

# New Pact on Migration and Asylum: CCBE position on the Proposal for a Regulation introducing a screening of third country nationals at the external borders

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## Introduction

The Council of Bars and Law Societies of Europe (CCBE), which represents the bars and law societies of 45 countries and, through them, more than 1 million European lawyers. The CCBE notes that the New Pact constitutes a fresh start in the area of international protection and migration management taking lessons from the migration crisis in the Union in 2015. In this regard, the CCBE also notes the adoption of a Proposal for a Regulation introducing the 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.

The scope of this Regulation covers<sup>1</sup>:

- Third-country nationals and stateless persons who are apprehended in connection with the unauthorised crossing of the external border of a Member State by land, sea, or air, except third-country nationals for whom the Member State is not required to collect biometric data pursuant to Article 14(1) and (3) of the Eurodac Regulation for reasons other than their age,
- Persons who have disembarked following search and rescue operations, regardless of whether or not they apply for international protection,
- Persons who apply for international protection at border crossing points or in transit zones without fulfilling the entry conditions.

The proposal for a Regulation aims at creating a tool (through clear and fair rules) to identify such persons at the earliest possible stage in order to allow for a more effective and consistent application of asylum procedures and of the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). This identification will be carried out by means of a check.

Although the CCBE welcomes the aim of this proposal to create a fairer and smoother asylum procedure, the CCBE would at the same time like to express concerns related to the full respect of fundamental rights and freedoms in the area of international protection, the access to the territory and the need in the present context to provide the necessary procedural safeguards for this purpose.

The fact that the screening procedure will take place outside the European Union should not prevent that these activities fall under the jurisdiction of the European Union and its Member States and under the scope of the application of EU law and international human rights standards, specifically:

- The Charter of Fundamental Rights of the European Union.

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<sup>1</sup> Recital 11 of the Proposal for a Regulation

- Article 78 (1) TFEU The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
- The European Convention on Human Rights and the European Court of Human Rights case-law.

The objective of this position paper is therefore intended to provide a platform for constructive engagement between the CCBE and the EU Institutions during the legislative process leading up to the adoption of the Regulation.

### **Screening at the external border, status of the third country nationals and deadlines**

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Recital 12 of the proposed Regulation states that screenings must be carried out at, or in proximity to the external border, before the persons concerned are authorised to enter the territory and declares that Member states should apply measures, including detention, in accordance with national law to prevent the persons concerned from entering the territory during the screening procedure.

In other words, although the Explanatory Memorandum of the proposed Regulation states that it does not "abridge the exercise of individual rights", third countries nationals are to be held in an area that is not intended to be the national territory of the Member States; they are to be deprived of their liberty; and they may be formally detained in accordance with the rules of the Member State whose border they are seeking to cross.

Another major difficulty is the time limit of 5 days (with some exceptions) for this process which we believe is entirely artificial and overly optimistic.

The CCBE also believes that there is no obvious basis for choosing such a short time limit. If a time limit needs to be established, it should be put in context. Indeed, many of the people arriving at EU borders or who enter on to EU territory and who are the subject of this proposed Regulation are in the experience of legal practitioners on the ground both exhausted and traumatised. When such an accelerated procedure is put in place, the addressees simply do not understand the procedures. They do not have the time to consider what case they want to make in relation to vulnerability or to seek out proper legal assistance from a lawyer. Furthermore, if the procedures and obligations are not correctly understood by the migrants, the fact that they failed to give the full picture at the asylum registration stage may be held against them during their asylum procedure including the appeal stage of the asylum procedure therefore not respecting their fundamental rights.

In times of crisis, Article 6 would extend the time limit by an additional 5 days. Even then, the CCBE believes that when applying it to the situation on the ground, it is not something that can reasonably be achieved.

