UNIVERSITY OF DEUSTO

European Master's Programme in Human Rights and Democratisation
A.Y. 2024/2025

Normalizing the exception: the Screening Regulation in the evolution of EU migration governance.

Examining the tension between securitization and rights protection in Regulation (EU) 2024/1356.

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Word Count Declaration: 28.817

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ABSTRACT

This thesis examines Regulation (EU) 2024/1356, which establishes a standardized pre-entry screening process for third-country nationals arriving irregularly at the EU's external borders. Designed to improve efficiency, coordination, and compliance with fundamental rights, the Regulation also raises significant legal and normative questions. The research explores*: to what extent does EU Regulation 2024/1356 integrate securitization into migration governance, impacting fundamental rights, particularly regarding detention and asylum access?*

Through doctrinal and jurisprudential analysis, alongside a comparative study of Italy, Greece, and Hungary, the thesis argues that the Regulation codifies long-standing trends of securitization, externalization, and legal exceptionalism. It formalizes emergency practices under a permanent legal framework, embedding a security-driven approach in EU migration law. Particular attention is paid to the Regulation's ambiguity around personal liberty and the risk of undermining asylum safeguards.

The Independent Monitoring Mechanism is also assessed in light of existing oversight bodies to evaluate its potential to ensure rights protection and accountability. Ultimately, the thesis finds that, despite its stated aim of procedural fairness, the Regulation reinforces a restrictive model of governance that prioritizes control, contributing to the erosion of legal certainty and access to protection within the EU asylum system.

ACKNOWLEDGMENT

As I conclude this important chapter, I feel profoundly thankful to the people who have been by my side.

To Haizea, no one else could have come first. You have been my guiding light throughout this journey. Reaching this moment wouldn't have been possible without you. Words will never be enough; this moment belongs to you too.

To Maca and Kate, our shared journey took us to Albania, Poland, and Spain. When my steps felt uncertain, your support helped me to keep going. I am deeply grateful to have shared the second part of the road with two such wonderful people. Eskerrik asko!

To Urko, as we've often said, we grew up alongside the avocado plant that was bare back in February. Meeting you has been a gift, you are one of the most precious parts of this journey that I'll carry with me.

To the Marias and to Antoine, thank you for your positivity, your support, and your presence that made the first semester lighter and more joyful. I love you guys.

To Iman and Sarah, when I needed to drop the weight of English and just be heard in Italian, you were there. Thank you for being that refuge, and for your constant understanding and support.

To Constanca, Natalia, Pien, Astrid, Helen, Anna, Lucia, Sophia, Alexandra, Sofia, Alice and all the wonderful souls I've met along the way. Your kindness, your words, and your smiles will stay with me.

This is for my mum and my sister, because all of my achievements are yours too. Thank you for your strength and unwavering love.

Introduction

The “New Pact on Migration and Asylum” significantly redefines the EU regulatory framework on migration and asylum. Proposed by the European Commission in 2020 and finalized in 2024 through a package of ten legislative instruments, the Pact aims to harmonize and accelerate migration and asylum procedures across Member States. It promises a more efficient, balanced, and coherent system, particularly by tackling irregular arrivals, improving coordination, and reducing so-called secondary movements within the Schengen Area. At the heart of this effort lies the creation of an “integrated border procedure”, a new legal framework aiming to standardize and expedite the processing of third-country nationals at the EU’s external borders. This integrated framework comprises three distinct legal regulations: the Screening Regulation (Regulation (EU) 2024/1356), the Asylum Procedures Regulation (Regulation (EU) 2024/1348), and the Border Return Regulation (Regulation (EU) 2024/1349).

This thesis focuses on the Screening Regulation (EU) 2024/1356, as the first step in the newly established integrated border procedure. The Regulation applies to all third-country nationals who cross the EU’s external borders without authorization, apply for international protection at the border, or are disembarked following a search and rescue operation. Its role is decisive, directing individuals toward either asylum or return procedures and thereby determining their legal path from the very beginning. Unlike the Asylum Procedures or Return Regulations, the Screening Regulation introduces a distinct legal space in which individuals are subject to security checks, identification procedures, and confinement at the external border, without access to formal protection mechanisms. This important phase is marked by legal uncertainty, yet it is precisely where key rights risks emerge.

Importantly, the Regulation has been adopted but will not enter into force until June 2026. This transitional moment is not a neutral phase of legal transposition, but one in which Member States are actively shaping how the Regulation will be implemented in practice. While the European Commission framed the measure as a means of harmonization and rights compliance, a closer reading reveals that its provisions are often vague, inconsistently drafted, and defer wide discretion to national authorities. This is particularly evident in the nature and duration of confinement, the point at which procedural guarantees are triggered, and the enforceability of legal remedies. It will be shown how this ambiguity is not merely a technical flaw but a

structural feature of the Regulation, enabling divergent national practices and risks entrenching rights-restrictive models under the guise of uniformity.

This thesis begins from the hypothesis that, although the EU Screening Regulation 2024/1356 is framed as a harmonizing measure aimed at enhancing transparency, efficiency, and fundamental rights compliance at the Union's external borders, it consolidates existing trends of securitization, exceptionalism, and externalization in EU migration governance. Emerging from politically charged and protracted negotiations, it reflects a delicate compromise, one that prioritizes security and control over the full realization of migrants' rights.

In light of these concerns, the thesis addresses the following research question: To what extent does EU Regulation 2024/1356 integrate securitization into migration governance, impacting fundamental rights, particularly regarding detention and asylum access?

To answer this research question, the thesis pursues three specific objectives. First, it analyzes the procedures introduced by the Screening Regulation and compares them with pre-existing national and EU-level practices, particularly those developed during the implementation of the hotspot approach. This comparison sheds light on how previously *ad hoc* or emergency-driven mechanisms have been formalized and standardized within the new legal framework.

Second, it examines the physical restrictions imposed on third-country nationals during the screening phase, interrogating the conditions under which such practices may amount to *de facto* detention and assessing their compliance with European and international legal safeguards, especially those enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

Third, the study assesses the potential of the Independent Monitoring Mechanism (IMM) introduced by the Regulation to ensure fundamental rights compliance in practice. This includes an evaluation of its scope, independence, and complementarity with existing national and international oversight structures.

Together, these objectives provide a critical lens through which to assess how the Regulation's legal architecture may enable, rather than constrain, the erosion of fundamental rights under the logic of border control.

In doing so, it draws on a multi-layered methodology. A doctrinal analysis assesses the legal architecture, definitions, and normative coherence of the Regulation. Moreover, the doctrinal analysis is contextualized within relevant jurisprudence from both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), particularly cases concerning detention of migrants, procedural guarantees in asylum procedures, and the scope of state obligations under international law.

A comparative legal analysis of Italy, Greece, and Hungary illustrates how past practices of screening and containment, developed under crisis conditions, have evolved and may inform the future implementation of the Screening Regulation. These countries were chosen due to their frontline position during the 2015 "refugee crisis," their strategic location at the EU's external borders, and their early adoption of the hotspot approach, which laid the foundation for the procedures now being formalized. Collectively, the case studies highlight how divergent national responses influenced EU-level negotiations and shaped the Regulation's final form. They also offer a critical lens through which to evaluate the broader consequences of institutionalizing hotspot-style governance, particularly in terms of legal uncertainty, the entrenchment of detention practices, and the erosion of asylum protections.

The theoretical lens draws on securitization theory and the concept of "crisification". Securitization, as developed by the Copenhagen School, explains how migration is framed as a threat requiring exceptional policy responses outside the bounds of normal legal and democratic processes. Crisification captures the process by which temporary, crisis-driven measures become normalized and institutionalized over time. Together, these frameworks help explain how the Screening Regulation transforms emergency border governance into permanent legal infrastructure, embedding practices of control, accelerated processing, and legal ambiguity at the EU's external borders.

Finally, while rooted in legal analysis, this study acknowledges its limitations. It does not engage in empirical fieldwork and focuses on a limited number of case studies, which, though illustrative, cannot represent the full spectrum of Member State practices. Furthermore, as the Regulation is not yet in force, conclusions about its implementation are necessarily predictive, based on existing national models and available guidance. Nonetheless, by interrogating the legal design and political logic of the Screening Regulation, this thesis contributes to a growing body of critical scholarship on the intersection between migration governance, security, and fundamental rights in the EU.

2. Securitization and Crisification: migration as a permanent state of emergency.

2.1 The securitization of migration: a theoretical and policy perspective.

The evolution of the European Union's migration governance cannot be fully understood without a close examination of the ways in which migration has been represented, particularly within legal and political discourse. This analysis seeks to highlight how, since the 1990s, migration has increasingly been portrayed not as a structural and manageable phenomenon, but rather as a crisis: urgent, exceptional, and threatening. This framing has profoundly influenced both public opinion and the formulation of EU-level policies. The concepts of "*securitization"* and "*crisification"* are thus essential to comprehend the underlying logic of new regulatory instruments, including the Screening Regulation.

