COMMENTS ON PRE-ENTRY SCREENING AND BORDER PROCEDURES

Comments on the 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) 2018/1240 and (EU) 2019/817 and on the amended proposal for a Regulation of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

The whole system envisaged by the New Pact on Migration and Asylum is constructed on two main ideas: that the majority of people currently arriving irregularly at the EU external borders are in fact not in need of international protection and that only people who are likely to be in need of international protection may enter the territory of the EU. The implication of this is that those not in need of international protection should therefore be quickly identified and returned. To this end, a 'pre-entry' screening is created and the use of border procedures is made mandatory for a large group of people, including those applying for asylum but having a nationality for which the average European recognition rate, based on Eurostat, is equal to or lower than 20%.

The objective of the pre-entry screening is to identify the irregularly arriving third country nationals, establish any health or security risks related to them, register their biometric data and subsequently refer them to the applicable procedures.

The goal of the expanded use of border procedures (asylum and return border procedures) is to quickly process those applications that are considered likely to be unfounded because of the applicants' nationalities or the country through which they transited, and to swiftly return those with no right to stay in the EU.

These proposals as presented by the European Commission, and read together with the other instruments of the Pact, raise numerous concerns both with regard to principles and legal aspects as well as to their practical implementation.

❖ Principle of no-entry: risk of legal uncertainty and curtailment of rights

Both the pre-entry screening and the mandatory border procedures are based on a 'legal fiction' that the people involved, while physically on the territory of an EU Member State, are legally not yet in the EU. This is problematic both in terms of implications of the underlying discourse as well as the potential legal consequences for the people concerned. On the one hand, by largely applying such a fiction, the EU aims to discourage arrivals by passing the message to migrants that it is pointless to try to enter the EU irregularly. However, most migrants do not have a choice other than doing so, as there is hardly any legal way for them to reach and enter the EU. On the other hand, the use of the no-entry fiction could lead to undue limitations or exceptions for migrants in accessing those rights they would otherwise have if they were legally admitted to the territory.

The explanatory memorandum to the pre-entry screening proposal states clearly that, in the cases in which people make an asylum application, the legal effects concerning the Reception Conditions Directive should apply only after the screening has ended. This includes both the reception conditions standards and the provisions related to detention conditions and safeguards. Consequently, the people subjected to a pre-entry screening are left in an uncertain legal situation when it comes to the conditions in which they should be accommodated, informed and assisted, and in relation to the legality and conditions of a probable detention (see further). Knowing that reception conditions at the EU external borders are presently often inhumane and do not meet current legal requirements, it very likely that such a legal uncertainty will only aggravate the situation instead of bringing sustainable solutions.

Resultant upon the screening, a person will be channelled into one of three procedures: the asylum procedure (either in the form of a mandatory border procedure or in-country, potentially accelerated); the border return procedure according to the Returns Directive; or the person will receive a refusal of entry. Such channelling will occur based on the information collected by the authorities in a 'debriefing form'. This raises a number of concerns: the debriefing form as presented is an internal document and not the gathering of information leading to a formal decision. It is unclear which authority will actually take the decision on which procedure to apply next. Will such a decision be taken by the border guards? Will asylum specialists, trained in detecting potential protection needs, be involved? Moreover, as it is not a formal decision that determines the next procedure, there is no possibility for the concerned individual to appeal against the decision. The proposal does not even oblige the authorities to show the completed form to the individual concerned and seek their agreement with the information included, some of which may be of a highly sensitive nature. These concerns are further aggravated by the fact that the proposed regulation does not explicitly foresee that all intercepted migrants will be informed about the right to seek international protection.

The consequences of an incorrect channelling can be very far-reaching, forcing people into less qualitative accelerated procedures, often at the borders and in detention. In the worst case scenario it could lead to hastily dismissing the existence of international protection needs and ultimately to refoulement. As people involved in such procedures at the border will officially not be allowed to enter the territory, this might turn de facto into legalisation of a push-back.

For this reason it is positive that the proposal introduces the obligation for Member States to set up an independent monitoring system that should cover respect of fundamental rights in relation to the screening, as well as respect of the applicable national rules in the case of detention and compliance with the principle of non-refoulement. Bearing in mind the current situation at the EU external borders, however, we believe that such monitoring should be expanded beyond just the screening phase and also apply to all alleged fundamental rights violations by European and national border management authorities and during border control activities. Moreover, true independence of the mechanism should be guaranteed by requiring the involvement of independent national authorities such as Ombudsmen, international organisations and civil society organisations, including churches and faith-based organisations, and by ensuring there is necessary support through EU funding.