Therefore, having a law that cannot effectively be applied undermines the rule of law which has a negative impact not only for the migrants concerned but also for the authorities of the Member States. It need hardly be said that respect for the rule of law in the present context where many of the addressees of the proposal may seek to assert the fundamental right to apply for international protection as recognised by the EU Charter of Fundamental Rights is a key hallmark of the Union whose values are based on decency, dignity and respect.

Additionally, insofar as control operations may lead to refoulement from the EU border, this proposal seems to be contrary to the principle of non-refoulement. This is all the more worrying because very often, when intercepted in the course of control operations, the person concerned has just gone through a difficult time, both in the country of origin and during the journey.

## **Lack of access to information, legal assistance and judicial review**

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The CCBE would also like to express its concern about the complete lack of clear information and recognition about what the legal status of the third country nationals subject to the screening will be, *i.e.*, are they detainees?<sup>2</sup> What rights will be recognised for them during the days in which they can be subject to screenings? Will the rights of any detained person be recognised? What will happen if after the 5 days established for carrying out the screening, including the extension period, the control has not been carried out? What legal situation will they find themselves in, and what legal guarantees will they have? According to the CCBE, concrete norms on access to information in the appropriate language and the right to legal assistance, as well as access to effective judicial protection are clearly lacking. For example, will they have legal assistance in the screening process? It is necessary to highlight that there are mandatory elements of the screening process in **Article 6**, such as health and vulnerability checks, identification<sup>3</sup>, security checks, the filling out of a de-briefing form<sup>4</sup>, referral to the appropriate procedure, etc. that are of great legal significance and which require legal assistance, as far as the people subject to these screenings may be without adequate legal assistance at least on the face of the proposal as it is currently worded.

In relation to the security check, Article 11 provides that third country nationals submitted to the screening shall undergo a security check to prove that the person does not pose a threat to internal security. In this regard, we would like to underline that the restrictive interpretation of the concept of “posing a threat to internal security” as applied in the case law of the ECJ must be considered<sup>5</sup> and should clearly be defined accordingly in Article 2 of the proposal. Moreover, it should be provided to prove that the data retrieved in the corresponding systems - indicating refusals of a travel authorisation, refusals of entry, or decisions refusing, annulling or revoking a visa or residence permit on the basis of security grounds - have not been subject to appeal.

Furthermore, the provision in its current format states that, since the screening itself is merely a stage aimed at gathering information which prolongs or complements the inspections at the border crossing points without involving any decision affecting the rights of the person, no judicial control is foreseen on the outcome of the screening. On the contrary, we disagree with this statement since, through this process, third-country nationals will be either referred to the appropriate procedures in relation to asylum (being then obliged to be the subject of an accelerated examination or border procedure) or exposed to return to the country of origin. Therefore, we consider it essential that the migrants concerned have access to effective legal assistance at this stage to be able to participate in this control or collection of information, since the way in which such data is collected could lead to the wrong procedure, and since the form and substance of the information/control carried out could determine the future of the person concerned.

Article 13 of the current proposal provides that on completion of the screening, the competent authorities shall fill in a de-briefing form. In our opinion, this does not constitute an administrative

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<sup>2</sup> In our opinion, we are dealing with persons in detention, insofar as **Article 13** of Regulation (EU) 2016/399 establishes that any person who has crossed a border in an unauthorised manner and who does not have the right to stay in the territory of the Member State concerned shall be **arrested** and subjected to procedures in accordance with Directive 2008/115/EC.

<sup>3</sup> The de-briefing form does not include questions about the identification of minors and victims of human trafficking (Article 13).

<sup>4</sup> In light of the content and relevant information to be included in the interview form, as well as the relevance of the data to be included therein with regard to the migratory path of the person subject to the procedure, we consider it essential that the interview must be carried out with legal assistance (Article 13 of the Proposal for a Regulation).

