

For A Europe That Truly Protects

Joint NGO Policy Brief on the Screening Regulation Proposal



Illustration by Jocie Juritz/IRC

Introduction

In September 2020, the European Commission presented its proposal on a new Pact on Migration and Asylum, promising a 'fresh start' to Europe's approach to migration. The Pact introduced a number of legislative proposals that are currently being examined in the European Parliament and the Council, including the Regulation introducing a screening of third country nationals at the external borders.¹

While a new start is urgently needed to ensure Europe's approach to migration upholds key EU values of human dignity, equality, equity and human rights, the undersigned 12 NGOs working in Greece have serious concerns about elements of the proposed Screening Regulation. We urge EU policy makers to revise the proposal, which risks undermining refugees and migrants' rights and compounding the suffering of people seeking safety and protection in the EU. It also increases the risk of *refoulement* by facilitating conditions by which people could be subjected to substandard asylum procedures, without their vulnerabilities being officially recognised - particularly if sufficient legal aid is not assured.

As members of Greek civil society and organisations working for many years to assist and improve the protection of refugees and asylum seekers in Greece, we see the impact of existing shortcomings in the current political and policy framework on a daily basis. The policies in place have proven to be not only ineffective but also detrimental to people's rights, dignity and well-being.²

The proposed Screening Regulation seems set to replicate many of the most worrying elements of present practice in Greece, including ineffective vulnerability screenings³ and the detention⁴ or containment⁵ of people on the Aegean islands in unsuitable, undignified and often unsafe reception conditions.⁶ It also risks reproducing elements of current or former Greek legislation that have already proven problematic.⁷ This includes the lack of oversight and complaint mechanisms for asylum seekers who have reported mistakes in their initial registration by the competent authorities, such as incorrect age assessment or the non-assessment of their vulnerabilities, which can lead to neglect of their medical and protection needs.⁸ Moreover, people could be denied access to a fair procedure at the borders, because the restrictive timeframe means that the screening could be finalised without a complete medical and vulnerability assessment and without giving them the chance to challenge the preliminary decision. The proposal also introduces new elements that give cause for concern. Foremost among them is the legal fiction of 'non-

¹ 2020/0278 (COD) 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

² The International Rescue Committee, "The Cruelty of Containment: The Mental Health Toll of the EU's 'Hotspot' Approach on the Greek Islands" (December 2020) <https://eu.rescue.org/report/cruelty-containment-mental-health-toll-eus-hotspot-approach-greek-islands>; see also CRWI – Diotima (2021), *Girls on the Move in Greece*. Commissioned by Save the Children-Sweden and conducted by Diotima Research Team: Diana Manesi, Maria Liapi – senior researchers, Iasonas Gousetis – research assistant. Athens, January 2021

³ Oxfam, 'Oxfam media briefing: Vulnerable and abandoned', 9 January 2019, https://www-cdn.oxfam.org/s3fs-public/file_attachments/2019-01_greece_media_briefing_final.pdf

⁴ Apart from detention of asylum seekers under L 4375/2016 and pre-removal detention under L 3386/2005 and L 3907/2011, detention without legal basis in national law or de facto detention measures are being applied for immigration purposes. [AIDA Country report, Greece, 2019, p.185-186] Detention is happening on Kos and is likely to become the standard for all reception facilities for the purpose of screening.

⁵ <https://infocrisis.gov.gr/12877/national-situational-picture-regarding-the-islands-at-eastern-aegean-sea-11-04-2021/?lang=en>; According to the government, there is a great number of 275 people detained at Eastern Aegean Islands (12.04.2021). See also: Oxfam. (2018, April 24). Oxfam and GCR applaud Council of State for ending containment policy and condemn Greek Government's attempts to defy Court's ruling. Press release <https://www.oxfam.org/en/press-releases/oxfam-and-gcr-applaud-council-state-ending-containment-policy-and-condemn-greek>

⁶ On the Eastern Aegean islands PRDFs (Lesvos PRDF and Kos PRDF), i.e. where persons are detained inter alia in order to be subject to readmission within the framework of the EU-Turkey Statement, there was no doctor, interpreter or psychiatrist present as of the end of 2019. Medical services are not provided in police stations. [AIDA Country Report, Greece, 2019, p. 23 Detention Conditions]

⁷ L 4375/2016 and L 4636/2019. For instance, RSA et al., *The Workings of the Screening Regulation*, (2021), available at: <https://bit.ly/3dOQzks>.

