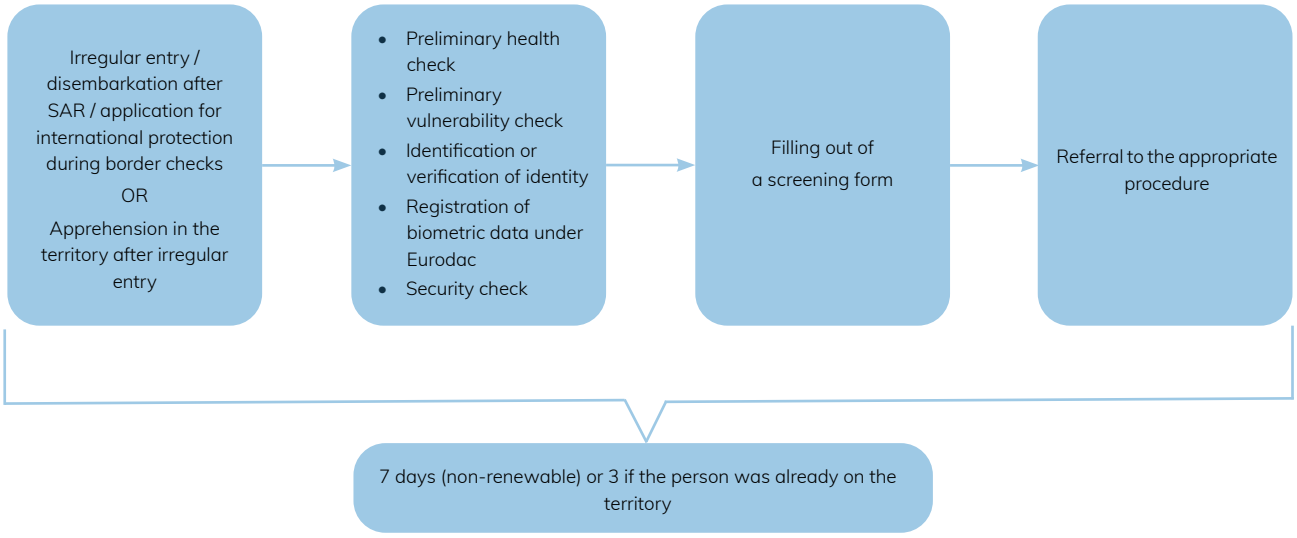
- **Identification or verification of identity** (art. 14): Individuals' identity should be verified based on their documents, data or information provided by them, and their biometric data (art. 14). Authorities shall also query the Common Identity Repository, the Schengen Information System, as well as, where relevant, national databases (art. 14(2)). The biometric data taken for the identification of the person should also be used for their registration in Eurodac.
- **Registration of biometric data under Eurodac** (Articles 15, 22 and 24 of Regulation (EU) 2024/1358)
- **A security check** (art. 15 and 16): The security check should cover both the individual and their objects. Searches should be regulated under national law (art. 15). Authorities shall consult the relevant EU databases, including SIS; ETIAS; VIS; ECRIS-TCN, Europol data as well as Interpol databases. Some limitations on the scope of the information that can be retrieved apply, in particular on the collection of information on previous refusals or annulment of visas for security grounds and convictions for serious criminal offences (art. 15(3) and (4)).

  If a query indicates a match with Europol data, Europol will be automatically notified, and will be able to take any appropriate follow-up action (art. 16(5)). Interpol can only be consulted if there is a way to do so without revealing information to the owner of the Interpol alert (art. 16(6)). The European Commission will have to adopt implementing acts on the cooperation procedure between Interpol and Europol.

- **The filling out of a screening form** (art. 17)
- **Referral** to the appropriate procedure (art. 18)

It can last for a maximum of 7 days, or 3 days for people who are already within the territory (art. 8). Both terms cannot be extended.

At the end of the screening, the authorities will fill out a form and refer the person to the appropriate procedure (see below).