<sup>5</sup> [C-380/18, Staatssecretaris van Justitie en Veiligheid v. E.P., 12 December 2019](#) and [C-381/18 & C-382/18, G.S. \(C-381/18\), V.G. \(C-382/18\) v. Staatssecretaris van Justitie en Veiligheid, 12 December 2019](#).

decision which can be appealed by the person concerned<sup>6</sup> and therefore, does not offer sufficient procedural safeguards in terms of adequate access to judicial review.

In addition to this, one of the goals of the European Union is to maintain and develop an area of freedom, security and justice. Consequently, given that the third country nationals who will undergo this screening will be *de facto* deprived of their liberty, the conditions in which they are held must fully respect the standards laid down in the Charter of Fundamental Rights and the ECHR, as well as in the case law of the Court of Justice of the European Union and the European Court of Human Rights. Such migrants must therefore be entitled to access to lawyers who are in an effective position to question the competent authorities about the conditions in which these persons are deprived of their liberty and furthermore be guaranteed access, as a matter of Union law, to effective review by an independent judicial authority as regards the basis and conditions of any such deprivation of liberty.

### **Establishment of minimum safeguards with regard to the rights of third country nationals**

Consequently, the CCBE believes that the following common minimum standards should be established with regard to the following rights:

#### **1. The right to be informed of their rights**

We believe that Article 8 of the Proposal which concerns the provision of information to third country nationals subject to the screening, lacks clarity as to who is responsible for providing the information. It also appears that this power to provide information (which is not the same as the provision of information itself) to third-country nationals during screenings may be delegated by Member States to relevant and competent national, international and non-governmental organisations and bodies. In our opinion, this provision is too vague, and it should notably be made clear in the text of the proposal that any legal information regarding the rights and obligations of third country nationals should be provided by qualified independent lawyers.

We understand that, in any case, third-country nationals must be provided with all the relevant information about their situation without any restrictions, and also, they shall receive all the information they demand. We believe that the current formulation of Article 8 is problematic as this information should always be given in a language that he/she understands, not that he/she is reasonably supposed to understand (see also point 4 below).

The detainee also has the right to receive the information in writing, including information on the right to legal assistance. The right to information is essential and it is reflected in both the Directive establishing minimum standards on the rights, support and protection of victims, and the Directive regulating the rights of the person under investigation. Although we are not dealing with criminal proceedings, it must be born in mind that in this context third country nationals are being deprived of their liberty and that the principles and guarantees that are recognised in criminal proceedings are also applicable in case of administrative detention/sanctions. In this regard, it should be expressly provided that the detainee receives a copy of all documentation (including the debriefing form) and that lawyers

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<sup>6</sup> Recital 24 of the Proposal for a Regulation: “By the end of the screening, the authorities responsible for the screening should fill in a de-briefing form. The form should be transmitted to the authorities examining applications for international protection or to the authorities competent for return – depending on whom the individual is referred to. In the former case, the authorities responsible for the screening should also indicate any elements which may seem to be relevant for determining whether the competent authorities should submit the application of the third-country national concerned to an accelerated examination procedure or to the border procedure”.

have the right of access to the places of detention. In addition, the right to use their mobile phone and to communicate freely with the outside world should also be provided for.

**2. The right to be heard** before an individual measure is adopted, which may adversely affect him or her or his or her interests (closely linked to the right of defence) and the right to good administration *ex ante* Article 41 EU Charter).

**3. The right to have access to pertinent documents related to the case** in order to analyse all the evidence that has been invoked against the person, to justify the decision of the competent authority and the right to rectify, clarify and correct data given or retained under the Data Protection Regulation.

**4. The right to translation and interpretation.** Linguistic assistance does not only imply the obligation to provide a translation of the decision but also the obligation to provide the assistance of interpreters. In this context, it is worth recalling that the ECtHR case-law (*Conka v. Belgium, M.S.S v. Belgium and Greece and I.M v. France*) identified the availability of interpreters as one of the factors affecting access to an effective remedy. Member States must therefore grant the right of the third-country national to receive adequate information in such a way that the person concerned has the possibility to make use of it.

**5. The right to legal assistance and legal aid.** Although **Article 48(2) of the EU Charter of Fundamental Rights** guarantees respect for the rights of the defence, there is no mention in this proposal of the right to legal assistance to migrants, refugees, children or possible victims of trafficking in human beings.

The detainee must be promptly informed about the right to have access to a lawyer (legal assistance). Rules on the right to legal assistance are found in Articles 4, 6, 7, 47 and 48 of the Charter of Fundamental Rights, connected to Articles 3, 5 and 8 of the ECHR, in line with the interpretation of the European Court of Human Rights on the right to legal advice, which states in its case law that the right to an effective remedy (and the fairness of the proceedings) that the detainee must be able to obtain the procedural safeguards, specifically those associated to the access to a lawyer, legal information and legal assistance. In this regard, the lawyer must be independent and qualified and be able to exercise the essential aspects of the defence without any restrictions.

In addition, Member States should ensure that persons subject to this Regulation have prompt access to legal advice. The necessary legal assistance and/or representation is granted, upon request, free of charge in accordance with the relevant national law or rules on legal aid, and they may provide that such legal assistance and/or representation is free of charge.

#### **6. The right to communication with relatives and consular authorities**

Persons deprived of their liberty have the right to consular assistance. EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, could be assimilated to this situation.

## **7. The right to an effective remedy and fair trial**

Article 47 of the Charter, states that *“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.* This needs to be given concrete effect in the proposal.

## **8. Right to special safeguards for vulnerable persons**

Firstly, Article 6(7) of the proposal for a Regulation states that *“Member States shall designate competent authorities to carry out the screening. They shall deploy appropriate staff and sufficient resources to carry out the screening in an efficient way”.* It also refers to medical staff, adding that *“national child protection authorities and national anti-trafficking rapporteurs shall also be involved, where appropriate”.*

The decision about whether these professionals must be involved in border control should not be vested in the national authorities. Instead, the CCBE considers that, in any case, a multidisciplinary team must be deployed, including a specialised independent lawyer.

Secondly, the proposal for a Regulation refers in Article 9 to medical checks and assessment of vulnerability. It states in paragraph 2 that, *where relevant*, checks shall be carried out to determine whether third-country nationals seeking access to EU borders are in a vulnerable situation, are victims of torture or have special reception needs, etc. However, the CCBE considers that the potential vulnerability of these persons must always be checked as otherwise there is a real risk of cases of differential treatment based on discretionary decisions. Moreover, if not always applied, it could prevent persons who are actually vulnerable to receive timely and adequate support in view of his or her physical and mental health, in accordance with Article 9, paragraph 3.

Thirdly, where the proposal for a Regulation refers to third country nationals as victims of human trafficking, it does not explicitly mention their rights as recognised in Directive 2012/29/EU of 25 October and Directive 2011/36/EU of 5 April on preventing and combating trafficking in human beings and protecting victims. Victims of crime must be recognised and treated in a respectful, sensitive and professional manner, without discrimination of any kind (on grounds such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, sex, gender expression or identity, sexual orientation, residence status or health).

Currently, the policy controlling migration flows also covers these cases, without considering the high risk that victims may face if and when returned to their places of origin where the branch of the trafficking organisation will or is likely to continue to exist. There is often neither time nor adequate means for a victim to be given the opportunity to adequately articulate his/her situation and denounce their trafficker-exploiters.

The proposal for a Regulation has no provision referring to the fact that, in order to be able to identify the vulnerability of a victim of trafficking in human beings, Member States must have trained and qualified personnel with the required skills to prevent and combat trafficking in human beings – which also requires the guarantee of free legal aid - and to identify and assist victims, especially minors. For this purpose, Member States must ensure that the various authorities should work together and with the organisations responsible for providing assistance, in order to enable victims to be identified in a procedure which takes into account the special situation of women and minors who are victims and, in appropriate cases, residence permits should be issued. This is provided for in the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention No 197), made at Warsaw on 16 May 2005, Articles 10 etc.