⁸ OHCHR (2019), Working Group on Arbitrary Detention: Preliminary Findings from its visit to Greece (2 - 13 December 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25421&LangID=E>

entry'. This could effectively entail blanket detention, even for the most vulnerable, under conditions that could lead to further neglect of the special needs of those in a situation of vulnerability, hindering their access to necessary care at EU borders.⁹

This policy brief outlines the most worrying potential impacts of the proposed Screening Regulation in relation to the protection of asylum seekers and their rights. Drawing on experience from our collective work in Greece and testimonies of asylum-seekers we have worked with, this brief also provides recommendations for amending the current proposal.

We, the undersigned organisations, therefore, urge Members of the European Parliament and representatives of EU member states to:

I. Protect the most vulnerable and safeguard the right to asylum:

The proposal must be amended to guarantee that no person is incorrectly channelled into fast-track border or return procedures as this risks referring highly vulnerable people to substandard procedures and can result in their unlawful return in the absence of a fair and full assessment of vulnerabilities, medical conditions and age.

- The experience in Greece has repeatedly shown that serious capacity shortages combined with a lack of legal assistance¹⁰ can lead to considerable delays and grave mistakes during assessments.¹¹ This results in the systematic neglect of basic needs,¹² a deterioration in people's living conditions¹³ and violations of their rights.¹⁴ It can even affect the asylum procedure and lead to the unfounded rejection of people's asylum claims.¹⁵
- It also illustrates that the timeframe set out in the proposal for the completion of the screening within five days is highly unrealistic. While it may be possible for identity and security checks to be completed within such a tight timeframe, there is a significant risk that vulnerability assessments will be rushed, or even omitted, for the sake of speed.

"In Afghanistan we were afraid of suicide bombers and I thought leaving there would be my salvation. But it is worse here... I have witnessed many suicide attempts. Some have been successful. I tried to hang myself, but my son saw me and called my husband. I think about death a lot, that it would be a good thing for the whole family. But then I look at my daughter and I think it's not her time yet."
- 32-year-old woman from Afghanistan, mother of two young children in Samos, Greece. 2020 (IRC)

⁹ DRC (2019), "Rights at risk" - Policy Brief, p.7; https://drc.ngo/media/ipifsrmi/drc-policy-brief-rights-at-risk_self-print.pdf

¹⁰ Oxfam and Greek Council for Refugees, 6 December 2019, No-Rights Zone How people in need of protection are being denied crucial access to legal information and assistance in the Greek islands' EU 'hotspot' camps, available at: <https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2019-12/Oxfam%20%26%20GCR%20Briefing%20Paper%20-%20No-Rights%20Zone%20-%2006122019.pdf>

¹¹ L 4375/2016, as amended in May 2018, provides that if the fast-track border procedure is applied, the competent RAO or AAU of the Asylum Service can refer the applicant to the medical and psychosocial unit of the RIC for vulnerability to be assessed at any point of the procedure. Despite these provisions, the shortage of medical and psychosocial care can make it extremely complicated and sometimes impossible for people seeking asylum to be re-assessed during that process. Following the medical and psychosocial assessment the medical psychosocial unit of the RIC informs the competent RAO or AAU of the Asylum Service. [AIDA Country Report, Greece, 2019, p. 110]

¹² Major delays occur in the identification of vulnerability on the islands, due to significant lack of qualified staff, which in turn also affects the asylum procedure. [AIDA, Country Report, Greece, 2019, p. 21, Identification of vulnerability]