Scope of application

The screening procedure will apply to third country nationals who:

- **Crossed an external border in an unauthorised manner**, without fulfilling the entry conditions set out in the Schengen Borders Code, except if they are directly sent back or if they are detained for the whole duration of their stay in the EU, which should be less than 72 hours (art. 5(1) (a), Screening Regulation and art. 22(1) and (4), Eurodac));
- **Applied for international protection during border checks**;
- **Have been disembarked after a search and rescue operation**;
- **Are already in the EU territory but cannot prove that they have already been subject to controls at external borders** (article 1). Recital 18 clarifies that not having a travel document with an entry stamp at the moment of the apprehension can be considered as an indicator of irregular entry

In November 2023, over 80 civil society organisations signed a joint statement calling on the screening in the territory to be deleted, highlighting the risk that this would increase racial profiling within the EU.

Recital 18 also clarifies that third-country nationals should not be subjected to repeated screenings.

The screening procedure does not apply to third country nationals who hold a residence permit or a long-stay visa in another EU Member State towards which they are transiting, or to whom a visa is issued at the border, except if they apply for asylum (art 5, art. 6(5) Regulation (EU) 2016/399 (Schengen Borders Code)). Individuals subject to national criminal law procedures, or to an extradition procedure, may also be excluded from the screening in accordance with national criminal law (art. 18(6)). The Screening should end if it becomes apparent that the person fulfils the entry conditions or if they leave the territory of the state (art. 5(3)).

For people who are already in the EU territory, the Return Directive will apply in parallel of the Screening Procedure (art. 4(2)). In this case, it is also possible for a person to be returned immediately to another member state immediately after apprehension, under bilateral agreements, arrangements or cooperation, and then subject to screening in the second state. The procedure for the screening within the territory will also apply to people apprehended in connection with irregular internal border crossing, when the internal border controls have not yet been lifted (rec. 21).

The application of the screening procedure to people who are already in the territory is likely to increase racial profiling.

The screening procedure will likely lead to the creation of a hostile environment in which minorities and people of colour - whether they are EU citizens or individuals with regular or irregular residence status - would face heightened risk of being targeted by discriminatory controls and potentially detained without adequate safeguards.

Detention

People undergoing the screening procedure at EU external borders are not authorised to enter the territory (art. 6). Member states need to ensure that they "remain at the disposal" of the authority in the locations of the screening, under national law (art. 6). This can take place in or at proximity to the external border, or on the territory (art. 8).

If people apply for asylum, the rules concerning detention within the Reception Conditions Directive (hereafter RCD) apply (art. 4(1)(b)), while the Return Directive (hereafter RD) applies for people who don't apply for asylum (art. 8(7)). However, it remains unclear from which moment the rules of the RCD will start applying exactly, as the asylum procedure will only be formally registered after the screening has ended (recital 15); and if and how will states implement two different regimes in the same screening facilities.

The rules of the RCD, which was recast in 2024, provide for broader safeguards as compared to the RD (see table below). In particular, the RCD clarifies that applicants for international protection shall not be detained only because they are an applicant or on the basis of their nationality (art. 10) – they can only be detained for one or more than one ground for detention (detailed in paragraph 4, art. 10). The RCD also requires Member States to ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law (art. 10(5)). Under the RCD, detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation (art. 11(4)).

In addition, the RCD imposes higher standards on non-detention of people with vulnerabilities and children. Under the RCD, where detention would put the physical and psychological health of applicants with special reception needs at serious risk, they shall not be detained (art. 13(1) RCD).

Children and families should as a rule not be detained (art. 13(2) RCD), except in exceptional circumstances, as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively, and after detention is assessed to be in their best interests [...]:

- in the case of accompanied minors, where the minor's parent or primary care-giver is detained; or
- in the case of unaccompanied minors, where detention safeguards the minor (art. 13(2) RCD).

On the contrary, the RD merely states that unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time (art. 17(1)).

