Meijers Committee
standing committee of experts on international immigration,
refugee and criminal law

CM2010 Meijers Committee Comments on the Migration Pact – Asylum Screening Regulation

November 2020

In this document, the Meijers Committee presents its comments on the proposal for an asylum screening regulation (hereafter the SR proposal), which supplements and in part replaces the Asylum Procedures Directive and the Reception Conditions Directive.[1]

The proposal puts into place a 'pre-entry screening' of third country nationals. The screening applies to all third country nationals who crossed the external borders in an unauthorised manner, request international protection at the external borders, or are disembarked following a search and rescue operation. Its overall aim is to establish the identity and health or security risks of a person quickly in order to determine the appropriate follow-up procedure (a return procedure, an asylum procedure, or a relocation procedure).

The main concerns of the Meijers Committee are:

1. Fundamental rights risks during the screening, in particular concerning reception conditions and the consequences of the fiction of non-entry.
2. Insufficiencies of the newly introduced monitoring and investigation obligations.
3. Identity and security checks and the use of biometrics and databases.
4. Limits to access to justice.

1. Fundamental rights risks during the screening

During the screening, all authorities—national and EU—have to comply with the fundamental rights guarantees set out in EU law, in particular the EU Charter of Fundamental Rights. The SR proposal raises three concerns in this respect.

A. The lack of specific guarantees and oversight mechanisms regarding reception conditions.
B. The fundamental rights consequences of the fiction of non-entry.
C. Overlap and confusion with other legal instruments.

A. Reception conditions

The screening procedure is to be conducted at a location at or in close proximity to the external border (Article 6(1) SR). Where exactly persons undergoing screening are to be accommodated is left open by the SR proposal, but in line with the 'hotspot approach' it may be assumed that the lynchpin of this new procedure is reception and identification centres set up at the external borders. Mechanisms to ensure adequate reception conditions and to prevent overcrowding of these centres will therefore be

[1] 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. [In the following referred to as SR proposal.]

a crucial element in ensuring the procedure can be carried out in compliance with fundamental rights while avoiding 'a second Moria'.

The strategy followed by the SR proposal to avoid overcrowding of reception facilities seems to exclusively rely on time limits. The screening is to be concluded within no more than five days. Under exceptional circumstances, where a disproportionate number of persons has to be screened, this period may be extended by another five days (Article 6(3) SR proposal). However, similar (actually shorter) time limits already apply under the current legal framework (Article 6(1) Asylum Procedures Directive). But as the experience from the Greek Lesvos hotspot showed, the actual challenge is to ensure adherence to these limits in practice. With the added tasks national authorities have to fulfil under the SR—more thorough checks as well as a preliminary assessment of identity, health, and security—possible delays in the procedure do not seem unlikely. While the introduction of strict time limits is essential, it is thus even more important to create administrative structures to ensure compliance with the time limits in practice.

In any case, relying on time limits alone does not seem sufficient to avoid overcrowding and ensure adequate living conditions. The SR proposal does not include any added guarantees regarding reception facilities and no mechanism to ensure oversight of the conditions therein in practice. In this context, it is particularly regrettable that the specific guarantees set out in the Reception Conditions Directive are excluded from application during the screening. The explanatory memorandum suggests that the Asylum Procedures Regulation and the Reception Conditions Directive should apply only after the screening has ended. This is at odds with Article 3 of the Reception Conditions Directive, setting forth that the Directive applies to all third-country nationals who apply for asylum at the border. It should be clear, in particular, under what circumstances and under what conditions asylum seekers may be detained, also during their screening. It should therefore be clarified that the guarantees of the Reception Conditions Directive apply to asylum seekers during the screening procedure together with effective mechanisms for oversight and sanctions for non-compliance.