The notion of "securitization" was first developed by Barry Buzan, Ole Wæver, and Jaap de Wilde (key figures of the Copenhagen School of Security Studies) in their leading work *Security: A New Framework for Analysis* (1998). In this context, securitization is defined as a discursive process through which a political actor constructs a particular issue as an existential threat, thereby legitimizing the adoption of extraordinary measures and the suspension of ordinary democratic procedures. It is important to note that this dynamic is not confined to the European context but is also observable in the United States, albeit within a distinct historical, political, and cultural framework. Scholars such as Tirman (2006) have emphasized the global dimension of this phenomenon. In the U.S., immigration has traditionally been interpreted through the lens of social security, particularly about the labour market and the welfare system. However, following the attacks of September 11, 2001, the public discourse and migration policies underwent a significant transformation. In this reconfigured context, immigration, especially from Arab and Muslim-majority countries, became increasingly associated with national security and terrorism, prompting the adoption of restrictive measures and selective border control strategies.

In the European context, the nexus between migration and security did not emerge solely in the aftermath of 9/11. As scholars such as Karyotis (2007, pp. 6–8) have observed, this shift is better understood as the culmination of a pre-existing process rooted in well-established

political and media discourses. Rather than creating a new narrative, the events of 9/11 reinforced existing securitarian framings. In this light, the securitization of migration in Europe is more closely linked to concerns over the protection of European cultural and identity norms. Moreover, the portrayal of migrants as a potential threat to European economic stability has further legitimized the adoption of increasingly restrictive migration policies (Farny, 2016). This representation has entrenched the construction of migration as a security issue, progressively shifting it from the domain of routine governance to one of exceptional control, consistent with the logic of securitization.

It is particularly significant to consider what is commonly referred to as the "migration crisis" in Europe not as the result of an anomalous surge in migratory flows, but rather as a fundamentally political crisis concerning the management and control of the EU's border regime. Campesi (2011) highlights that what manifested as a "crisis" following the Arab uprisings was not so much the increase in arrivals *per se*, but rather the collapse of a framework of political arrangements, bilateral agreements, and international cooperation that had until then contained migration flows across the Central Mediterranean. From this perspective, the so-called migration crisis emerges as a crisis in the EU's and its Member States' capacity to sustain their external border control through an outsourced mobility management mechanism. The breakdown of control instruments (above all, cooperation with third countries such as Libya) has exposed the internal fragilities of the EU's border governance architecture, which had been built over previous decades on deterrence and externalization.

From a methodological standpoint, it is important to emphasize that the securitization of migration operates through the activation of emotions, especially fear, which serves as a key lever to justify the adoption of extraordinary measures. As Farny (2016) argues, fear is not merely a collateral effect, but a structural and intentionally evoked component of this process, capable of mobilizing consensus and legitimizing securitarian narratives that exceptionalize migration and construct the migrant as a threat. More specifically, securitization is a discursive process through which political and security actors frame migration as a threat to security (Farny, 2016). These actors hold epistemic and institutional power to produce and disseminate knowledge about the nature and severity of the phenomenon, shaping public perceptions and political debate. According to Buzan, Wæver, and de Wilde's well-known definition (1998, pp. 23–24), securitization is achieved through a "speech act," by which an issue is presented as an existential threat necessitating exceptional measures outside standard democratic procedures.

In this framework, migration becomes a security issue not due to its intrinsic danger, but because it is presented and perceived as such. It is the act of articulation, rather than the objective nature of the phenomenon, that confers the status of threat.

The performative force of securitization lies in the discursive construction of the "other" as profoundly different, culturally alien, and potentially dangerous. The politics of fear is structured around the construction of the migrant, refugee, or irregular foreigner as a symbolic embodiment of the "non-European," frequently delineated through religious (e.g., "the Muslim") or ethnic (e.g., "the Hispanic") identifiers, as highlighted by Ceyhan and Tsoukala (2002, p. 22) and Togral (2011, p. 219). These categories carry not only a security but also an identity dimension and are mobilized to reinforce the perception that such individuals threaten not only physical and social security, but also the cultural unity of the host community.

This construction of the "other" as a potential enemy has been amplified by media narratives, political discourse, and even parts of the academic literature. Works such as Samuel Huntington's *The Clash of Civilizations* (1993) have significantly contributed to consolidating an ideology based on the antagonism between cultural and religious identities. Huntington's thesis, which conflicts in the post–Cold War era would predominantly stem from cultural differences, has served to reinforce securitarian narratives framing cultural alterity as an inherent source of instability.

In this context, migration is framed not merely as an issue of border control or public order, but as an existential threat to national identity. The securitarian discourse thus acquires an identity dimension, intertwining the protection of security with the defense of values perceived to be endangered by the presence of the "other." Consequently, restrictive policies and extraordinary measures are framed as necessary and legitimate responses to a constructed threat that is as much symbolic and cultural as it is material, fostering a climate of suspicion and fear.

Many scholars, including Campesi (2011), have emphasized the critical importance of the context in which securitarian narratives are produced and received. The construction of a security narrative around a phenomenon such as migration is context-dependent. It is heavily conditioned by the cultural, institutional, and political resources specific to the society in which it emerges. As Stritzel (2007) suggests, the securitization process unfolds on two interconnected levels: the socio-linguistic, where discursive strategies evoke shared meanings;

and the institutional-political, which enables the translation of these narratives into concrete practices and regulatory instruments.

The performative power of securitization lies in its ability to resonate within a prior existing semantic framework, drawing on symbols, fears, expectations, and cultural references embedded in the collective imagination. In other words, for the securitarian discourse to take hold, it must echo a set of meanings already familiar to its audience (Campesi, 2011). From this perspective, the success of securitization does not rely solely on the authority of the securitizing actor, but on the presence of an "empowered audience": a public capable of recognizing and legitimizing the securitarian discourse and acting, either implicitly or explicitly, as its amplifier (Campesi, 2011).

Thierry Balzacq (2011) further refines this point, arguing that securitization cannot be understood as a self-referential process, but rather as an intersubjective interaction between the speaker and the audience. The effectiveness of securitization thus lies in the relationship between political actors and their public, mediated by the cultural and institutional context. Migration becomes securitized not due to any objective danger it poses, but because it is represented as such in an environment receptive to such narratives.

The analysis of the New Pact on Migration and Asylum, in light of recent literature and in particular the contribution by Stępka (2023), confirms that the securitarian turn initiated in the 1990s continues to shape current EU migration governance. Nevertheless, 2015 marks a turning point when securitarian logic became more pervasive, as attested by: the restructuring and expansion of the Frontex Agency, the growing militarization of borders, and the widening use of data collection and migrant profiling practices. Within this framework, risk management and the rhetoric of exceptionality emerge as central features of securitization, presenting migration as an uncontrollable external force necessitating extraordinary responses (Stępka, 2023).

While the New Pact presents itself as a reform grounded in principles of responsibility, solidarity, and security, it arguably continues the trajectory set by the 2015 European Agenda on Migration. As Stępka (2023) notes, rather than marking a clear break with the past, the Pact seems to reinforce pre-existing logics within EU migration governance, particularly those rooted in security and risk management. Its measures, including flexible crisis response, an integrated border management system, pre-entry screening, accelerated return procedures, and

the externalization of migration control, aim to render the system more efficient and responsive. However, this approach risks perpetuating an emergency-driven framework, emphasizing institutional resilience and containment over a normalized and structured management of migration flows.

Stępka (2023) identifies pre-entry screening as one of the most emblematic securitarian practices embedded in the Pact. This measure entails rapid identification of irregular migrants through health and security checks, fingerprinting, and registration in the Eurodac database. While intended to distinguish promptly between admissible individuals and those eligible for expedited return, a legitimate aim within a common external border system, the screening procedure raises significant concerns where security imperatives meet individual rights. Its selective, securitarian logic risks entrenching migration as a threat, thus pushing EU policy toward a paradigm of control and exclusion.

Moreover, the concept of *crisification*, which will now be further elaborated, is deeply intertwined with that of securitization in the EU's migration management. It is argued that while securitization provides the narrative and symbolic framework for constructing migration as an existential threat, crisification constitutes its institutional and systemic translation: it is the process by which the logic of emergency is normalized and becomes the prevailing operational paradigm. Within this vicious cycle, the proclamation of a "state of crisis" not only justifies but also strengthens securitarian responses, transforming temporary measures into entrenched governance mechanisms.