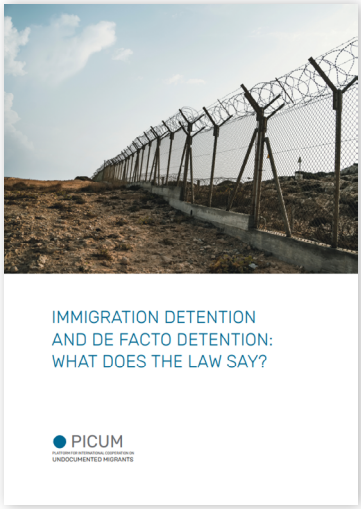
Both the RCD and the RD clarify that detention can only be applied if no other less coercive measures are possible (art. 15). Both instruments require detention to be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based as well as why other less coercive alternative measures cannot be applied effectively (art.11(2) RCD, 15(2) RD). In addition, the RD clarifies that, if there is no reasonable prospect of return, the person should be immediately released (art. 15(4)).

Reception Conditions Directive (RCD)	Return Directive (RD)
Detention is applicable if necessary based on an individual assessment, only if no less coercive measure is possible. States should include alternatives to detention (ATD) in their national law.	Detention is applicable only if necessary and if no less coercive measure can be applied in a specific case
Seeking asylum cannot be the ground for automatic detention. Detention is only allowed: • to determine or verify identity or other elements; • to ensure compliance with an order restricting their freedom of movement, if there is risk of absconding; • to decide on the right to enter the territory, during a border procedure; • for applications made to prevent return; • for national security reasons; • during the transfer of responsibility for the examination of the merits of an application for international protection from one Member State to another ("Dublin transfer"), under the appropriate rules	Detention is unlawful if there is no reasonable prospect of removal. Detention is only allowed: • if there is a risk of absconding; • if the third country national avoids or hampers return.
Order in writing, with reasons in fact and law	Order in writing, with reasons in fact and law
No detention if it would put health of people with special needs at risk	//
Children and families can only be detained in exceptional circumstances, if it is in their best interests, if either care-giver is also detained, or to safeguard an unaccompanied child	Children and families can be detained as a measure of last resort, and for the shortest period of time.

Despite the fact that the RD and RCD impose safeguards and limitations to the circumstances in which detention can be applied during the screening procedure, the Screening Regulation also requires states to ensure that people "remain at the disposal" of the authority in the locations of the screening, and considers them as not having formally entered in the territory (art. 6). Therefore, there are serious concerns that the application of the screening procedure will lead to widespread resort to de facto detention (i.e., a measure which in practice amounts to deprivation of liberty but which states do not formally qualify as such, and where safeguards are not applied). This will also apply to children, families and people in situations of vulnerability. In addition, the high number of people daily subjected to the screening procedure raises doubts on how and whether the safeguards outlined above will be implemented in practice.

The implications of the screening procedure at the external borders can be inferred from the hotspot procedure implemented at the Greek Aegean islands, which the screening procedure resembles. In practice, people placed at Greek hotspots are either deprived of their liberty or have their freedom of movement restricted, although domestic law refers only to restriction of liberty.

The functioning of the hotspots blurs the lines between the restriction on and deprivation of liberty and leads to de facto detention practices. Similar concerns have been expressed with regard to the Multi-Purpose Reception and Identification Centre intended to replace the Lesvos hotspot and operationalise the screening procedure.



For a further analysis of what de facto detention is, and the legal framework applicable to immigration detention in the EU, please see PICUM's briefing: "Immigration Detention and De Facto Detention: What Does the Law Say?"

Access to the screening location and NGOs' involvement

The Regulation provides that organisations and persons providing advice and counselling shall have effective access to people during the screening (art. 8(6)). However, it also allows states to impose limits under national law, if these are necessary for security, public order or administrative management of a border crossing point or a screening facility, "provided that access is not severely restricted or rendered impossible" (art. 8(6))

NGOs might also be involved in the provision of information (art. 11(4)), in vulnerability screenings (art. 12(3)) and in the fundamental rights monitoring mechanism (art. 10). According to article 10, the fundamental rights monitoring mechanism shall carry out spot checks and random and unannounced checks, and have access to all relevant locations, including reception and detention facilities, insofar as this is necessary for their work. However, access to "relevant locations or classified information" shall be limited to persons having received the appropriate security clearance under national law.