B. Fiction of non-entry

During the screening, the third-country nationals are not authorised to enter the territory (Article 4 SR). In fact, of course, the persons undergoing screening are already present on EU territory. Therefore, Article 4 SR creates a fiction of non-entry. However, it remains unclear what consequences this fiction has for the relationship between the screened individual and the screening authority with respect to their mutual rights and obligations. It should in any case be clarified that this cannot affect the applicability of fundamental rights guarantees, including in particular the prohibition of *non-refoulement.* [2]

One consequence of this fiction of non-entry may be the increased reliance on detention. Recital 12 of the SR proposal specifies that Member States are to apply measures pursuant to national law to prevent the persons concerned from entering the territory. Given that the persons are actually already physically present, this can only refer to measures preventing persons from freely moving around

[2] Cf. the case law of the ECtHR about migrants having not (yet) legally entered yet falling within the State's jurisdiction: ECtHR 15 June 1996, *Amuur v. France*, appl. no. 19776/92; ECtHR 21 Nov. 2019, *Ilias and Ahmed v. Hungary*, app. no. 47287/15; ECtHR 21. Nov. 2019, *Z.A. a.o. v. Russia*, appl. no. 61411/15.

within national or EU territory. Indeed, Recital 12 also specifically refers to the possibility that these measures may include detention. It is important to stress that the screening procedure should not lead to the increased use of detention. The Meijers Committee recommends to include guarantees against arbitrary detention during the screening procedure as are formulated in the Reception Conditions Directive and the Returns Directive.[3]

C. Overlap and confusion with other legal instruments

The Meijers Committee observes that the proposed Screening Regulation creates overlap and potential confusion with the Asylum Procedures Regulation, the Reception Conditions Directive, the Returns Directive and the Schengen Borders Code. As noted above, it should be fully clear for both national authorities implementing the applicable rules, as for the individual, from what moment and in which situation, guarantees of the asylum acquis apply to asylum-seekers. A further unclarity concerns the application of the Return Directive to persons who have not applied for asylum and who do not meet the entry conditions of the Schengen Borders Code. Article 14(1) of the SR proposal sets forth that these persons must be referred to "the competent authorities to apply procedures respecting the Return Directive". The Return Directive, however, allows Member States not to apply the Return Directive to persons who have been refused entry in accordance with the Schengen Borders Code (Article 2(2) Return Directive). Because the Return Directives formulates important procedural guarantees as well as guarantees against arbitrary detention, our Committee recommends to clarify that the Return Directive must be applied in all circumstances in case of referral to a return procedure of a person who is refused entrance during a screening procedure.

Recommendations

- Specify where and how persons subject to the screening procedure are to be accommodated.
- Create structures that ensure adherence to the proposed time limits and the requirements regarding reception conditions and clearly specify the consequences of non-compliance.
- Make sure the fiction of non-entry does not negatively impact fundamental rights guarantees or lead to the increased use of detention.
- Clarify that the Reception Conditions Directive applies from the moment a third-country national applies for international protection
- Clarify that the Return Directive applies to those third-country nationals who are refused entrance during a screening procedure and who are referred to a return procedure.

[3] Cf. the case law of the ECtHR about migrants having not (yet) legally entered yet falling within the State's jurisdiction: ECtHR 15 June 1996, *Amuur v. France*, appl. no. 19776/92; ECtHR 21 Nov. 2019, *Ilias and Ahmed v. Hungary*, app. no. 47287/15; ECtHR 21. Nov. 2019, *Z.A. a.o. v. Russia*, appl. no. 61411/15.

2. Monitoring fundamental rights compliance and investigating alleged violations

Article 7 of the SR proposal introduces an obligation for Member States to set up an independent mechanism to monitor fundamental rights compliance, in particular the prohibition of *refoulement* and national rules on detention. In addition, Member States have to set up a system to investigate all allegations of fundamental rights violations during the screening procedure, including by ensuring that any complaints are dealt with expeditiously and appropriately. They are supported by the Fundamental Rights Agency which is to draft guidelines in this respect.