Another extremely problematic consequence of the application of the no-entry fiction is the curtailment of the right to an effective remedy. According to the amended Asylum Procedure Regulation, the effects of a return decision will only be automatically suspended as a consequence of an appeal procedure for as long as an applicant has a right to remain or is allowed to remain on the territory of a Member State. Applicants subjected to the border procedures have legally never been admitted to the territory and are thus explicitly mentioned among those cases for which an appeal will not have an automatic suspensive effect. An appeal without suspensive effect can hardly be called an effective remedy in asylum cases, as it could result in the applicant being recognised as in need of protection only after having been removed to the country of origin, in clear contradiction to the principle of non-refoulement.

❖ Obligation to 'keep people at the border': risk of lengthy and automatic detention

A direct consequence of the 'no-entry' legal fiction is that Member States are supposed to 'keep people at the border', both during the pre-entry screening and, if applicable, during the asylum and/or return border procedures.

Although the use of detention is not explicitly made mandatory, the current experience in the hotspots and in the use of existing border procedures shows that automatic detention is a predominant practice. In the proposed system, the pre-entry screening combined with asylum and return border procedures, could lead to a total of more than six months of detention. Moreover, the current proposals establish that if no return is achieved by the end of the 12 weeks of the return border procedure, the person concerned is further handled under the regular return procedure according to the Return Directive or equivalent procedures. In this case, if the person was detained during the return border procedure and detention is maintained, the time of detention can be extended for a further 15 more months to reach the maximum time of 18 months under the Return Directive. As a result, one could end up being deprived of liberty for up to 21 months. In the case of 'crisis or *force majeure*', the asylum border procedure can be extended for eight more weeks, bringing the possible total count to 23 months. This means almost two years. It is extremely hard to see what migration management related goal would justify such a far-reaching deprivation of liberty.

There is large evidence showing that detention is detrimental to people's mental and physical health. Moreover, people in detention face higher obstacles to accessing their rights, such as legal assistance, which in turn impacts on the quality of their legal procedures. There is on the contrary no evidence showing that the use of detention increases the effectiveness of returns.

The use of detention is generally justified as necessary to counter the risk that people abscond. However, the current system is designed in a way that forces people into absconding, particularly by obliging them to stay in the country of first entry when they might have legitimate reasons to wish to go elsewhere, such as the presence of family members in another Member State or the fact that the country of first entry is clearly not providing them with humane and dignified reception conditions and adequate procedural guarantees. The mandatory use of border procedures will not bring a solution to such a phenomenon but will rather further aggravate it.

❖ Mandatory border procedures and the '20% recognition rate': a dangerous and unreliable criterion

Border procedures are not a new concept in EU law, but their application is currently optional and in fact only used by a few Member States and in vastly different ways, i.e. in terms of duration, location, authorities involved, and access to procedural guarantees such as legal assistance and effective remedies[1]. The main novelty of the Pact consists in making the use of such procedures mandatory in a number of cases and in particular when migrants have a nationality for which the average European recognition rate is equal or lower to 20%. Moreover, in cases of crisis or 'force majeure' Member States can choose to process under a border procedure, applications from nationalities with an average European recognition rate up to 75%.

Border procedures offer in law and practice fewer procedural guarantees than the regular asylum procedures. In the current proposal, they can either involve an 'admissibility decision' or a decision on the merits of the claim in the cases where the examination of the application is accelerated. Both situations are based on the use of highly problematic concepts, such as safe country of origin and safe third country. The applications of such concepts result in a very high burden of proof on the part of the applicants, who are basically presumed not to be in need of protection unless they can document to the contrary. This high burden of proof goes together with short timeframes and de facto detention or severe restriction of movement at border areas that are often remotely located and difficult to reach for visitors, NGOs and lawyers. While access to proper legal assistance is often already problematic in regular procedures, research shows that applicants subjected to border procedures encounter even higher obstacles to access a lawyer[2]. Effective remedies are also more limited in the case of border procedures, i.e. Member States shall limit remedies to one level of appeal and such appeals will not have an automatically suspensive effect. This could make it harder to ensure redress if a deficient first decision is taken and undermines the Member States' obligations to ensure access to an effective remedy.

Furthermore, the use of a statistical criterion to determine who will be subjected to the border procedure is unreliable. A 20% recognition rate is not that low and could affect a lot of individuals, depending on the number of arrivals from a given country of origin. Moreover, given the great discrepancies in recognition rates in Europe, a relatively low European average recognition rate can mean a low rate in one country and a very high rate in another country and does not therefore accurately reflect the security situation in a given country. Finally, it is unclear from the proposal whether the recognition rate to be used will also take into consideration the recognitions of status granted through appeals. This is an important element given that in certain countries a sizeable number of first negative administrative decisions are overturned in appeal by the national courts.