> As member states have discretion on whether to involve NGOs in the provision of information, in the vulnerability checks and in the monitoring mechanism, and can impose limits concerning access for a broad list of reasons, there is a concrete risk that in practice they will deny them access to the areas in which the screening will take place. This is particularly concerning because, as mentioned above, people in the screening procedure will be held in situations of de facto detention, without the right to contact a lawyer and with likely very limited information about their rights.

Outcome of the screening and access to national level permits

At the end of the screening, the authorities will fill out a form with information on the identity of the person, their nationality, the reason for which the screening was performed, the outcomes of the health, vulnerability and security checks, whether the person has applied for international protection, whether they have family members in the EU and whether they have complied with the "obligations to cooperate". In addition, where available, the form should also include the reason for the irregular stay, information on the routes travelled, and information on cases of suspected smuggling or trafficking (art. 17).

The information in the screening form shall be recorded in such a way that it is amenable to administrative and judicial review during any ensuing asylum or return procedure, and can be presented to the person concerned either in paper or electronic format. If the information is incorrect, the person should be able to indicate it in the form (art. 17(3)).

After the screening is completed, or when the time limits expire (art. 18(5)), people should be referred to the asylum procedures (or, where relevant, relocation or other solidarity mechanisms) or to return procedures under the Return Directive (art. 18).The text (art. 18(1)) explicitly provides for the application of art. 6(5) of the Schengen Borders Code, which clarifies that member states may allow entry to the territory on "humanitarian grounds, on grounds of national interest or because of international obligations" to people who do not qualify the conditions to enter the territory.

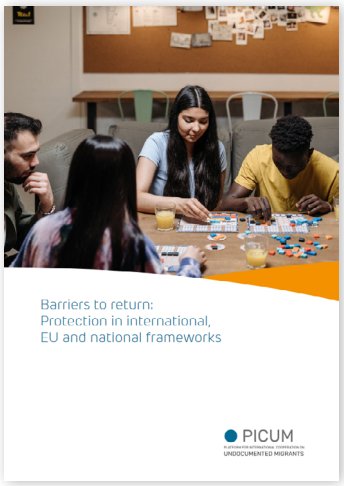
It should also be noted that as the return procedures should be regulated by the Return Directive, art. 6(4) of the Return Directive[1] is also applicable, meaning that at any moment, Member States may decideto grant an autonomous residence permit or other authorisation offering a right to stay for

1 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive)

compassionate, humanitarian or other reasons. In these cases, where a return decision has already been issued, it will be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay (art. 6(4), Return Directive).

Article 3 further clarifies that, when applying the Regulation, member states shall act in compliance with the Charter and relevant international law, including the Geneva Convention, the principle of non-refoulement and fundamental rights.

The Screening Regulation formally mentions asylum and return as the two possible outcomes of the screening procedure. However, in light of the applicability of the Schengen Borders Code, the Return Directive and EU and international standards, it should be inferred that individuals submitted to it should have access to a broader range of permits as regulated under EU and national law, including for humanitarian, family and health reasons, to protect the best interests of the child, and for work reasons. Failure to assess these permits could lead to violations of international and European law, including the principle of non-refoulement.



PICUM's report "Barriers to return: Protection in international, EU and national frameworks" (2022) analyses the main human rights reasons for which people who do not qualify for asylum cannot be deported, as well as the external circumstances that can make deportation or return impossible. It includes a comparative analysis of different policies adopted by EU member states to provide rights and protection for people with barriers to return.

Children's rights during the screening procedure

The Screening Regulation applies to children and adults alike, including the sections on immigration detention. Some standard safeguarding provisions are included in the Regulation, either in article 13 ('guarantees for minors') or elsewhere.