While the obligation to introduce these mechanisms is commendable, the framework proposed to ensure their well-functioning is insufficient. There are three particular shortcomings:

A. It is unclear who assumes the primary responsibility to 'monitor the monitors'.
B. There are no clear sanctions for non-compliance of fundamental right obligations by the Member States.
C. The monitoring and investigation obligations do not extend to EU agencies when they assist in the screening.

A. Who monitors the monitors?

The responsibility to make sure Member States comply with the monitoring obligation is distributed among three EU bodies using at least five instruments. The Commission is to evaluate the mechanisms and make recommendations in its annual Migration Management Report (which in turn is part of the newly proposed framework for monitoring in the Asylum and Migration Management Regulation) and the Schengen Evaluation Mechanism. It is also envisaged that the Commission carries out more systematic monitoring and launches infringement procedures where necessary. In addition, Frontex will have a monitoring role in the context of its vulnerability assessments. The to be established European Union Agency for Asylum will monitor asylum systems more generally. According to Article 7 of the proposal, the Fundamental Rights Agency must issue guidance and, upon request, support to the Member States. This set up makes it difficult to determine who assumes the primary responsibility to 'monitor the monitors', which may lead to inefficiency of the oversight mechanism and lack of accountability of the EU bodies tasked with it. The EU institutional involvement is far too complex.

B. Lack of sanctions

The current framework foresees no specific sanctions to fundamental rights violations by Member States. This is problematic especially in light of the recent experience with the complaints mechanism established under Article 111 EBCG Regulation.[4] In that context, Member States are required to set up mechanisms to investigate allegations of fundamental rights violations brought through the Frontex's complaints mechanism and report back to the Frontex Fundamental Rights Officer on the matter. However, in practice, it has been proven extremely difficult for the Fundamental Rights Officer to get Member States to actually comply with this obligation. To ensure the practical effectiveness of the new

[4] Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation No 863/2007 of the European Parliament and of the Council, Council Regulation No 2007/2004 and Council Decision 2005/267/EC.

monitoring mechanism, it is thus essential to build in actual sanctions for non-compliant Member States.

C. Monitoring the role of agencies

The monitoring obligations insufficiently take account of the role of agencies in the context of the screening procedure. While the SR proposal foresees no specifically reinforced role for EU agencies, it does emphasise that the national authorities competent to carry out the screening may be assisted or supported by the European Border and Coast Guard Agency and the European Asylum Support Office (which is to be transformed into the European Union Agency for Asylum). The proposed monitoring mechanisms, however, apply to national authorities alone. Especially since the framework to guarantee agencies' accountability has long fallen short of the rule of law requirements under EU law, it is essential that the fundamental rights monitoring explicitly extends to the agencies involved.

Recommendations

- Clarify who bears the primary responsibility to 'monitor the monitors' and who they are answerable to.
- Simplify the EU monitoring structure.
- Define clear sanctions for situations of non-compliance by Member States with their investigation or monitoring obligations.
- Extend fundamental rights monitoring obligations to Frontex and EASO when they support national authorities in the context of the screening procedure.

3. Identity and security checks and the use of databases

The proposed Screening Regulation (Article 11) puts further emphasis on the identification and security checks of third-country nationals at external borders, adding new powers to the already extensive powers of Member State to collect, store and use personal information of third country nationals in the EU. This new proposal may have the effect that third-country nationals, including children, are generally and indiscriminately subjected to checks for security reasons without a specific reason or justification. The Meijers Committee is concerned about the underlying presumption of this proposal that all third-country nationals (including asylum seekers) are to be considered as a per se threat to national security. Such general checks furthermore include the risk of increasing discriminatory and racist sentiments or attitudes towards third-country nationals.[5] Moreover, the proposal allows for intrusive and disproportionate checks, allowing the investigation of 'objects in their possession'.

