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

CM2109 Comments on Council Amendments of the Screening Regulation Proposal 2020/0278(COD)

July 2021

In November 2020, the Meijers Committee published a comment on the proposal for the Regulation introducing the screening of third-country nationals at the external borders, COM (2020) 612 (hereafter the Screening Regulation proposal). In our previous comment, we highlighted our concerns in relation to fundamental rights risks during screening, insufficiencies of the newly introduced monitoring and investigation obligations, identity and security checks and the use of biometrics and databases. In this note, the Meijers Committee would like to present a number of additional points of concern, also addressing amendments to the proposal introduced by the Council in document 10222/21 of 25 June 2021.[1] We hope that the EU co-legislators will take these comments into account in their further negotiations on the proposal.

1. Definition of detention and detention conditions

Definition of detention

To prevent absconding, applicants are expected to stay at locations at the external borders as they are not authorised to enter the Member State and will have the obligation to remain in the designated facilities during screening (Articles 4-6A). This means that persons concerned has to wait at the external borders or at a 'designated location' until the Member State authorities decide either to grant them asylum or to return them to the country of origin or of transit – without any possibility of moving until the Member States takes a decision. In its Working Document, the Commission mentioned that "during the screening, migrants would be *held* by competent national authorities".[2] This implies that the persons undergoing screening will be, as a rule, deprived of their liberty.[3] The screening procedure is, thus, in fact, detention for up to ten days.[4]

In the current proposal, different terms are used to describe the powers of Member States to restrict the liberty of third-country nationals (TCNs) to remain at the external borders and the locations where these individuals have to remain. For example, where Article 4 refers to "remain at the disposal of the competent authorities" and "other designated locations"; Article 6 mentions that Member States can resort "to other locations" and the screening can take place at "appropriate locations", while Article 6 refers to the obligation of third-country nationals subject to screening TCNs to remain "for its duration, at the disposal of the screening authorities". The Regulation must clarify that this concerns (de facto or formal) detention which falls within the scope of Article 6 of the EU Charter on Fundamental Rights (CFR) and Article 5 ECHR. Therefore, any measure obliging third-country nationals to remain at specific locations while restricting their liberty should be in accordance with the conditions of these fundamental rights. The proposal now only explicitly mentions detention in Recital 12, which includes detention as a possibility to ensure that persons "remain in the designated location" and also includes

[1] See also document 10200/21 at https://www.statewatch.org/media/2551/eu-council-screening-regulation-ms-comments-10020-21.pdf
[2] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2020:0207:FIN:EN:PDF
[3] Screenings at the external border (Article 3) should be completed within 5 days with a possible extension of 5 days in the case of a disproportionate number of TCN's awaiting screening; screenings within the territory (Article 5) should be completed in 5 days.
[4] See also Judgment of 14 May 2020, Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (C-924/19 PPU and C-925/19 PPU.

effective remedies. However, the definition of detention and the extent of such effective remedies is not elaborated on in the Regulation itself.

The Meijers Committee proposes to insert a specific provision in which the conditions of detention for the purpose of the screening procedure are precisely defined, including that deprivation of liberty is only allowed as a measure of last resort and in accordance with the conditions of Article 6 CFR and 5 ECHR.[5] Furthermore, it must be ensured that individuals have the right of timely access to effective judicial remedies, which is required not only on the basis of Article 47 CFR but also Article 5 ECHR and 6 CFR.

Detention conditions

The proposed Screening Regulation does not include any condition concerning the detention of third-country nationals at the external borders of their obligation to remain in "designated" or "other locations". Article 6 of the Screening Regulation Proposal envisages the location of the screening either to be at or close to the external borders or, if this is impossible, the Member State can locate the screening procedure at another location within the Member State (new addition in the amended proposal). Any appropriate location can be used for screenings within the territory (third-country nationals illegally staying in the country). These provisions raise several questions on the conditions and safeguards necessary for the detention of third-country nationals. Will Member State adjust existing infrastructure? What happens if specific circumstances require increased staff, facilities, and/or resources to conduct these screening procedures at screening locations? What is the relationship between detention for the purpose of screening procedures and the accommodation of asylum seekers at hotspots? How will large groups of third-country nationals be accumulated at the border, and will this be possible against their will as well?

Furthermore, Article 5 of the Proposal introduces the possibility of detention during screening within the territory, allowing Member States "to ensure that those third-country nationals remain at the disposal of the competent authorities for the duration of the screening, to prevent any risk of absconding and potential resulting security risks". This provision thus extends the power to deprive TCN's within the territory, without clear relationship with the purpose of this screening procedure itself, which is external border controls. This entails the risk of misuse by national authorities. Thus, the Meijers Committee proposes to delete the provision in the proposed Article 5 allowing for detention during screening procedures within the EU territory as this provides a disproportional and unnecessary extension of powers to deprive individuals of their liberty.