Article 13(1) and recital 25 clarify that a child's best interests "shall always be a primary consideration".

Article 11(3) states that information given to children must be given in a child-friendly and age appropriate manner and "with the involvement of the representative or person referred to in art 13(2) and (3)".

According to Article 12(4) on preliminary health checks and vulnerabilities, support to children "shall be given (...) in cooperation with child protection authorities." Recital 25 states that "[c]hild protection authorities should, wherever necessary, be closely involved in the screening to ensure that the best interests of the child are duly taken into account throughout the screening." However, the Regulation does not require child protection authorities to be present in screening locations, but rather requests that they are called in by migration authorities if the latter deem it necessary. This may reduce the likelihood that child protection needs are detected and children placed into child protection when necessary.

Article 13(3) requires member states to designate a guardian (representative) "as soon as possible." As no deadline is set by this article, this means that, in practice, unaccompanied children may not be appointed their guardian ('representative') during the whole screening procedure, even though they are in a critical phase in their migration process. Concerningly, the Regulation also allows Member States not to appoint a guardian/representative at all, but to instead designate "a person trained to safeguard the best interests of the minor and his or her general wellbeing" to "provisionally act" as a guardian (art 13(3)). Both guardians and 'trained persons' can be supporting up to 30 unaccompanied children at one time (article 13(5)).

The Regulation includes no references or provisions regarding age assessments or the principle of the benefit of the doubt. Logically speaking, this omission in combination with the fact that the Regulation must be implemented in the best interests of the child and the Charter (respectively art 13 and 3), should be understood to mean that authorities cannot cast doubts on a person's age during the Screening procedure. Authorities must, in other words, assume all people saying they are children are children and apply the safeguards enshrined in the Regulation to them (regarding detention conditions, adapted information provision, appointment of a guardian, etc).

Given the purpose of the screening regulation, it is to be expected that unaccompanied and separated children will be interviewed for screening purposes. Article 13(2), shows that children in families can also be interviewed, as the article states that children shall be screened in the presence of an adult family member, if they are present. This assumption is further strengthened by recital 33, which covers the content of the screening form. Despite the possibility to interview children, the Regulation does not include minimum standards, safeguards or references regarding child-friendly interviewing or collection or interpretation of information to be included in the Screening Form.

For a more detailed analysis of child rights in the Pact, see PICUM's separate briefing: The 2024 Migration and Asylum Pact: PICUM's child rights analysis.

Right to information and other safeguards

Individuals subject to the screening procedure should be informed about the different elements of the screening and its purpose, the right to apply for international protection and their obligations, the possibility to contact and be contacted by individuals and organisations providing advice and counselling, and their rights under the GDPR. They should also be informed, if appropriate, about the rules of entry under the Schengen Borders Code, the obligation to return and information on voluntary departure programmes, and about relevant solidarity mechanism when relevant (art. 11).

Information shall be provided in a language which is understood, in writing (in paper or electronically) and where necessary orally.

All persons subject to the screening should be accorded a standard of living which guarantees their subsistence, protects their physical and mental health, and respects their rights under the charter (art. 8(8)). They should have access to emergency health care and essential treatment of illness (art. 12).

Fundamental rights monitoring

Member States shall provide for an independent fundamental rights monitoring[2], which should monitor compliance of all activities implemented by member states under the Screening Regulation with EU and international law, with a focus on:

- The asylum procedure
- The principle of non-refoulement
- The best interests of the child
- Detention

The monitoring should ensure that allegations of fundamental rights violations are dealt with effectively and investigated, and issue annual recommendations to Member States. Member States shall investigate allegations of non-respect for fundamental rights during the screening, and ensure, where appropriate, referral to civil or criminal justice proceedings (art. 10).

The mechanism shall carry out spot checks and random and unannounced checks, and have access to all relevant locations, including reception and detention facilities, insofar as this is necessary for their work. However, as mentioned above, access to "relevant locations or classified information" shall be limited to persons having received the appropriate security clearance under national law (art. 10).