Fourthly, with regard to children subject to the screening, Article 9(3), of the proposed Regulation, concerning health checks and vulnerability assessment, states that *“in the case of minors, support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities”* and Recital 22 states that *“[...] Particular attention should be paid to the best interests of the child”*. In this regard, the CCBE considers that additional specific safeguards should be explicitly provided for children, including a child-friendly provision of information; the independent and adequate support and assistance to children, including by lawyers specifically trained in dealing with children; identifying whether an individual is a child; identifying whether a child is accompanied by a parent, legal guardian or customary caregiver; undertaking health checks and identification of medical risks; identifying additional vulnerabilities; identification and referral of suspected child victims of trafficking; and the full prohibition of detention and deprivation of liberty of children<sup>7</sup>. It would also be opportune to explicitly include in the proposal a reference to the principle of the benefit of the doubt as a key principle and procedural safeguard, where there is a doubt about the age of the person concerned and an age assessment procedure is necessary. In this respect, it would be appropriate to provide for the possibility of removing from the screening procedure any children whose age is disputed (under suspicion), transporting them to places of safety, allowing them access to the territory (within the meaning of Article 25 of Directive 2013/32 recast of the asylum procedure) and applying to them the specific safeguards mentioned above considering that they should be considered as children until a final decision is taken.

In any case, when dealing with persons in vulnerable situations, the principle of non-refoulement as set out in Article 33 of the Refugee Convention and as results from the non-derogable provisions in Article 3 of the European Convention on Human Rights must be considered and respected.

### **Mechanism for monitoring respect for fundamental rights**

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Regarding the **mechanism for monitoring respect for fundamental rights**, it is of concern that the Regulation leaves the **monitoring of fundamental rights** exclusively in charge of an *“independent monitoring mechanism”* to be established by each Member State (**Article 7**). When monitoring respect for fundamental rights, the competent authorities must comply with the Charter of Fundamental Rights of the European Union and ensure respect for human dignity by refraining from discriminating against persons on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, disability, age or sexual orientation. Particular attention should be paid to the best interests of the child<sup>8</sup>. The monitoring mechanism should cover the respect of fundamental rights in relation to the control, as well as the applicable national rules on detention and compliance with the principle of non-refoulement as referred to in Article 3(b) of Regulation (EU) 2016/399<sup>9</sup>.

The CCBE is in this regard concerned that nothing is stated in the proposal about the migrant's access to this mechanism or about the legal instruments that will be made available to him/her to avoid an inability to assert his/her rights (access to independent legal assistance and defence, and access to an effective remedy, which can review the acts, which we understand to be administrative, of the entire monitoring procedure and even of this monitoring mechanism). The last paragraph of Article 7 of the Regulation states that *“Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring”*. This invitation, which is left to the choice of each Member State, should not replace the intervention of an independent lawyer in the defence of the fundamental rights of each migrant, who would be entitled to make, for example, *“allegations of non-respect for fundamental rights in relation to screening”*. However, in accordance

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<sup>7</sup> See in this regard [Child Circle/Kind's Briefing Paper with key recommendations on Making proposed EU measures concerning migrant children at the EU external border more child-centred and child-sensitive](#)

<sup>8</sup> Recital 22 of the proposal for a Regulation.

<sup>9</sup> Recital 23 of the proposal for a Regulation.

with ECtHR case law, the reviewing body may be an administrative authority, provided that such an authority is composed of impartial members enjoying guarantees of independence and that national provisions provide for the possibility of the decision being reviewed by a judicial authority, in accordance with the rules laid down in Article 47 of the Charter of Fundamental Rights.

In addition to this, as already mentioned above, according to Article 47 of the EU Charter, “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”. Therefore, Member States must investigate allegations of violations of fundamental rights during screening, ensuring that complaints are promptly and properly processed.