¹³ Council of Europe, Commissioner for Human Rights, Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities, 31 October 2019, available at: <https://bit.ly/2SdBgpM>; Response by the International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) to the Observations of the Greek Government on the Merits of Collective Complaint 173/2018, November 2019, available at: <https://bit.ly/3bn30cW>

¹⁴ The Director of the EU's Fundamental Rights Agency, Michael O'Flaherty, described the EU Hotspot Moria in Lesbos as "the single most worrying fundamental rights issue that we are confronting anywhere in the European Union", EU Observer, "Greek migrant hotspot now EU's 'most rights issue'" (7 November 2019); For more information: HumanRights360, No end in sight, The mistreatment of asylum seekers in Greece, August 2019., https://www.humanrights360.org/wp-content/uploads/RRE_NoEndInSight.pdf

¹⁵ Two cases of unaccompanied minors handled by the same caseworker, where the applicants have been rejected, following personal interviews that lasted less than an hour. Although there were strong indications that they could be victims of economic exploitation and human trafficking, no thorough examination of the above critical circumstances took place and therefore the latter were not properly assessed in the scope of the decision. (<https://asylumineurope.org/reports/country/greece/asylum-procedure/procedures/regular-procedure/>) IRC caseworkers reported a similar incident involving a beneficiary of our MHPSS programmes whose vulnerability assessment did not take place prior to the interview and who received a first instance rejection of his asylum claim as a consequence.

- Vulnerability checks can be complex and require time and adequate numbers of trained staff, including doctors, nurses, psychologists and qualified interpreters. They must be conducted in a suitable and safe environment to avoid further harm to the well-being and dignity of people who have experienced severe trauma. All people who arrive must have access to free legal assistance to ensure that they understand their rights and obligations, and that they are able to challenge erroneous registration of their personal data, including misregistration of their age or incorrect assessment of their vulnerability.
- In light of the severe consequences of wrong or incomplete assessments and misregistrations on the subsequent procedures, the new Screening Regulation must guarantee that member states meet these minimum requirements, that people have the right to appeal referral decisions and authorities only refer people to a subsequent asylum or return procedure once all assessments are completed.



Illustration by Jocie Juritz/IRC

II. Ensure adequate conditions and prevent unlawful detention:

The proposal must be amended to guarantee that the screening process respects EU standards for both reception and respect of human rights, as foreseen in the Reception Conditions Directive, and refrain from any form of detention in the absence of important individual grounds.

- Given that a thorough assessment cannot be completed within anything close to the five days proposed and the risk that people could therefore be held in de facto detention for extended periods of time, it is essential that the proposal ensures the swift transfer of people from border facilities to appropriate accommodation, regardless of their status, while waiting for a full and fair assessment.
- It is concerning that reported violations¹⁶ of peoples' rights in Greece could continue and even deteriorate, as the new proposal is legally ambiguous and raises concerns that EU standards of reception might temporarily not apply¹⁷ during the screening process. The legal fiction of the "pre-entry" zone undermines the principle that fundamental rights apply to everyone in the EU without distinction.¹⁸ If the regulation is to respect human rights, member states must refrain from resorting to collective detention measures during the screening process in the absence of important individual grounds.
- Women, children including unaccompanied children and families should always be exempt from detention-like conditions and the best interest of the child should be the guiding principle of all decisions concerning children. States must explore alternatives to detention to protect human rights and increase effectiveness of screening procedures.
- Given the traumas that asylum seekers have already experienced on their journey to Europe, the revised proposal must favour the use of an outcomes-focused and survivor-centred case management model.