National Ombudspersons and National Preventive Mechanisms (NPMs) shall participate in the mechanism and may be appointed to act as independent monitors, while NGOs and other international organisations "may" be involved. The mechanism should maintain links with national and EU data protection authorities.

The Fundamental Rights Agency will issue general guidance for Member States on the fundamental rights monitoring and its independence. A previous FRA report, from 2022, will therefore be updated for this scope.

The findings of the monitoring mechanism shall be included in the Commission's assessment of the implementation of the Charter. They will also be used to assess the fulfilment of the Common Provisions Regulation in the use of EU funds.

The monitoring mechanism shall be equipped with "appropriate financial means" by Member States (art. 10(4)).

2 The mechanism should respect the rules of independence under the Principles relating to the Status of National Institutions (The Paris Principles), the Principles for the Protection and Promotion of the Institution of Ombudsman (Venice Principles), the United Nations General Assembly Resolution of 28 December 2020 on the role of the Ombudsman, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (rec. 27).

Recommendations on the implementation of the Screening Regulation:

Maintain access to permits beyond asylum

As mentioned above (see section 5), the Screening Regulation foresees only asylum or return as applicable procedures. However, in the context of its implementation, it will be key to ensure that existing permits under national and EU law will continue to be accessible for people arriving irregularly in the EU. This requires an automatic (ex officio) assessment of these permits, before a return decision is issued.

Supporting arguments:

- As the return procedures should be regulated by the Return Directive, art. 6(4) of the Return Directive is also applicable, meaning that at any moment, Member States may decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons. In these cases, where a return decision has already been issued, it will be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay (art. 6(4), Return Directive).
- When applying the Pact, member states shall act in compliance with the Charter and relevant international law, including the Geneva Convention, the principle of non-refoulement and fundamental rights (art. 3, Screening Regulation).
- Article 18(1) of the Screening Regulation explicitly provides for the application of art. 6(5) of the Schengen Borders Code, which clarifies that member states may allow entry to the territory on "humanitarian grounds, on grounds of national interest or because of international obligations" to people who do not qualify the conditions to enter the territory.

Additional advocacy resources:

For more information on the international and EU standards on non-refoulement and access to permits beyond asylum, please see PICUM briefings "FAQ Non-refoulement in the context of the EU Pact on Migration and Asylum" and "Why is the Commission's Push to Link Asylum and Return Procedures Problematic and Harmful?".

Prohibit the use of automatic and de facto detention

As analysed above (see section 3), the Screening Regulation is likely to lead to widespread resort to de facto detention (i.e., a measure which in practice amounts to deprivation of liberty but which states do not formally qualify as such, and where safeguards are not applied). This will also apply to children, families and people in situations of vulnerability.

While maintaining that **nobody should ever be placed in detention for migration related purposes**, and **calling on member states to put an end to this practice**, PICUM recommends that, in the context of the implementation of the Screening Regulation, the following mitigating measures should at the very least be adopted:

- Children, families and people with vulnerabilities should never be detained.
- Any decision to enforce immigration detention should be based on an individual assessment of necessity, proportionality and the applicability of alternatives to detention.
- Detained applicants shall immediately be informed in writing, in a language which they understand, of the reasons for detention and the procedures for challenging the detention order, as well as of the possibility to request free legal assistance and representation.
- Everyone in detention should have the right to request the speedy review of the lawfulness of their detention by a court, which should lead to their release if the court finds detention unlawful. The scope of the review should extend beyond the mere compliance of detention with domestic law and include an assessment of other requirements flowing from the prohibition of arbitrary detention.
- In countries that require every detention decision to be validated by a judge within 48 or 72 hours, this safeguard should be maintained and applied also to people subject to the screening procedure (both on the territory and at its borders).

Additional advocacy resources:

For more information on the relevant legal standards on detention, please see above (section 3) and PICUM's briefing "Immigration Detention and De Facto Detention: What Does the Law Say?".

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