2.2 Defining crisification: from crisis narrative to policy strategy.

As mentioned above, the narrative linking migration and crisis emerged at the end of the last century, following the profound geopolitical changes that swept across Europe after the end of the Cold War. Historical events such as the dissolution of the Soviet Union and the violent fragmentation of Yugoslavia triggered massive refugee flows during that period, particularly from the Balkans, where wars and ethnic cleansing forced millions of people to flee. Migration from Bosnia, Kosovo, and other former Yugoslav territories was one of the first major political and humanitarian challenges for post-Cold War Europe, which lacked common instruments for managing asylum. In the early 2000s, however, the adoption of the Common European Asylum System (CEAS) aimed to ensure international protection for those in need. The CEAS was accompanied by the entry into force of the Charter of Fundamental Rights of the European

Union (CFR), which explicitly enshrines the right to asylum and the principle of non-refoulement. These developments should have laid the foundations for a cohesive system based on common principles and the protection of fundamental rights.

Since the 2010s, however, the idea of a "migration crisis" has become increasingly ideological and media-driven; this narrative has overshadowed the legislative progress that has been made. A key moment in this shift occurred in 2015, when over a million people, primarily Syrians fleeing civil war but also including Afghans, Iraqis, and Eritreans, arrived in Europe via the Mediterranean and Balkan route. This event was perceived as a "crisis" for the integrity of the Schengen area and the stability of the European Union (Moreno-Lax, 2023). Despite the exceptional nature of the humanitarian situation, public and political debate focused primarily on security, public order, and border management. This contributed to reinforcing the perception of migration as an emergency: a chaotic and threatening event.

From this perspective, Moreno-Lax's (2023) concept of *"crisification"* is particularly useful as it sheds light on the dynamics underlying the regulatory architecture of Regulation (EU) 2024/1356. This notion, understood as the tendency to treat migration as a permanent crisis, is not only relevant for interpreting the rationale behind the Regulation, but also for understanding the broader logic of the new Pact on Migration and Asylum. Indeed, it can be assumed that the Screening Procedure itself is informed by this paradigm, as it is structured according to exceptional mechanisms and emergency measures that reinforce the notion of migration as a phenomenon to be contained rather than governed in a structural, rights-based manner. Through the term "crisification", the author describes the process by which crisis rhetoric becomes a structural device of governance, normalising exceptional responses and enabling extraordinary measures to be adopted outside the ordinary parameters of the rule of law. This phenomenon is particularly evident in the use of urgent measures, derogations from normal democratic procedures, and the adoption of exceptional instruments that, over time, become the new norm. In the field of migration, this has led to a shift from an approach theoretically based on protecting rights to one centred on security and border control, in which migration is systematically treated as a crisis.

Moreno-Lax (2023) argues that two legal mechanisms lie at the heart of this: "softification", whereby formal and flexible measures are adopted to elude binding legal obligations, rendering rights less accessible and more difficult to enforce; and "lawification", whereby exceptional practices are formalised and transformed into permanent laws, thereby legitimising them.

The author (2023) identifies an example of “softification” in the practical application of the EU–Turkey Statement to restrain migration via the Aegean Sea route during the 2015 migration crisis. Although the statement was not a formally constituted binding agreement under EU law and was not adopted in accordance with the procedures laid down in the treaties, it produced immediate and substantial legal and administrative effects. Notably, the Council adopted the Statement without consulting the European Parliament or seeking its approval, presenting it as a political declaration rather than a formal international agreement to avoid legal scrutiny and obligations.

The implementation of the statement had significant practical consequences, including the forced return of thousands of migrants from Greece to Turkey (Moreno-Lax, 2023). Additionally, there have been reports of illegal pushbacks by Greek authorities and refoulement by the Turkish Coast Guard (UNHCR, 2020). While the Statement has reduced irregular arrivals in Greece by 94%, this has come at the expense of migrants' rights and legal protections.

This example exemplifies the process of legal ”softification”, wherein a politically driven and non-binding agreement has facilitated the implementation of containment, control and detention measures that effectively undermine or bypass formally protected rights. The flexibility of the agreement, stemming from its insulation from judicial or parliamentary oversight, has enabled the enactment of restrictive practices with minimal accountability. Its informal nature has led to evasion of legal responsibility, which has had a significant impact on migrants' rights. Furthermore, the voluntary nature of the Syrian relocation scheme from Turkey underscores the discretionary and non-justiciable character of the mechanism (Moreno-Lax, 2023).

As a paradigm of “lawification”, Moreno-Lax (2023) alludes to the Belarusian migrant crisis of 2021. The Belarusian regime meticulously orchestrated this crisis to incentivise migrants from third countries to reach the EU's external borders, predominantly in Poland, Latvia, and Lithuania. This was intended as a form of political retaliation against the sanctions imposed by the EU. The European institutions have defined this phenomenon as a “hybrid threat” (Prime Ministers of Poland, Lithuania, Latvia, & Estonia, 2021) thus legitimising highly restrictive and militarised responses.

In response, the three Member States involved declared a “situation of extraordinary circumstances” (Lithuania) and a “state of emergency” (Poland and Latvia), thereby suspending or restricting certain fundamental protections provided for by European and international asylum law. These measures comprised the erection of physical barriers, the expansion of police and military powers, the systematic use of pushbacks, and the introduction of derogations from procedural guarantees. This provoked censure from several institutional actors, including the European Court of Human Rights, which found Poland guilty of violating the principle of non-refoulement (see *M.K. and Others v. Poland*, 2020; *D.A. and Others v. Poland* 2021; *A.I. and Others v. Poland* 2022; and *A.B. and Others v. Poland*, 2022)

In an attempt to institutionalise a coordinated response to similar future events, the European Commission has put forward a series of legislative proposals, including the Anti-Instrumentalisation Regulation and amendments to the Schengen Borders Code, which aim to codify instruments initially designed for exceptional situations as ordinary measures (European Commission, 2021).

Although these initiatives are presented as temporary and limited responses, they highlight a clear trend towards the regulatory structuring of an emergency approach to migration management. In this sense, they are a prime example of the phenomenon Moreno-Lax (2023) defines as “the lawification of crisis”: a process through which the state of exception is progressively incorporated into positive law. This has the effect of normalising extraordinary practices such as derogations from procedural guarantees, summary refoulement, and the selective intensification of border controls within the Union's acquis.

In conclusion, analysing the concept of “crisification” reveals that the crisis is a genuine regulatory and political strategy, not merely a narrative framework. It acts as a catalyst for reconfiguring legal paradigms in the field of migration, legitimising the erosion of individual protections in the name of security and urgency. This effectiveness is demonstrated through the practices of “softification” and “lawification”, which, rather than being temporary exceptions, tend to become established instruments of governance. Therefore, it could be argued that the repeated use of the crisis narrative shaped the priorities of the European agenda, contributing to the transformation of migration governance towards emergency- and security-based approaches that potentially conflict with the guarantee-based structure of EU law.

The Screening Regulation can be seen as a key instrument through which these trends are both reflected and reinforced. The Regulation does not simply respond to crisis narratives; it operationalises them, embedding logics of urgency, control, and exception into the core of EU migration procedures.

2.3 How the Screening Regulation reflects and reinforces these trends.

Building on the processes of crisification and securitization outlined above, the Screening Regulation can be understood as a concrete institutionalization of these dynamics within EU migration governance. The Regulation exemplifies the shift from a rights-based framework toward one prioritizing security and emergency management, embedding exceptional measures into the standard operational architecture.

As Salvati (2021) observes, the European Union's migration policy has progressively oriented itself around securitarian concerns, emphasizing border control and externalization mechanisms. The Screening Regulation codifies this approach by institutionalizing rapid identification and processing procedures at the EU's external borders. These procedures often involve intensified data collection, pre-entry screenings, and expedited return processes, which reinforce the perception of migration as an uncontrollable risk requiring exceptional responses.

This thesis argues that, although Regulation (EU) 2024/1356 is presented as a step forward in migration management, it does not introduce significant regulatory innovations; rather, it is an emblematic manifestation of the normalisation of crisis procedures. The regulation is considered to be part of a broader trajectory already evident in European migration policies, reflecting a structured and repeated emergency response logic.

This response is based on the security logic inherent in migration. Despite the Pact's language referring to a holistic view of security, its approach remains firmly rooted in Eurocentric security logic, perpetuating the notion of "Fortress Europe" (Salvati, 2021). The focus on external stability does not address the needs of third countries, but rather reflects a European strategic interpretation of human mobility as a risk factor to be contained.

This approach contradicts the broader, well-established contemporary concept of security, which encompasses not only defence against military threats, but also the multidimensional notion of human security. This includes protection of fundamental rights, safeguarding against structural violence, access to resources, and a dignified life (Salvati, 2021). While the Pact

formally calls for the integration of security and development, in practice, it will be shown that it prioritizes security, marginalizing fundamental rights and international solidarity.