"I stayed three months in detention when I arrived on the island. When I went out of detention, I had no appointment with the doctor. A doctor eventually examined me in October. [...] The appointment was very fast, and he did not allow me to share my story."
- Single man from Ghana, Lesbos, 2020 (Fenix Humanitarian Legal Aid)

¹⁶ HumanRights360, No end in sight, The mistreatment of asylum seekers in Greece, August 2019., https://www.humanrights360.org/wp-content/uploads/RRE_NoEndInSight.pdf

¹⁷ SCREENING OUT RIGHTS? DELAYS, DETENTION, DATA CONCERNS AND THE EU'S PROPOSAL FOR A PRE-ENTRY SCREENING PROCESS, ECRE, p.3 (<https://www.ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf>) ; ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A SCREENING REGULATION COM(2020) 612, p.9 (<https://www.ecre.org/wp-content/uploads/2020/12/ECRE-Comments-COM2020-612-1-screening-December-2020.pdf>) ; See also : (<https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>); and RSA Comments on the Commission proposal for a Regulation on screening at the external borders, p/ 5-6 (https://rsaegan.org/wp-content/uploads/2020/10/RSA_Comments_Screening.pdf.)

¹⁸ Human rights obligations apply where the State exercises jurisdiction (recent reminder in ECtHR case law in *ND and NT*). Also, the asylum *acquis* applies at borders, territorial waters and transit zones (art 3 APD, art 3(1) RCD).

III. Guarantee effective independent oversight and accountability through an improved monitoring mechanism:

The proposal must be amended to ensure that the monitoring mechanism is expanded in scope, and that independence and accountability are guaranteed and suitable consequences are included that follow reported violations. It must introduce substantial provisions that allow for thorough documentation and full transparency during procedures, as well as reporting, investigation and sanctions mechanisms for all stakeholders involved, to prevent potential abuses of power.

- In principle, the proposal for a monitoring mechanism is welcomed. However, in its current format it is insufficient to cover broader fundamental rights violations unless it is substantially amended.
- Greece is a stark illustration of what can happen without effective, robust, resourced and independent monitoring. For years asylum seekers have suffered as a result of serious and well-documented misconduct by border personnel,¹⁹ ranging from discrimination, incorrect age registration by Frontex,²⁰ and reported pushbacks that prevent people from even reaching the border,²¹ to de facto rejections of their asylum claims outside the legal framework.²²
- The debriefing forms proposed as part of the new proposal carry similar potential for abuse and could further restrict access to asylum, leading to the unlawful return of asylum seekers.
- Such violations can only be prevented if there is an effective and independent monitoring mechanism. The scope of the mechanism must be extended to cover cross-border activities through the establishment of an independent and transparent monitoring and evaluation mechanism with the involvement of Greek, EU and UN bodies or agencies, to ensure human rights compliance of all operations in the centres and at the EU's external borders.

"The Greek police caught me and kept us in the police station for one night. They took my phone, the copy of my birth certificate, my shoelaces and my scarf. The next day, they took us back to Turkey".
- Boy from Afghanistan, 16 years old, Evros, 2020 (NCR)

Co-signing organizations:



¹⁹ No end in sight, The mistreatment of asylum seekers in Greece, August 2019, p. 22-25, available at: <https://bit.ly/2y52GaH>. ; See also: <https://www.theguardian.com/global-development/2021/jan/28/refugee-rights-under-attack-at-europes-borders-un-warns>

²⁰ <https://easo.europa.eu/sites/default/files/publications/Border-procedures-asylum-applications-2020.pdf>

²¹ AIDA Country report Greece (2020), p.18

²² This may result in the underestimation of the procedural guarantees provided by the international, European and national legal framework, including the right to be assisted by a lawyer. As these truncated time limits undoubtedly affect the procedural guarantees available to asylum seekers subject to an accelerated procedure, as such, there should be an assessment of their conformity with Article 43 of the recast Asylum Procedures Directive, which does not permit restrictions on the procedural rights available in a border procedure for reasons related to large numbers of arrivals. ; In November 2019, a number of 28 applications examined under the fast-track border procedure on Lesbos island, have been rejected at first instance by the Lesbos RAO, without undergoing any asylum interview before, contrary to the guarantees of the Directive 2013/32/EU. [AIDA Country Report, Greece, 2019, p. 93, 96, 97]