

**Note on Joint Consultation on Independent National Monitoring Mechanisms
proposed in the EU Pact on Migration and Asylum
23 February 2021**

The EU Pact on Migration and Asylum was proposed by the European Commission in September 2020. It includes a proposal to require EU Member States to establish “independent national monitoring mechanisms.” This is contained in Article 7 (2) of the proposed Screening Regulation (see annex II). In addition to the proposal in the Screening Regulation, which is under discussion among EU Member States and may remain under discussion for some time, Croatia has announced its intention to establish a fundamental rights monitoring mechanism.

In light of these developments, this consultation, co-hosted by UN Human Rights (OHCHR) and UNHCR, aimed at collecting and sharing the views and insights of representatives of international and regional mechanisms and organizations with experience in monitoring human rights in the context of migration and asylum. The meeting was an informal discussion held under the Chatham House Rule.¹

The consultation was structured around guiding questions in two sessions focused on the independence and scope of independent national monitoring mechanisms and on effectiveness and accountability.

The note presents main points raised by the participants (see annex I).

Section 1: Independence and scope of national monitoring mechanisms

A) Prerequisites for independence:

- Many participants stressed the need to ensure the independence of the monitoring mechanism in **law and in practice**.
- It was pointed out that the **institutional independence** of the monitoring mechanism must be ensured. In particular, the mechanism must be independent from the authorities being monitored or which may be responsible for violations. Functional independence should be further strengthened through independent and transparent recruiting practices as well as clearly defined internal working methods and procedures.
- The need for adequate **financial and human resources** and financial autonomy was consistently raised as essential elements for the independence of monitoring mechanisms. As for human resources, not only **adequate capacity** should be available in order to effectively carry out monitoring activities but also the appointment of **appropriately qualified staff**, with **particular skills** and **expertise** (such as those in the medical profession and those with forensic skills) should be ensured. Moreover, the mechanism should be composed of **multidisciplinary and diverse teams** (including as regards **gender** and **background**). These elements are necessary to ensure **operational autonomy** to proactively investigate alleged violations as well as to cooperate with national and international stakeholders, and conduct consultations.

¹ “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” Source: <https://www.chathamhouse.org/chatham-house-rule>.

- The mechanism should have the power to **conduct unannounced visits, access all kinds of documents, places, records, files, video recording, witnesses and alleged victims**. In that regard, **confidentiality of the information received and of the sources** must be ensured.
- The mechanism should also include the power to **report, follow up**, provide the authorities with **recommendations** and make referrals directly to national prosecution authorities. Findings from the monitoring should be made **publicly available** and the **reporting cycle** should be clearly defined.
- In defining the independence of the monitoring mechanism, the **UN Paris principles** as well as other international/regional organisations' models could represent useful references, especially with regards to the concept of autonomy, composition, pluralism and adequate resources.
- The independence of the mechanism should be **regularly assessed** and kept under **periodic review**, including through accreditations procedures which assess the independence of the mechanism.
- **Transparency** should be ensured in terms of the **composition of the mechanism** and the sphere of its **competencies**.

B) Scope of the monitoring mechanism

- As for the **material scope** of the mechanism, a consensus was reached that this must extend to all aspects of relevance to pushback practices. The scope must extend beyond screening and border procedures and include monitoring of the situation at and beyond the border in order to be in a position to effectively monitor any interception/diversion practices conducted on a formal or informal basis. This is essential given that human rights violations often occur outside, near or at the borders of Europe and prior to the screening. The material scope of the mechanism should therefore include **search and rescue operations, pushbacks, the use of force and collective expulsions**. Moreover, there was agreement that monitoring should not be limited to procedural violations during screening, but should also be extended to all violations that migrants and asylum seekers face in practice in order to ensure that the human rights monitoring is **migrant-centred**.
- Concerning the **personal scope**, there was agreement that the monitoring mechanism should be able to investigate alleged violations, regardless of whether they were perpetrated by a State or non-State actor.

C) Relevance of international/regional human rights and humanitarian legal instruments

- Several participants raised the importance of **clarifying**, in the screening regulation, the **applicability of the international legal framework and customary international law**, in particular as far as it concerns the need to respect **international human rights instruments**. This could also include reference to ECtHR case law in interpreting EU law and **soft law** instruments that could offer useful guidance.
- It was noted, in addition, that the legal framework in relation to **national rules on detention** should be clarified and explicit reference should be made to the Member States' obligation to comply with international norms and standards.

Section 2: Effectiveness and Accountability

A) Lessons learnt from international/regional best practices

- It is vital that the new monitoring mechanisms complement and reinforce **protection capacity** already existing at national level, including assistance provided by civil society.
- The **SPT** (Subcommittee on the Prevention of Torture)'s **guidelines on national preventive mechanisms** could represent a useful reference in terms of general principles governing the monitoring mechanisms.
- The **CPT** (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment)'s **operational experience** in monitoring and substantive findings should also be taken into account.

- The existence and role of the national monitoring mechanisms should be clearly stated in **FRONTEX operational plans** and should be well known to the FRONTEX Fundamental Rights Monitors (when deployed) to ensure synergy between these actors.
- National legislation should include a clear **obligation on national authorities to cooperate** and work constructively with the national monitoring mechanisms.