The result is an approach that tends to transfer migration control outside of Europe, with the intention of externalising responsibility. This contributes to the institutionalisation of a migration management regime based on an asymmetrical conception of partnership relations (Salvati, 2021). In this context, the rhetoric of cooperation becomes a tool for strengthening barriers and containment mechanisms, betraying the complexity of the causes of migration and the need for protection- and inclusion-based policies.

Furthermore, as also the doctrine (Rondine, 2024; De La Orden Bosch, 2024; Jakulevičienė, 2020; Campesi, 2020) have repeatedly asserted, the measures outlined in the Regulation align with the "hotspot" approach introduced in the 2015 European Agenda on Migration. This mechanism was developed in response to irregular arrivals along Mediterranean routes, and was the first attempt to establish border governance centred on containment and rapid identification. In doing so, it often derogated from standard procedural guarantees. However, rather than representing a rupture with the past, it will be shown how this could be written as stabilisation and refinement of an emergency paradigm that has become structural. In this paradigm, instruments created to deal with extraordinary situations gradually become normalised and integrated into the European regulatory framework (Salvati, 2021).

This institutionalization of crisification and securitization within the Screening Regulation invites a closer examination of its specific provisions and operational mechanisms. Understanding how Regulation (EU) 2024/1356 translates the broader security-driven and crisis-oriented logic into concrete policy instruments is essential for grasping its implications on migration governance and fundamental rights.

The following chapter examines the Screening Regulation's objectives and scope, its key provisions, and how this Regulation interacts with existing EU asylum and migration frameworks.

3. Regulation (EU) 2024/1356: the screening of third-country nationals at external borders.

3.1 Objectives and scope of the Screening Regulation.

Before analysing the general objectives of Regulation (EU) 2024/1356 and the scope of its provisions, it is useful to briefly review the context that led to the establishment of a new European approach to migration and asylum.

The European Commission's proposal for the "New Pact on Migration and Asylum" on 23 September 2020 marked a renewed effort to harmonize migration governance across EU Member States. This initiative builds upon a legal framework established over decades: from the Maastricht Treaty (1992), which first positioned asylum and immigration within the EU's competence, to the Treaty of Amsterdam (1997), which laid the groundwork for the Common European Asylum System (CEAS). The CEAS itself was concretely articulated in the 1999 Tampere Conclusions, aiming to implement common minimum standards in asylum procedures between 2000 and 2006, and further developed under the Treaty on the Functioning of the EU (TFEU) post-2007 to consolidate a uniform status of international protection.

Yet, as Abrisketa (2022) critically notes, the CEAS has never fully escaped fragmentation. The 2015–16 migration influx severely exposed systemic weaknesses, triggering a retreat into national, often unilateral, policy responses. These divergent measures undermined the very harmonization the CEAS sought to achieve, deepening disparities in asylum practices across Member States. This divergence reflects a persistent tension between EU-wide principles and national sovereignty: a long-standing issue that has repeatedly prevented reform negotiations from progressing, particularly regarding the Dublin III Regulation[1] and solidarity mechanisms under Article 80 TFEU (Abrisketa, 2022).

Against this backdrop, the New Pact emerged as a political compromise. Designed to reconcile conflicting Member State interests, it opts for a flexible framework acknowledging national heterogeneity while nominally upholding fundamental Union principles. This approach,

[1]The Dublin III Regulation (EU No. 604/2013) establishes that, unless exceptions apply, the Member State of first entry is responsible for examining an asylum application. This principle has placed a disproportionate burden on border countries such as Italy and Greece. To address these imbalances, the European Commission has repeatedly sought an agreement among Member States to introduce a new mechanism for solidarity and responsibility-sharing.

however, raises questions about whether such flexibility risks diluting protections and entrenching uneven implementation rather than fostering genuine harmonization (Abrisketa, 2022).

Therefore, the Screening Regulation must be understood within this broader context. It reflects the Commission's attempt to impose a minimal layer of uniformity at the very first procedural stage, regardless of operational inconsistencies. At the heart of the Commission's reasoning was the idea that early and standardized screening procedures could bring order and structure to a migration system long seen as reactive, fragmented, and inefficient. Three core objectives were central to this vision: ensuring security and public order (Recital 3 and 14), improving the management and efficiency of procedures (Recital 2, Article 1, and COM(2020) 609 final, p. 3:), and protecting vulnerable persons (Recital 7 and Article 6(4), COM(2020) 609 final, p.6).

First, the Commission saw the introduction of identity, health, and security checks for all third-country nationals at the external border as an essential precondition to safeguarding internal security. In the Explanatory Memorandum (p. 3), it explicitly states that the screening is intended to *"contribute to addressing threats to internal security"* by enabling early detection of individuals who might pose a risk to society. The Regulation also emphasizes that immediate registration can reduce the risk of absconding, a challenge repeatedly identified in previous migration flows, where individuals entering the Schengen area were not adequately documented or followed up, leading to irregular secondary movements.

Second, the Commission framed the screening as a measure to increase the efficiency of the system as a whole. By enabling a quick but systematic channeling into the relevant procedure, be it asylum, border, or return, the regulation is designed to relieve pressure on asylum systems by ensuring that individuals are directed correctly from the outset. The Commission viewed this as a way to avoid delays and improve case management, particularly in high-pressure situations. Furthermore, the Regulation is seen as a means of ensuring harmonisation across Member States, noting in the explanatory memorandum (p. 4) that previous reliance on national discretion has led to a *"patchwork of procedures"* that undermines mutual trust and the functioning of the Common European Asylum System (CEAS). By imposing uniform rules for the screening of all irregular entrants, the Commission intends to promote legal clarity, procedural consistency, and a more solidarity-based distribution of responsibility.

Third, the Regulation includes specific provisions aimed at identifying vulnerable persons early, such as unaccompanied minors, victims of torture, or stateless individuals (see Article 12 and Recital 37). The Commission acknowledged that the timely identification of such people is essential for ensuring that they receive the special procedural guarantees to which they are entitled under EU and international law. In this sense, screening is not only a control mechanism but also a protective one.

While this reasoning is internally coherent and responds to real and pressing challenges in the EU migration system, it is not without significant limitations. The prioritisation of security as the leading objective of the regulation risks reinforcing a securitised narrative of migration, where the presumption is one of risk rather than need. Although Member States do have a legitimate interest in preserving public order, the Regulation's framing, particularly the first sentence of the explanatory memorandum and recital 14, risks overshadowing the protection dimension. Moreover, while the risk of absconding is a legitimate concern, it will be demonstrated that its scope has been considerably expanded, thus enabling its use to justify detention in a broader set of circumstances.

On the efficiency front, the Commission's desire for a fast and coherent system is understandable, but the seven-day limit for completing the screening raises practical and legal concerns. This time frame may be too short for making an informed assessment, particularly in cases involving trauma, linguistic barriers, or complex identity issues. Compounding this is the fact that the *screening form,* though presented as administrative, effectively determines the procedural trajectory of the individual, without offering a clear right to challenge or correct errors, an omission that undermines procedural safeguards and the right to an effective remedy under Article 47 of the Charter.

In terms of harmonisation, although the Regulation aims to standardise practices, its lack of binding obligations of result means that Member States retain broad discretion in how they implement key provisions. As seen in past CEAS instruments, such discretion can lead to uneven application of rights and undermine mutual trust. Finally, while the Commission rightly places emphasis on the protection of vulnerable persons, the border environment, characterised by time pressure, limited infrastructure, and varying administrative capacity, is often ill-suited for nuanced vulnerability assessments. Without significant investment and oversight, the provisions in Article 12 may remain aspirational rather than effective.

Finally, regarding the scope of the Regulation, which encompasses a broad and heterogeneous category of people under the category of "third-country nationals who do not fulfil the entry conditions", the introduction of the screening phase carries significant procedural and symbolic implications. As Abrisketa (2022) points out, as also asylum seekers will be subjected to screening, the time needed for procedures may postpone their access to international protection and their related rights, potentially weakening the principle of timely protection. Additionally, the fact that people already on EU territory without evidence of prior border checks will be subjected to screening, broadens the group subject to these controls in a way that raises serious legal and ethical concerns.

PICUM's (2024)[2] critique of the screening regime highlights a significant risk: the potential for ethnic and racial profiling to become structurally embedded within the operation of systematic controls. This concern is rooted in the Regulation's lack of clearly defined and operationalised criteria for identifying third-country nationals already present on the territory (see Article 7(1)). In the absence of procedural safeguards or objective thresholds, enforcement actors may resort to external markers such as skin colour, language, or perceived origin when deciding who to subject to screening. This risk is not merely speculative: the European Union Agency for Fundamental Rights (FRA) has in previous reports documented similar patterns of discriminatory stops and identity checks, especially in border and transit zones (FRA, 2013; FRA, 2020). The legal ambiguity in the Regulation thus creates structural conditions that could enable discriminatory practices, even if they are not formally endorsed.

Having outlined the objectives and scope of the Screening Regulation, the analysis now turns to its core components. As shown, while the Regulation aims to harmonise and streamline border procedures, it risks reinforcing a securitised approach to migration and lacks robust safeguards to prevent uneven implementation and potential rights violations. The next section explores the key provisions that define the screening process, including the mechanisms for identification, health assessments, and security checks. These procedural elements form the

[2]PICUM (Platform for International Cooperation on Undocumented Migrants) is a network of over 160 organisations spanning 30 countries. It is dedicated to promoting social justice and human rights for undocumented migrants. PICUM has closely followed the evolution of the European Pact on Migration and Asylum, participating in consultations, analyses and recommendations throughout the preparatory stages and negotiations, up until the Pact's official adoption in May 2024.

operational core of the Regulation, reflecting its emphasis on swift and rigorous control measures at the external borders.

3.2 Key provisions: identification, health and security checks, and procedures.

Turning now to the provisions governing external border controls, the Screening Regulation establishes a series of initial checks for third-country nationals. These include identity verification, security assessments, and a preliminary health evaluation. This phase, ostensibly neutral and procedural, serves a critical filtering function. In fact, it shapes access to asylum or return pathways. Yet beneath its technical framing lie significant legal and normative concerns.

Article 3 of the Regulation reaffirms that national authorities implementing the screening procedure must comply with European Union law, including the Charter of Fundamental Rights, and international legal standards, notably the 1951 Geneva Convention and the principle of non-refoulement. While this provision articulates a principled commitment aligned with the EU's foundational values, it ultimately risks functioning just as a declaratory safeguard. Its practical effect may be limited, as the following sections will demonstrate, structural shortcomings in the Regulation cast doubt on the substantive enforcement of these human rights standards.

Continuing in the same vein, Article 4 governs the relationship between the Screening Regulation and other key legal instruments. Regarding persons that apply for international protection, it refers to Article 27 of Regulation 2024/1348, which mandates timely and accurate, though not duplicative, registration of asylum applications. Furthermore, the article incorporates minimum reception standards in line with Article 3 of Directive 2024/1346. As for the return procedure, it states that rules from Directive 2008/115/EC or similar national laws can only be applied after the initial screening process is fully completed. However, there is an exception: during the specific type of screening described in Article 7 of this Regulation, those return rules or national laws based on them can be applied at the same time as the screening is happening.

Article 5 defines the personal scope of the screening, referring to the broadly worded category of "third-country nationals not fulfilling entry conditions." This vague designation blurs the legal distinction between asylum seekers, who are entitled to specific protections, and irregular migrants. Such conflation undermines the differentiated treatment required under international

law for persons seeking protection, potentially leading to procedural shortcuts or inappropriate handling of asylum claims.

Paragraph 3 further complicates the picture. It exempts third-country nationals who have been authorised to enter under Article 6(5) of Regulation (EU) 2016/399 from the screening procedure. However, it makes an exception for those authorised under Article 6(5)(c), typically individuals allowed entry on humanitarian grounds or due to international obligations, if they subsequently apply for international protection. In such cases, screening becomes mandatory. This provision raises concerns about legal consistency and fairness: individuals granted entry for humanitarian reasons may face the same initial filtering process as those arriving irregularly, potentially undermining the protection embedded in the humanitarian exception.

Moreover, article 6 clarifies two situations in which the screening procedure might be interrupted: according to provision, screening should end when it is evident that the individual does not meet the entry conditions set out in Article 6 of the Schengen Borders Code; the second case is the third-country national voluntarily chooses to leave the territory. The latter is particularly controversial, as it risks legitimizing an implicit waiver of the right to seek asylum. This logic recalls the so-called “three-walls” doctrine developed in the case law of the European Court of Human Rights (ECtHR) concerning detention in transit or border zones (Wilsher, 2011). According to this doctrine, there is no deprivation of liberty where the individual can, in theory, leave the transit zone voluntarily, typically by returning to their country of origin or provenance. In such cases, unlike traditional detention where the restriction on freedom is imposed against the person’s will, the confinement is seen as self-imposed. However, as the CJEU highlighted in the *FMS and Others* judgment (2020, paras. 223, 231), this possibility is often purely theoretical for asylum seekers. Leaving the transit zone may mean forfeiting their protection claims and risking refoulement to unsafe countries, making the so-called "voluntary" nature of the stay highly questionable.

Article 6 codifies the so-called “fiction of non-entry.” As it will be further explained in chapter 3.3, this legal construct is central to the EU’s externalisation strategy. Under this fiction, individuals are physically present on EU territory but are not legally considered to have “entered.” As a result, they are deprived of full procedural rights. Moreover, article 6 states that Member States should ensure the availability of individuals during screening, including restrictive measures aimed at preventing absconding or preserving public order. However, it must be stressed that the Regulation fails to clearly define the legal nature of such restrictions.

The implications of this ambiguity, especially for the right to liberty, require close legal scrutiny and will be addressed in greater detail in chapter 6.

Article 7 significantly broadens the scope of the Screening Regulation by extending its application to third-country nationals who are already irregularly present within the territory of a Member State, not just those intercepted at borders. Even in these inland situations, authorities are required to ensure that individuals remain available for identification and security checks during the screening process. Moreover, where bilateral readmission agreements are in place, the Regulation allows for the screening to be delegated to a third country. A prominent and controversial example is the Italy–Albania agreement, under which certain procedures are outsourced beyond EU territory. This provision raises serious concerns. Firstly, it introduces ambiguity about the legal safeguards and standards that apply when procedures are carried out outside the EU's jurisdiction or delegated to non-EU states. Secondly, by referencing and potentially endorsing such arrangements within the framework of an EU Regulation, the provision risks conferring a form of EU-level legitimacy on practices that may fall short of fundamental rights protections, particularly in terms of access to asylum, judicial review, and conditions of detention.

The legal and territorial ambiguity continues in Article 8, which regulates the location and operational conditions of the screening. It vaguely provides that screening may occur "in any appropriate and adequate location designated by the Member State, generally situated at or in proximity to the external borders or, alternatively, in other locations within its territory". Such generic language avoids substantive regulation of the facilities and conditions in which screening is conducted, leaving wide discretion to national authorities. It can be hypothesized that in the absence of binding standards, Member States with existing "hotspot" infrastructures are likely to continue using them, despite well-documented structural and legal shortcomings. Article 8 therefore represents a missed opportunity for the EU to meaningfully reform the reception conditions at external borders. It perpetuates a patchy and fragmented legal landscape that jeopardizes the effective protection of fundamental rights.

Furthermore, Article 8 sets out procedural guarantees and basic rights for individuals undergoing the screening process. On the surface, the provision appears to strike a balance between administrative efficiency and fundamental rights. However, a closer examination reveals several problematic aspects. First and foremost, the article imposes strict time limits: seven days to complete the screening for individuals apprehended at the external border (as per

Article 5), and just three days for those already present irregularly within the territory of a Member State (Article 7). These timeframes are extremely tight and, in many cases, unrealistic, especially during periods of mass influx or increased arrivals, when national authorities are likely to be overwhelmed. Under such pressure, adhering to these deadlines could result in rushed procedures that compromise the quality and fairness of the procedure.

Moreover, the Regulation does allow access to organisations and individuals providing advice and counselling, but even this is undermined by the possibility for Member States to restrict such access. The provision permits limits "where objectively necessary for security, public order, or administrative management," which leaves broad discretion to national authorities. In practice, this could mean that NGOs, lawyers, or even consular representatives could be prevented from meaningfully assisting migrants.

Finally, while Article 8 requires that individuals undergoing screening be granted a "standard of living which guarantees their subsistence, protects their physical and mental health, and respects their rights under the Charter", the language is vague and minimalistic. The absence of more detailed benchmarks or binding minimum conditions problematically leaves room for interpretation, potentially allowing for unsatisfactory reception conditions, especially in remote or overcrowded facilities. This could fall short of international and EU standards on human dignity and the treatment of migrants and asylum seekers (Moreno-Lax, 2024; Mitsilegas, 2022).

One of the few innovations of Regulation is found in Article 10, which establishes an independent monitoring mechanism aimed at ensuring compliance with fundamental rights. While this may represent a step forward in principle, serious doubts arise regarding its actual effectiveness. Critically, the monitoring mechanism is limited solely to the screening phase. It excludes the subsequent asylum and return procedures, even though these are inherently linked in the new border procedure model (Abrisketa, 2025). This artificial segmentation risks rendering the monitoring tool largely ineffective. The effectiveness of this mechanism, therefore, will depend heavily on both its operational reach and its material implementation, issues that merit detailed examination in chapter 7.