[1] For a comprehensive evaluation on the existing legal framework and practices on border procedure see the European Parliamentary Research Service 'Asylum Procedures at the Borders - Implementation Assessment', November 2020, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf [last accessed 08/01/2021]

[2] ibidem

The end result of these border procedures is that the risk of refusing protection to those in need is much higher than the supposed advantage gained in quickly filtering out those not likely to need it.

With this in mind it is positive that the proposal includes safeguards for vulnerable groups by excluding unaccompanied children and families with children under the age of 12 from the application of border procedures. We must point out, however, that making a specific provision for children only under 12 is at odds with the spirit of the UN Convention on the Rights of the Child that defines a child as 'every human being below the age of eighteen years'. While differentiation among children of different ages might be allowed in some cases, nothing in the border situation indicates how such a difference in treatment could be justified nor be in the best interest of the child. Moreover, such provision diverges from the European Commission's own approach in the communications on 'the protection of children in migration'[3], where it stresses the need to protect all children regardless of status and at all stages of migration. We therefore firmly insist that, if the use of border procedures is maintained, the exception from their application should be applied to all children below the age of 18, and their family members, as well as vulnerable people.

❖ Lack of – dignified – infrastructure and capacity at the external borders

The implementation of the proposed system and the imperative of 'keeping people at the border' would require the existence of facilities to systematically accommodate people for an extended period of time in dignified conditions. It would also require the presence of adequate offices, sufficient qualified staff and technical equipment to carry out the different procedures at the border crossing points. Such conditions are largely lacking today. In the current situation, the proposed system would only worsen the condition of the already overcrowded existing reception and detention facilities at the borders. Moreover, the workload in terms of cases to process for the Member States at the external borders is likely to increase rather than decrease, resulting in the extension of the existing delays and backlogs in the processing of applications instead of ensuring 'swift' decision making. It would require major investments in money and human resources to make the system workable. Given the concerns mentioned above regarding people's protection needs, it is clear that reinforcing the existing asylum and reception systems in the territory would be a much wiser investment.

❖ Feasibility of time limits

The proposed pre-entry screening is supposed to take place in five days. Even though this can be extended to 10 days in the case of an arrival of a 'disproportionate number of third-country-nationals', respecting such time limits would currently be challenging for a number of Member States of the external borders due to lack of staff and infrastructure at the border crossings as well as the significant needs of people arriving. In the case of people arriving by sea, their medical condition might be such that the screening cannot take place in those five days. It is unclear what would happen in such situations. The likelihood that it will be possible to identify people based on their documents or in using one of the several EU databases is

[3] Communication from the Commission to the European Parliament and the Council - The protection of children in migration COM(2017) 211 final.

also limited. In many cases a longer time and research will be needed, which makes the added value of the pre-entry screening questionable.

When it comes to the practical implementation of border procedures, the envisaged 12 weeks could theoretically be a sufficient time for a well-resourced asylum administration to reach a well-substantiated decision. However, as research shows[4], due to deficiencies in the asylum systems and the lack of capacity and staff, applicants currently often stay much longer than 12 weeks at the border, sometimes waiting for months just to have a first personal interview. It is, therefore, highly unlikely that Member States will be able to meet this time limit, particularly considering that the number of people subjected to border procedures will probably increase due to the proposed mandatory aspect and the application of the 20% recognition rate criterion.

Moreover, reaching a decision within 12 weeks appears practically impossible if that timeframe also has to include the procedure for the determination of the Member State responsible for the examination of the asylum claim. Knowing that Member States are not obliged to carry out such determination in the context of the border procedure, they are likely to skip it to avoid having to ultimately admit people to the territory after the 12 weeks limit. As a consequence, and in the absence of any other provisions to ensure family reunification, people subjected to border procedure will be precluded from the possibility of reuniting with eventual family members in other Member States.

❖ Our vision and recommendations

The proposed pre-entry screening and border procedures raise such a large number of serious concerns that it is impossible for our organisations to support them. Moreover, we do not share the idea that strong borders and filters at entry is what is needed in order to reduce irregular arrivals and guarantee effective asylum and return procedures. We firmly believe that the only way to ensure orderly migration to the EU in fully respecting human dignity and the right to seek protection is to significantly increase safe and regular migration channels.

We do recognise that spontaneous arrivals, albeit reduced, would keep happening even with safe pathways in place. For this reason we do not oppose the idea of a procedure to identify and register people upon irregular arrival as such steps are also in the migrant's interest to ensure that they get access to the appropriate procedures and support. However, we believe that a fundamental change in the conception of such a screening is needed. Instead of prioritising the identification of those people likely not to be in need of protection, such a screening should aim at identifying any vulnerability or immediate health need to be addressed and at ensuring that those likely to need protection will also effectively apply for it. Such a procedure should not be rushed and should take place after everybody has been duly informed about their situation and their rights, including the right to seek international protection.