B) Accountability of Member States

- The **EU should proactively intervene and support** the work of the national monitoring mechanisms.
- Explicit and clear **consequences for non-compliance** with the recommendations of the mechanisms should be introduced. The lack of inter-State accountability could have a negative impact on the effectiveness of the national monitoring mechanisms. There is also clearly a role for the EU Commission to ensure inter-State accountability at the borders.
- The European Union Agency for Fundamental Rights (FRA) has a key role to play in setting out what is required for the establishment and functioning of the national monitoring mechanism.
- **Transparency** is a key element to strengthen accountability.
- It is fundamental that **findings** of the national monitoring mechanisms are made **publicly available**.

C) Synergies with international, regional mechanisms and non-governmental organizations and national human rights institutions

- National monitoring mechanisms should be designed in a way to ensure **fruitful cooperation, sharing information and complementarity** with other monitoring institutions/bodies at the national, regional and international level. It would be useful in order to benefit from other organisations' **expertise and models** as well as to avoid the risk of fragmentation of reporting lines and obligations.
- Making use of the **avenues available at international level**, such as the Special Procedures, the Universal Periodic Review and the Treaty Bodies would be relevant in order to ensure synergies and sharing findings of the national monitoring mechanisms.
- Building up **partnerships with other relevant actors across EU borders** is important in order to improve effectiveness, especially with regards to timely collection of information.

Next steps

- **Share the key points** that emerged during the discussion with the relevant actors involved in the negotiation process, especially the European Commission, EU Member States and the European Parliament.
- Hold further **discussions and consultations** on the mechanism. For the moment, the focus should be on the state of play and on the legislative proposal under negotiation.

Annex I

List of participants

United Nations

Mr Benyam Mezmur, UN Committee on the Rights of the Child

Ms Stamatia Stavrinaki, UN Committee on the Elimination of Racial Discrimination

Ms Nora Sveaass, UN Subcommittee on the Prevention of Torture

Mr Gentian Zyberi, UN Human Rights Committee

Mr Karim Ghezraoui, Chief, Special Procedures Branch (OHCHR)

Ms Carmen Aravelo, Secretariat of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (OHCHR)

Mr Gonzalo Vargas Llosa, Representative for EU Affairs, UNHCR Representation for EU Affairs

Ms Sophie Magennis, Head of Policy and Legal Support, UNHCR Representation for EU Affairs

Mr Ola Henrikson, Regional Director, International Organization for Migration (IOM)

Ms Birgit Van Hout, Regional Representative for Europe, UN Human Rights Office (OHCHR)

Ms Natalia Alonso Cano, Senior Policy & Advocacy Advisor, UNICEF Office for Relations with EU Institutions

Council of Europe

Mr Drahoslav Štefánek, Ambassador, Special Representative of the Secretary-General on Migration and Refugees

Mr Mykola Gnatovskyy, President, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

Mr Christian Mommers, Adviser to the Commissioner for Human Rights

OSCE Office for Democratic Institutions and Human Rights

Ms Christine Hirst, Senior Expert

Ms Joanna Fomina, Migration Expert, Migration and Freedom of Movement Unit

European Union

Ms Jagoda Walorek, Fundamental Rights Specialist, European Border and Coast Guard Agency (FRONTEX)

Mr Adriano Silvestri, European Agency for Fundamental Rights (FRA) (*Observer*)

International organizations

Mr Knut Doermann, Head of Delegation to the EU, NATO and the Kingdom of Belgium International Committee of the Red Cross (ICRC)

Mr Gabriel Almeida, Expert, European Network of National Human Rights Institutions (ENNHRI)

Annex II

Recital 23 of the Proposal for a Screening Regulation²

In order to ensure compliance with EU and international law, including the Charter of Fundamental Rights, during the screening, each Member State should establish a monitoring mechanism and put in place adequate safeguards for the independence thereof. The monitoring mechanism should cover in particular the respect for fundamental rights in relation to the screening, as well as the respect for the applicable national rules regarding detention and compliance with the principle of non-refoulement as referred to in Article 3(b) of Regulation (EU) 2016/399. The Fundamental Rights Agency should establish general guidance as to the establishment and the independent functioning of such monitoring mechanism. Member States should furthermore be allowed to request the support of the Fundamental Rights Agency for developing their national monitoring mechanism. Member States should also be allowed to seek advice from the Fundamental Rights Agency with regard to establishing the methodology for this monitoring mechanism and with regard to appropriate training measures. Member States should also be allowed to invite relevant and competent national, international and non-governmental organisations and bodies to participate in the monitoring. The independent monitoring mechanism should be without prejudice to the monitoring of fundamental rights provided by the European Border and Coast Guard Agency's fundamental rights monitors provided for in Regulation (EU) 2019/1896. The Member States should investigate allegations of the breach of the fundamental rights during the screening, including by ensuring that complaints are dealt with expeditiously and in an appropriate way.

Article 7 (2) of the Proposal for a Screening Regulation

Each Member State shall establish an independent monitoring mechanism

- to ensure compliance with EU and international law, including the Charter of Fundamental Rights, during the screening;
- where applicable, to ensure compliance with national rules on detention of the person concerned, in particular concerning the grounds and the duration of the detention;
- to ensure that allegations of non-respect for fundamental rights in relation to the screening, including in relation to access to the asylum procedure and noncompliance with the principle of non-refoulement, are dealt with effectively and without undue delay.

Member States shall put in place adequate safeguards to guarantee the independence of the mechanism.

The Fundamental Rights Agency shall issue general guidance for Member States on the setting up of such mechanism and its independent functioning. Furthermore, Member States may request the Fundamental Rights Agency to support them in developing their national monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes.

Member States may invite relevant national, international and non-governmental organisations and bodies to participate in the monitoring.

² [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, 23 September 2020.