Article 11 introduces a positive safeguard by requiring Member States to provide comprehensive information to third-country nationals undergoing the screening procedure. At this early and critical stage, individuals are expected to navigate complex legal frameworks

with far-reaching consequences for their rights, often without legal assistance. Therefore, the obligation to inform them about the purpose, duration, and elements of the screening, as well as the right to apply for international protection, constitutes a positive step toward procedural fairness and transparency.

The Regulation highlights the importance of delivering information in a language the person understands or is reasonably supposed to understand, and that such information must be provided in written and oral form, including through interpretation services when necessary.

However, the practical effectiveness of this safeguard remains uncertain. While cultural mediation is mentioned in Article 11(3), the wording states that authorities "*may*" decide on such services, rather than "*shall*". This non-mandatory language undermines what could otherwise be a robust procedural guarantee.

Moving to the core of the checks, Article 12 states that the medical examination should be conducted by qualified medical professionals. Specialised personnel should also carry out a preliminary check to identify situations of vulnerability. Particular attention must be paid to stateless persons, vulnerable persons, victims of torture or ill-treatment, and persons with specific needs. If any such vulnerabilities or special needs emerge, the person must receive timely and adequate support in suitable facilities. Additionally, all involved authorities are required to report any situation of vulnerability they become aware of, directly or indirectly.

Article 14 clarifies that individuals must undergo an identification or identity verification process based on documents or information they provide. The competent authorities must also consult the Common Identity Repository, the Schengen Information System (SIS), and, where relevant, national databases (Article 14(2)). Biometric data collected during identification will also be used to register the person in the Eurodac system.

Finally, according to Articles 15 and 16, security checks are intended to verify whether third-country nationals may pose a threat to internal security. These checks apply to both individuals and their belongings; searches, however, should be governed by national law. Authorities should consult relevant European databases, including the SIS, ETIAS, VIS, ECRIS-TCN, Europol and Interpol. Certain limitations apply to the scope of information that can be retrieved. This is especially the case when collecting data on previous visa refusals or annulments on security grounds, and convictions for serious crimes (Articles 15(3) and 15(4)). If a request indicates a match with Europol data, Europol will be automatically informed and may take any

follow-up action it deems appropriate (Article 16(5)). Interpol may only be consulted if this can be done without disclosing information to the Interpol alert issuer (Article 16(6)). The European Commission must adopt implementing acts to regulate cooperation between Interpol and Europol.

Finally, concerning the channeling of individuals into distinct legal pathways, the screening procedure concludes with the assignment of each third-country national to the appropriate pathway based on the information gathered during screening (Article 18). This is formalized through the completion of a screening form (Article 17), which is then forwarded to the competent authorities responsible for the subsequent procedure, whether asylum or return. The importance of this decision cannot be overstated, as it effectively determines the legal route an individual will follow. However, this form raises significant concerns, particularly because it is not subject to appeal, yet serves as the foundational document directing individuals into distinct legal procedures. The implications of this, and the potential impact on individuals' rights and procedural safeguards, will be explored in greater detail later.

Critically, due to the broad and expansive criteria for applying the border procedure, as outlined in Article 43 of Regulation 2024/1348, it can be hypothesized that referral to the regular asylum procedure will become increasingly rare. The border procedure applies in a wide range of circumstances, including when applicants are considered risks to public order or national security, originate from countries with low recognition rates, or have provided misleading information to authorities. Consequently, the new system rests on a presumption favoring accelerated, border-based processing, while the regular procedure is reserved only for exceptional or clearly well-founded cases (Abrisketa, 2025).

Conversely, if an application for international protection has not been submitted and the individual is found not entitled to remain in the territory, they will be referred to the return procedure as set out in Directive 2008/115.

Having conducted a detailed examination of the key provisions of the screening procedure, it becomes apparent that the Regulation is characterized by a recurring lack of clarity in its legal drafting and operational guidelines. This ambiguity effectively grants extensive discretionary powers to Member States, allowing for significant variability in implementation that may undermine uniform protection standards across the Union. Furthermore, the Regulation's focus on accelerated and physically distant procedures inherently prioritizes speed and geographical

separation over comprehensive procedural safeguards. Such physical distancing often translates into reduced access to legal assistance and oversight, thereby weakening fundamental guarantees for the individuals concerned.

In conclusion, such a framework reflects and entrenches a securitized and emergency-oriented approach to migration management. Far from constituting a temporary or exceptional response, these measures institutionalize a continuous logic of urgency and exclusion. These dynamic risks facilitate violations of fundamental rights, including due process guarantees, the right to seek asylum, and protections against arbitrary detention or refoulement.

Finally, it is essential to turn to a more conceptual issue at the core of these measures: the legal fiction of non-entry. This notion has profound implications for third-country nationals' rights, as will be explored in the following section.

3.3 The legal fiction of non-entry: implications for migrants' rights.

One of the most significant innovations introduced by the Regulation (EU) 2024/1356 is the formal institutionalisation of the legal fiction of non-entry, which provides the essential legal foundation for the entire mechanism (Rondine, 2024). Article 6 explicitly stipulates that third-country nationals undergoing screening “shall not be authorised to enter the territory of a Member State” while the process is ongoing. This provision relies on the legal construct whereby individuals physically present on the territory, or at its borders, are nevertheless treated as if they remain outside of it.

To critically assess the impact of this mechanism, it is necessary to examine its nature, scope, and consequences, particularly regarding legal safeguards. The legal fiction of non-entry is not novel; it has long been embedded in the governance of transit zones at airports and ports across the EU. It has to be highlighted that its purpose is not to exclude individuals entirely from the legal order of the state in which they are located, but rather to subject them to a differentiated legal regime that suspends ordinary rights and protections afforded to those formally admitted (Rondine, 2024). In essence, the fiction enables the application of a lower standard of legal guarantees, legitimising a framework in which rights may be curtailed.

Sodeström's (ECRE Commentary, 2022[3]) illustrates how several Member States (including Austria, Belgium, France, Germany, Spain, Greece, Hungary, and Portugal), have previously used the fiction to regulate asylum seekers at borders and transit zones. Germany's extension of this regime from airports (under the 1997 Residence Act) to land borders since 2018 exemplifies its growing systemic use. This trend reveals that the legal fiction of non-entry has shifted from an exceptional procedural tool to a core instrument for controlling access to international protection, reflecting states' efforts to tighten migration governance.

The Screening Regulation effectively expands this concept into what Söderström (2022) terms a "supranational transit zone" along the entire EU external border. This zone constitutes a uniform legal space governed by shared procedural rules at the EU level, where individuals are not considered to have entered the EU, thus suspending traditional legal safeguards. This extension beyond physical transit zones to entire border regions materially and conceptually transforms the fiction of non-entry, amplifying its reach and consequences.

Rondine (2024) explains that the growing use of the fiction non-entry arises from the absence of positive international or EU obligations to formally admit third-country nationals. While the principle of non-refoulement imposes a duty not to return individuals to situations in which they could be in danger, it does not entail a corresponding obligation to grant them formal entry. This gap generates a legal "grey zone" where physical presence does not translate into legal protection, a zone that the Screening Regulation exploits by making non-entry the default status for all individuals under screening (Rondine, 2022).

As De la Orden Bosch (2024) highlights, basing the Screening Regulation on such fiction raises profound concerns around legal certainty. Article 6, while stating that individuals are not allowed to enter the territory, fails to specify the exact location where screening should occur, causing ambiguity. Articles 6 and 7 require Member States to ensure screened individuals' availability to authorities to mitigate risks such as absconding or security threats. Yet, the Regulation's language implies that individuals may be "held" in a legally undefined liminal state at the borders, raising serious questions about deprivation of liberty without clear procedural safeguards regarding duration, conditions, or access to remedies. The legal fiction

[3] ECRE Commentaries are analyses written by experts on specific topics related to asylum and migration, with the aim of providing insights into issues relevant to EU policies. They are commissioned by the European Council on Refugees and Exiles (ECRE). Please note that the views expressed reflect the views of the authors alone and do not necessarily represent the views of the organisation.

of non-entry, therefore, functions as a tool that significantly restricts freedom of movement, confining migrants to controlled spaces with limited access to legal protection.

Further complicating matters, the Regulation's vagueness about screening locations opens the door to extraterritorial controls, potentially extending migration management beyond EU soil. Abrisketa (2022) observes the potential for checks to occur in third countries via bilateral cooperation, a practice already exemplified by Italy and Albania's 2023 agreement establishing Italian-managed centres in Albania for migrants intercepted at sea. This outsourcing consolidates a broader trend toward decentralising migration control beyond EU borders.