Furthermore, we believe that to avoid border areas becoming overcrowded and undignified de-facto detention centres, as is the reality today for instance on the Greek islands, people should be transferred, as soon as practically possible, from the borders to appropriate

[4] European Parliamentary Research Service 'Asylum Procedures at the Borders - Implementation Assessment', November 2020, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654201/EPRS_STU(2020)654201_EN.pdf [last accessed 08/01/2021]

reception facilities. These would be on the territory of the Member State where they arrived in order to continue carefully assessing their situation and further establishing the appropriate procedures to follow. The conditions in such facilities should at least be equal to those established by the EU Reception Conditions Directive. Further steps, including relocation, will be examined from such facilities, however immediate relocation from the border to another Member State should be preferred in cases where it is immediately evident that the newly arrived person has family or other ties there and agrees to the transfer. If at any time during this procedural phase, people express their wish to apply for asylum, they should immediately be treated as asylum seekers according to the EU acquis and get access to all the related rights, such as reception conditions under the Reception Conditions Directive.

We firmly refuse to accept that detention or 'detention-like' conditions are inevitable for the implementation of any screening and border procedure. We believe that reducing the risk of absconding can be achieved through creating an environment of trust, where people are listened to, duly informed and supported while accommodated in dignified conditions.

We believe that every person should be subjected to the same treatment, unless special needs related to vulnerabilities are present. A difference in treatment, such as a fast-track procedure, based on nationality is only acceptable when the situation in a given country is objectively such that the large majority of people coming from this country are likely to be in need of international protection.

We strongly recommend the EU co-legislators to depart from the current proposals and reject the undue use of non-entry fictions and border procedures and to rather refocus EU Asylum and Migration policy and legislation on respect for human dignity, the implementation of efficient and fair asylum procedures and the common good.

However, as negotiations will continue to proceed on the current proposals, we **recommend** the following:

- Clearly specify that during the **pre-entry screening**, the same reception and detention conditions apply as those established in the Reception Conditions Directive.

- Ensure that **reception conditions** at border facilities are dignified and tailored to the needs of vulnerable people until they are relocated somewhere else.

- Amend the proposals to ensure that people applying for international protection are channelled into the **asylum procedure** as soon as they apply, without waiting for the end of the pre-entry screening.

- Ensure that all people subjected to the screening are duly informed by **qualified and trained staff** about their rights and the possibility to apply for international protection in a language that they understand**.**

- Ensure that all people subjected to the screening are duly informed in writing about the outcome of this procedure and the reasons behind it and can challenge it effectively if they do not agree. Provisions related to the **de-briefing form** should be

made less discretionary and more legally sound and the de-briefing form procedure should be subject to appeal.

- Expand the **monitoring system** beyond the screening phase to also apply to all alleged fundamental rights violations by national border management authorities or during border control activities.

- Ensure **true independence** of the monitoring mechanism by requiring the involvement of independent national authorities, such as the national Ombudsmen, and civil society organisations, and support them through EU funding.

- Delete provisions that make the **use of border procedures** mandatory for Member States and reduce the possibility to use the concepts of safe third country and safe country of origin.

- Delete the **criterion of the 20% recognition rate** to decide who could be subjected to eventual border procedures.

- Ensure that **vulnerable people** are excluded from the application of border procedures. Children, intended as people under the age of 18, as well as the family members accompanying them, should always be excluded.

- Clearly specify that the **use of detention** during the screening and border procedure should only be used as a measure of last resort, applicable only in well-defined situations and based on a case-by-case assessment of the situation, while privileging alternatives to detention.

- Ensure that **relocation** to another Member State can take place as soon as possible upon arrival. The presence of family ties in other Member States must be a primary consideration in the implementation of relocation and should also be applicable for people subjected to eventual border procedures.

- *Caritas Europa, www.caritas.eu*
- *CCME – Churches' Commission for Migrants in Europe, www.ccme.eu*
- *COMECE – Commission of the Bishops' Conferences of the European Union (Secretariat), www.comece.eu*
- *Don Bosco International, www.donboscointernational.eu*
- *Eurodiaconia, www.eurodiaconia.org*
- *Sant'Egidio BXL Europe, www.santegidio.org*
- *ICMC – International Catholic Migration Commission, https://www.icmc.net/europe/*
- *JRS Europe – Jesuit Refugee Service Europe, www.jrseurope.org*
- *Protestant Church in Germany – EKD, www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm*