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From: Presidency  
To: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)  
Subject: Challenges of screening and detention at the border

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**Introduction**

During the lunchtime discussion at the informal meeting of the Ministers of the Interior that took place on 15 July 2021 in Brdo, Slovenia, a number of ministers voiced their support for the rapid advancement of the negotiations on the proposal for a Regulation introducing a screening of third country nationals at the external borders (the Screening Regulation). Similar calls were made during the discussion at the extraordinary JHA Council on 31 August 2021. The Presidency therefore decided to reflect on the best possible way forward in order to enable the negotiations on this proposal to be concluded as a matter of priority.

The New Pact on Migration and Asylum provides for a pre-entry phase at the external borders consisting of both the screening phase and the asylum and return border procedures, as set out in the Amended proposal for a Regulation establishing a common procedure for international protection in the Union (Asylum Procedures Regulation). Although the processes established by these two proposals are linked, they actually have different objectives based on Schengen and asylum/return acquis respectively and govern different situations. They could therefore be dissociated and considered separately. The same applies to the legal fiction of non-entry and the associated restriction of freedom of movement that appears as an open issue in both proposals.

### **Possible options for the obligation to prevent unauthorised entry ("legal fiction of non-entry")**

The key outstanding issue in the amended proposal of the Screening Regulation is Article 4, namely the practical implementation of the obligation to prevent unauthorised entry (the so-called legal fiction of non-entry) and the associated restriction of freedom of movement, including possible alternatives.

Article 4(1) of the latest compromise text proposal for the Screening Regulation<sup>1</sup> stipulates that persons subject to the screening shall not be authorised to enter the territory of a Member State before the screening has been completed. In practice, applying the legal fiction of non-entry is inextricably linked to the options available for ensuring the restriction of freedom of movement at the external borders while protecting fundamental rights. Article 4 further stipulates that Member States shall lay down provisions in their national legislation to ensure that persons subject to screening remain at the disposal of the competent authorities at the external border or in other designated locations for the duration of the screening to prevent any risk of absconding and potential resulting security risks.

The screening is a self-standing process, aimed at establishing the person's identity, state of health and whether they present a security threat. The objective is also to channel that person into the appropriate procedure. Similar measures aimed at identification and security checks at external borders already exist today at national level in the implementation of the Schengen Borders Code but these checks are currently limited to entries at external border crossing points.

The German Presidency examined the issue of preventing unauthorised entry by developing a questionnaire for Member States in the Frontiers Working Party, aimed at gathering information on current arrangements in the Member States, and compiling the responses<sup>2</sup>. The results of this written consultation show possibilities and potential limits but highlight in particular the need for clarification. Replies indicate that in the implementation of Article 14 of the Schengen Borders Code (refusal of entry at external borders), restriction of freedom of movement was predominantly used as a measure to prevent entry in the short term. Modalities included accommodation in airport transit areas and comparable facilities at land/sea borders, administrative detention, investigations and short-term stays in offices or remaining in the means of transport. Only a small number of replies referred to the reporting requirement and other conditions.

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<sup>1</sup> ST 10222/21

<sup>2</sup> WK 14822/2020 INIT

This clearly shows that in the case of screening, Member States might consider the restriction of freedom of movement as a key measure in preventing the persons concerned from absconding. During the technical discussion, the question of effective alternatives to detention in the context of the border procedure arose in relation to the Asylum Procedures Regulation rather than in connection with the Screening Regulation. That was to be expected as the duration of the screening is considerably shorter than the duration of the asylum border procedure. Another open question is whether the fiction of non-entry necessitates measures to restrict freedom of movement.

The asylum border procedure, which may follow the screening, has a different aim, which is that of accelerating the examination of applications for international protection lodged at external borders by certain categories of third country nationals. As such, the screening phase does not prejudice the further situation of a person in the border procedures and serves a different purpose. Therefore, the Presidency considers that adopting the Screening Regulation would bring an added value in the protection of external borders even if dissociated from the other proposals of the Pact. In that perspective the Presidency will strive for a swift agreement on the Screening Regulation with a view to strengthening the protection of the external borders and preventing illegal migration.

**Questions for discussion:**

1. Do the Member States agree that the Presidency should strive for a swift agreement on the Screening Regulation separately from other dossiers in order to strengthen the protection of external borders and as a measure to prevent illegal migration?
2. In that case, could the Member States agree that the question regarding the legal fiction of non-entry as proposed in the Screening Regulation should be addressed by the Presidency independently from the discussions on the legal fiction of non-entry in the Asylum Procedure Regulation without prejudging the current or future border procedure?
3. Taking into account national practices, do the Member States consider it necessary to address the question of alternatives to the restriction of freedom of movement in the context of the Screening Regulation?