Given the far-reaching implications of these issues, they warrant more focused examination in subsequent chapters. Chapter 5 will analyse how the legal fiction of non-entry compromises asylum seekers' rights by excluding them from formal asylum procedures and, by extension, from the protections guaranteed under the 1951 Geneva Convention. Similarly, Chapter 6 will assess how the regulation's legal ambiguities risk turning screening into a form of *de facto* detention in spaces that lack formal legal status and are devoid of adequate safeguards. By deferring these discussions, the analysis can more fully address how such mechanisms enable states to bypass fundamental obligations, thereby undermining core principles of international and EU law (Söderström, 2022).

Furthermore, if analysed in light of the principle of proportionality, enshrined in Article 52(1) of the EU Charter of Fundamental Rights, the institutionalisation of non-entry raises significant doubts. While effective border management and internal security are legitimate aims, the blanket application of the fiction of non-entry to all screened individuals regardless of circumstance appears neither necessary nor the least intrusive means available. Moreno-Lax (2024) critiques the EU's escalating reliance on coercive border measures as sacrificing legal certainty and human dignity for symbolic efficiency. The fiction of non-entry institutionalises a legal limbo that probably will result in *de facto* detention, delays or denial of asylum access, and curtails procedural rights, all of which arguably exceed what proportionality requires.

By prioritising migration control over individual rights, the fiction of non-entry normalises a regime of exception at the borders, suspending ordinary rights under a veil of legal formalism and stretching the boundaries of EU law to accommodate exclusionary policies.

This practice also fits within a broader EU policy trajectory of externalisation and securitisation of migration governance. Carrera et al. (2016) have documented how the EU increasingly shifts

migration control beyond its borders through partnerships, containment, and extraterritorial processing. Treating third-country nationals as legally absent despite physical presence effectively displaces responsibility onto transit spaces or third countries, often with poor human rights records (Moreno-Lax, 2024).

Concurrently, the fiction legitimises security-driven approaches that frame irregular migration as a threat to public order, enabling exceptional measures like remote processing, and diminished safeguards. Bigo's (2002) securitisation theory illuminates how migration becomes constructed as a risk category warranting extraordinary legal responses. Within this logic, the screening mechanism, by normalising this kind of legal invisibility, becomes central to pre-emptive exclusion and deterrence-based governance.

The implications of the legal fiction of non-entry thus reveal a broader normative shift in EU migration governance, one that reconfigures borders not only as territorial lines, but as legal thresholds of exclusion. Yet the Screening Regulation does not operate in isolation. Its legal and practical effects must be understood within the broader architecture of EU asylum and migration law.

3.4 The Regulation's relationship with other EU Asylum and Migration instruments.

This section assesses the interaction between the Screening Regulation and three foundational instruments of EU migration law: the Schengen Borders Code (Regulation 2016/399), the Return Directive (Directive 2008/115/EC), and the Reception Conditions Directive (Directive 2013/33/EU). As will be shown, the Screening Regulation risks undermining or bypassing key guarantees embedded in these instruments, reflecting broader tensions within the EU's fragmented legal framework on migration governance (Moraru, 2021).

Two principal issues arise from the relationship between the Screening Regulation and the Schengen Borders Code (SBC). First, the new screening framework appears to erode the discretion granted to Member States under Article 6(5)(c) SBC. This provision allows third-country nationals to be admitted into the territory of a Member State "on humanitarian grounds, on grounds of national interest or because of international obligations," even if they do not fulfil the standard entry conditions listed in Article 6(1). The Screening Regulation, however, introduces a conditionality that narrows this flexibility. Article 5(3) of the Screening Regulation states that third-country nationals authorised entry under Article 6(5) SBC "shall

not be subject to the screening," yet it makes a crucial exception: if those individuals apply for international protection, they must undergo screening.

This provision effectively dilutes the SBC's humanitarian clause by rendering its application procedurally burdensome. Rather than serving as a straightforward basis for admission, Article 6(5)(c) becomes subject to additional checks and assessments, thereby undermining its intended function as a safeguard for vulnerable persons. As will be further demonstrated in Chapter 5.2, this restrictive interpretation poses significant risks to the integrity of the EU asylum regime by entrenching exclusionary logics at the earliest stages of protection access.

Second, while it is true that regulatory revision was needed due to the operational and normative limitations of the Schengen Borders Code, the approach taken by the Screening Regulation raises important concerns. Article 8 of the SBC already provided for certain border checks, including verification of identity and documentation, yet it lacked the procedural specificity and operational scope that the Screening Regulation now introduces, particularly in areas such as vulnerability assessments and systematic biometric registration. The inefficiencies and fragmentation of the prior regime, coupled with increasing migratory pressures, justified the need for a more structured and harmonised framework. However, the choice to establish a parallel screening mechanism, rather than improve and expand upon existing SBC provisions, has drawn criticism in legal literature. The new procedure duplicates functions that could arguably have been better integrated into the existing border management framework. As Carrera (2020) observes, a more legally coherent and operationally streamlined approach might have been achieved by refining Article 8 SBC and reinforcing inter-agency coordination, rather than introducing a wholly separate layer of control.

Concerning the relation between the Screening Regulation and the Return Directive, article 18(4) of the Screening Regulation states that third-country nationals referred to in Article 7 (i.e. those not applying for asylum) shall "continue to be subject to return procedures respecting Directive 2008/115/EC". However, this formal reference to the Return Directive is challenged by Article 2(2)(a) of the same Directive, which allows Member States to exempt from its scope individuals either refused entry under Article 14 SBC or apprehended after irregular entry who have not subsequently obtained authorisation to stay.

This creates a legal loophole: the same individuals subjected to screening can, under their irregular status and immediate apprehension, fall outside the procedural safeguards of the

Return Directive, including access to legal remedies, individualised return decisions, and judicial oversight. While the CJEU originally interpreted Article 2(2)(a) as a narrowly tailored derogation aimed at facilitating swift removals in exceptional cases (*Affum*, 2016, paras. 74), the Screening Regulation institutionalises this derogation as the baseline approach. Crucially, the pre-removal phase becomes a legal grey zone, where coercive measures such as *de facto* detention are possible without the full suite of procedural guarantees (Marin, 2021).

These dynamic risks entrenching a system where procedural exceptions become standard governance tools, what Moreno-Lax (2024) terms a "regime of rights deferral", underpinned by the legal fiction of non-entry. By maintaining that individuals undergoing screening are not formally in EU territory, the Regulation circumvents obligations that would otherwise arise under both the Charter and the Return Directive, including those related to detention conditions and access to legal counsel.

To address this normative gap, a comprehensive approach is required. Article 2(2)(a) of the Return Directive should either be repealed or narrowly reinterpreted considering the Charter of Fundamental Rights and relevant CJEU jurisprudence. In *Gnandi v. Belgium* (2018) and *QY v. Bundesrepublik Deutschland* (2021), the Court affirmed that the right to an effective remedy applies to all individuals subject to a return decision, regardless of the procedural phase. Furthermore, in the short term, the Screening Regulation itself should be amended to explicitly state that all individuals subjected to screening fall under the procedural safeguards of the Return Directive, unless and until their status is formally regularised through another pathway (e.g. asylum).

However, the most problematic issue is the absence of any meaningful interaction between the Screening Regulation and the Reception Conditions Directive, which governs the rights of asylum seekers from the moment they express their intention to seek protection. Article 17 of Directive 2013/33/EU obliges Member States to guarantee material reception conditions that ensure a dignified standard of living, including accommodation, food, and access to health care.

The Screening Regulation, however, explicitly excludes the applicability of this Directive during the screening phase. Instead, it requires only a minimum "standard of living in accordance with the Charter" (Article 8.8), without specifying substantive benchmarks or enforcement mechanisms. This vague formulation grants excessive discretion to Member States and deviates from existing CJEU jurisprudence affirming the immediate applicability of

reception rights (*La Cimade and GISTI*, 2012, para. 39). As Jakulevicienė (2020) notes, such procedural decoupling creates material hardship and undermines the dignity and well-being of individuals at a critical stage of the protection process.

To address this normative inconsistency, the Screening Regulation should be amended to explicitly guarantee the immediate applicability of Article 17 of the Reception Conditions Directive during the screening phase—at least from the moment an individual expresses a wish to apply for asylum. Furthermore, the vague "standard of living" clause in Article 8(8) should be aligned with relevant CJEU case law by incorporating a direct reference to the minimum reception standards set out in the Directive. Such reform would ensure not only legal clarity and coherence across EU instruments but also uphold the principle of human dignity and the right to adequate material conditions from the outset of the asylum process.