The Meijers Committee is also concerned about the reliance in this propose on the use of personal information as recorded in the EU databases such as Eurodac, SIS, VIS, EES, ETIAS, ECRIS-TCN. Whereas the (timely) sharing of information between national authorities can be crucial to prevent and fight terrorism, the added value and reliability of data in the aforementioned databases or of security checks

[5] See also the Report A/75/590, 10 November 2020 of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on the use of border technologies, https://www.ohchr.org/EN/newyork/Documents/A-75-590-AUV.docx

only at the external borders, must not be overestimated.[6] Furthermore, it is unclear how these powers under the new proposal relate to the limitations as provided in current legislation dealing with law enforcement access to EU migration databases.[7] As ruled by the CJEU, the proposal should also safeguard that access to information retained must be made dependent 'on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued'.[8] Finally, dealing with the right of information as proposed in Article 8, the Meijers Committee regrets that the proposal does not include the obligation to provide applicants information on which databases and which information will be checked. In sum, the necessity and proportionality of this measure in addition to the existing use of EU databases, is not substantiated and does not take into account the strict criteria as formulated by the CJEU and the ECtHR when dealing with mass surveillance and large-scale collection of personal information.[9] To ensure the necessity and proportionality of such a measure, if adopted, the Meijers Committee proposes the following amendments.

Recommendations

- Amend the proposed Article 11 in order to limit the scope of security checks to situations where it is substantiated that such checks are necessary to support and strengthen action by the Member States in preventing, detecting or investigating terrorist offences or other serious criminal offences and there is an overriding public concern which makes the check proportionate.
- Safeguard in the proposal that access to the data retained for security reasons must be made dependent 'on a prior review carried out by a court or by an independent administrative body whose decision sought 'to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued'.
- Add in the proposed Article 8, a provision obliging national authorities to inform the applicant in writing about which national or EU information system will be checked and for which specific reason and about the outcome of this check.

4. Access to justice

The purpose of the screening procedure is information-gathering. As such, it does not end with a formal decision but rather with the screening authorities filling out a so-called debriefing form (Article 13 SR proposal). The debriefing form contains information regarding the identity of the person, an initial assessment of their nationality, countries of residence, and languages spoken, the reasons for

[6] See also earlier comments by the Meijers Committee, the European Data Protection Supervisor (EDPS) and the Fundamental Rights Agency (FRA) on the interoperability of those EU large-scale data systems.

[7] See for example Articles 20 and 21 of the Eurodac Regulation 604/2013.

[8] CJEU *Digital Rights Ireland Ltd* 8 April 2014, C-293/12, point 62.

[9] ECtHR *S. and Marper v. United Kingdom*, 4 December 2008, appl. nos 30562 and 30566; CJEU *Digital Rights Ireland Ltd* 8 April 2014,C-293/12 and CJEU C-362/14, *Schrems v. Data Protection Commissioner*, 6 October 2015.

their arrival, the routes travelled, and assistance provided by others on the way. This outcome of the screening procedure is as such not subject to judicial review. This is based on the assumption that the screening does not entail any decision affecting the rights of the person concerned.

While this is formally correct, it is important to note that the information collected may indirectly affect the rights of the screened individuals. This is because the debriefing form is transmitted to the authorities responsible for the following procedure—return or asylum—who may use the information collected during the screening to take their decisions. The assumption is that the information collected during the screening can be questioned in the context of challenges to the final decision taken by the authorities responsible for the follow-up procedure. However, this may be difficult, for instance when it was collected by an EU agency or through the use of artificial intelligence. It is thus important to ensure that even under these circumstances individuals have avenues to raise concerns regarding the information collected. This right must entail the guarantees in accordance with the right to effective judicial review as protected in Article 47 of the EU Charter on Fundamental Rights.[10]

In addition, given the relevance of the information collected during the screening, individuals should have access to legal assistance already during the screening procedure.

Recommendations

- Make sure the information during the screening can always be challenged in accordance with the right to effective judicial protection as protected in Article 47 of the Charter.
- Make sure persons have access to legal assistance already during the screening procedure.

[10] See also *Schrems v. Data Protection Commissioner*, 6 October 2015, point 95.