Regarding the use of detention during the border procedure, we specifically refer to the judgment of 17 December 2020, in which the CJEU recognised that Member States are authorised to place applicants for international protection arriving at their borders in 'detention', within the meaning of Article 2(h) of Directive 2013/33, before granting them a right to enter their territory. However, the CJEU underlined this is only possible "on the conditions set out in that same Article 43 and in order to ensure the effectiveness of the procedures for which Article 43 provides". Furthermore, the CJEU held that it follows from Article 43(1) of Directive 2013/32 that detention based on that provision is justified only in order to allow the Member State concerned to examine, before granting the applicant for international protection the right to enter its territory, whether his or her application is not inadmissible […] or whether that application must not be rejected as unfounded […]".[6]

[5] See also CJEU *European Commission v Hungary* 17 December 2020 C-808/18 and ECtHR *R.R. and others v Hungary*, 2 March 2021, no. 36037/17.
[6] CJEU C-808/18, paras 179 and 183.

The Screening Regulation Proposal needs to provide clear rules on what reception conditions should be offered to third-country nationals that screened. In line with the requirement to ensure coherence with CEAS standards, such conditions need to be equivalent to the conditions proposed in the EU Reception Conditions directive. Finally, the Meijers Committee proposes to delete the provision in the proposed Article 5 allowing for detention during screening procedures within the EU territory as this provides a disproportional and unnecessary extension of powers to deprive individuals of their liberty.

2. Registration of biometric data

The Meijers Committee is concerned about the definition of biometrics in the amended proposal for the Screening Regulation. Article 6(6)(c) and 10 regulate the use of biometric data in the appropriate databases as an element of identification and verification of identity in the screening procedure. In the proposed amendments to the proposal for the Screening Regulation, a new addition in Article 10 mentions biometric data "including facial images and fingerprints". Such an open definition allows for the use of other types of biometric data than fingerprints and facial images, including the use of DNA materials. Different stakeholders (including the Fundamental Rights Agency and European Data Protection Supervisor) have already expressed their concern regarding the necessity and proportionality of the current EU measures allowing for central and large-scale storage of biometric data of third-country nationals. In *S. and Marper*, the ECtHR made clear that the indiscriminate and central storage of DNA on (innocent or suspected) individuals is a violation of Article 8 ECHR.[7]

In the current proposal, it should be made explicit that biometric data only entails 'fingerprints and facial images', aligning this proposal with the definition of 'biometric' in the current Eurodac proposal.[8]

3. Use of Interpol data

The amended proposal includes an extended possibility for the access and use of Interpol data, however, without additional safeguards ensuring that the rights of third-country nationals are sufficiently protected. The Meijers Committee notes in this regard that the national authorities of non-democratic and authoritarian states are also using Interpol. This implies that national authorities from those states may use Interpol for entering alerts on political grounds.[9] The European Commission and EU co-legislators must ensure that such information from third states will not be automatically used for decision-making at the external borders for the purpose of refusal of entry or for the 'flagging' of such persons as 'posing security risk' in EU data systems on the basis of Article 11 of the Screening Proposal and Article 12 of the Eurodac proposal of 2020 (COM) 614.

Precise rules should be included in the Screening proposal on the basis of which third-country nationals will be informed whenever Interpol data is accessed and use. Individuals should have the

[7] ECtHR *S. and Marper v. United Kingdom*, 4 December 2008, appl. nos 30562 and 30566.
[8] See Article 3 (p) in the provisional agreement of 19 June 2018, published on 22 June 2021 at the Public Register of the European Parliament.
[9] See also the concerns expressed by members of the Parliamentary Assembly of the Council of Europe in 2018 on the political use of the Schengen Information System https://pace.coe.int/en/files/25186/html and on which topic the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly is now preparing a report.

right to provide supplementary information to this data and have the right to effective judicial remedies against measures and decisions based on such information.

4. Effective judicial remedy

The Meijers Committee points out that there is a lack of an explicit right to effective remedies against the outcome of the pre-screening at external borders based on Article 14 of the Screening Regulation Proposal. Article 14(1) of the original proposal provided that anyone who has not applied for international protection would fall within the scope of the Schengen Borders Code, which would only allow for a non-suspensive right of appeal. This provision is amended, providing that such persons will be referred "to the competent authorities to apply the Returns Directive including, where applicable refusal of entry or other simplified return procedures". Moreover, individuals who are the subject of screening within the territory of a Member State in accordance with Article 5 of the proposal are immediately subjected to the Return Directive following Article 14(4) of the proposal. The Return Directive does include a right of legal remedies against a return decision, including the possibility of temporary suspension. However, this remedy does not address the outcome of the screening procedure itself. Furthermore, the meaning of the definition in the amended Article 14(1), "where applicable refusal of entry or other simplified return procedures", is unclear and risks to introduce very differentiated implementations by the Member States.

Only where the authorities accept that a person has made an application for international protection, they are transferred into the Asylum Procedures Directive mechanism (which includes a suspensive appeal right). This means that when an individual submits that they have been wrongly categorised, there is no appeal right under the Screening Regulation. This is particularly problematic where individuals at external borders or during safe and rescue operations are wrongly categorised as not applying for asylum due to a misunderstanding or lack of misinformation. This may ultimately result in a violation of the non-refoulement principle.

Third-country nationals must have the possibility to rebut the representation of the facts included in the outcome of the screening procedure. The screening authorities must be obliged to respond to the supplementary information and explain in writing the screening outcome.

Third-country nationals have the right of effective judicial protection against the outcome of the screening under the Charter, including legal aid and assistance if necessary to ensure the protection of the non-refoulement principle. The screening regulation should expressly recognise this.