In conclusion, the Screening Regulation's interaction with key EU legal instruments reflects a broader governance paradox: while presented as a means to enhance efficiency and coordination, the Regulation introduces legal inconsistencies, procedural fragmentation, and the erosion of rights protections By overriding the humanitarian exceptions embedded in the Schengen Borders Code, circumventing the procedural guarantees of the Return Directive, and excluding the Reception Conditions Directive at a critical early stage, the Regulation constructs a parallel legal space marked by ambiguity, discretion, and diminished accountability.

This legal architecture does not merely reflect technical flaws but institutionalizes a logic of containment and control, consolidating securitized governance under the veneer of harmonization. The result is a multi-tiered system in which individuals are treated not according to their legal status or protection needs, but according to where and how they enter European territory. These dynamic risks deepen inequalities and further normalize the exception at the EU's external borders.

Addressing these structural deficiencies requires more than marginal technical fixes. It demands targeted legal amendments to ensure procedural safeguards apply uniformly and to anchor the system firmly in the Charter of Fundamental Rights and CJEU jurisprudence. Restoring legal clarity and ensuring coherence between the Screening Regulation and related instruments is the only path toward a migration system that is both functionally efficient and normatively legitimate.

Building on this analysis, the next chapter explores how the Screening Regulation does not represent a new approach, but rather codifies and extends crisis-driven practices that first developed in specific national settings. Focusing on the experiences of Italy, Greece, and Hungary with the hotspot model, the next chapter demonstrates how exceptional, *ad hoc* measures have been institutionalized into a standardized EU policy framework, reinforcing a long-standing trend of securitization in migration governance.

4. From emergency to structural policy: screening as the institutionalization of crisis-driven practices.

The Screening Regulation (EU) 2024/1356, as analysed in the previous chapter, introduces a pre-entry mechanism that redefines the EU's border management strategy. However, far from representing a radical innovation, the screening procedure is interpreted in this analysis as the formalization and institutionalization of practices that were initially deployed in response to the so-called migration "crises" of the past decade. This chapter aims to demonstrate how the Regulation reflects longstanding practices initially developed at the national level, often under exceptional or crisis conditions, in frontline states such as Italy, Greece, and Hungary, highlighting striking similarities in their security-driven, emergency-oriented approaches.

The chapter proceeds by critically assessing how these three Member States responded to large-scale arrivals of third-country nationals, particularly after 2015, and how those responses laid the groundwork for the procedural and normative architecture found in the new Regulation. A structured comparison is undertaken using three analytical axes: (1) institutional responses to irregular arrivals; (2) identification and screening procedures, particularly at border zones and hotspot centres; and (3) implications for fundamental rights protections. By anchoring the analysis within these dimensions, the chapter seeks to highlight common trends that anticipate the logic of the Screening Regulation.

The central thesis is that practices once applied as discretionary and often temporary emergency measures have now been incorporated into binding EU law. Given the substantial parallels highlighted throughout this chapter, it is reasonable to deduce the consequences of the Screening Regulation from the outcomes of analogous cases examined. The Screening Regulation should thus be understood as a continuation of governance approaches, characterized by the formalization of exceptional procedures, adjustments to procedural safeguards, and the evolving role of borders as spaces for pre-admission processing.

4.1 The Italian Case and the Hotspot Approach

4.1.1 Historical foundations of migration governance in Italy and the introduction of Hotspots.

Italy's engagement with structured migration governance began in the early 1990s, following the collapse of the socialist bloc and the subsequent instability in the Balkans. These

geopolitical shifts led to large-scale arrivals, particularly from Albania, turning Italy, especially the region of Puglia, into a symbolic frontier of European border management (Perrone, 2003). Initially unprepared for sustained migratory flows, Italy resorted to *ad hoc* measures that would come to define its long-term approach.

Puglia emerged as a testing ground for emergency-oriented governance, where extralegal practices were normalised under the guise of necessity (Dal Lago, 1999). The approval of Law No. 563/1995, commonly referred to as *Legge Puglia*, exemplified this model. Adopted to manage the so-called "Albanian emergency," the law facilitated the militarisation of the coastline and established reception centres (*Centri di accoglienza*, CDAs). However, its temporary nature and lack of clarity on migrants' legal status or procedural rights fostered a regulatory vacuum that persisted well beyond the law's expiration (Rondine, 2024).

This early emergency framework laid the groundwork for a fragmented and discretionary reception system. The 2006 rebranding of CDAs into First Aid and Reception Centres (CPSAs) through an interministerial decree did little to resolve legal ambiguities. These centres continued to operate in a legal grey zone, providing basic medical services and facilitating identification or expulsion, but without defined parameters for deprivation of liberty. Article 23 of Legislative Decree No. 286/1998 offered only vague limits, stating that stays must last no longer than "the time strictly necessary" to determine legal status: a flexible standard that failed to protect against arbitrary detention.

Thus, long before the formalisation of the hotspot model, Italy's migration governance had already institutionalised a state of exception. Emergency measures were not transitional but became deeply embedded in the legal and administrative architecture of migration control. These practices, premised on containment and expediency, would shape the reception landscape well into the next phase of European migration policy.

The 2015 European migration crisis marked a turning point in EU asylum governance, prompting the introduction of the "hotspot approach" under the European Agenda on Migration. Italy, alongside Greece, was designated as a frontline state for implementation. With over 150,000 arrivals by sea that year, Italy became a critical entry point along the central Mediterranean route (Chamber of Deputies, 2015).

Conceived as crisis-management hubs, Italian hotspots were designed to concentrate the initial processing of migrants through joint operations with EU agencies such as Frontex, EASO,

Europol, and Eurojust. While this reflected a shift toward multi-level governance, operational control and legal responsibility remained firmly with Italian authorities, especially regarding reception, asylum adjudication, and returns (Maiani, 2016; Benvenuti, 2018).

Benvenuti (2018) outlines the hotspot model's four-fold identity: an operation, an emergency situation, a method of managing migration and a physical site. This conceptual multiplicity, however, lacked corresponding legal codification. It was not until 2017 that Article 10(3) of the Consolidated Immigration Law (TUI) explicitly referenced hotspots, retroactively incorporating them into Italy's legal framework. As such, the model extended, rather than reformed, the country's longstanding reliance on loosely regulated reception infrastructures.

This regulatory continuity meant that unresolved legal ambiguities persisted. Despite new legislative measures, such as Decree-Law No. 113/2018, authorising detention for up to 30 days in hotspots, and Decree-Law No. 20/2023, regulating border procedures, clear procedural safeguards remained absent. Crucially, irregular migrants not seeking asylum fall outside the scope of these provisions, revealing a bifurcated legal regime and perpetuating a state of legal exception.

The European Court of Human Rights (ECtHR), in *Khlaifia v. Italy* (paras. 97-108, 2016), affirmed the structural resemblance between hotspots and earlier centres, condemning Italy for unlawful detention without procedural guarantees. This ruling underscored the enduring failure to align migration control with fundamental rights and due process norms.

4.1.2 The normalisation of detention in Hotspots.

The most contentious evolution of the hotspot system has been its *de facto* transformation into a detention regime. Although initially conceived as transit points for rapid registration and referral, hotspots function as sites of coercive confinement, often without legal basis or effective judicial oversight.

This transformation has been repeatedly challenged before the ECtHR. In a landmark 2023 ruling, *J.A. and Others v. Italy* (paras. 97-99), the Court found that migrants held in Lampedusa were unlawfully deprived of liberty, without formal detention orders or access to legal remedies (Veglio, 2024). Violations of Articles 5(1), 5(2), and 5(4) of the European Convention on Human Rights were identified, alongside breaches of Article 13's right to an effective remedy.

Further jurisprudence, including *M.A., A.B. and A.S. v. Italy* (paras. 55–75, 2023), highlighted the absence of a clear and accessible legal framework governing detention within hotspots. Practices such as coercive fingerprinting were deemed illegal, exposing the systemic lack of procedural safeguards and judicial scrutiny.

Empirical data confirms the scale of these practices. Between 2020 and 2022, an estimated 130,000 individuals passed through Italian hotspots, including a significant proportion of unaccompanied minors. In Pozzallo, minors experienced average detention periods of up to 36 days, far exceeding acceptable thresholds for temporary stays (Veglio, 2024).

Recent legal developments have compounded these issues. Law No. 187/2024, converted from Decree-Law No. 145/2024, shifts jurisdiction over detention validation from specialised immigration tribunals to general Courts of Appeal, which lack expertise in migration law. This procedural shift limits detainees' ability to challenge detention effectively, especially when held in remote or extraterritorial facilities such as those established under the 2024 Italy-Albania agreement (Law No. 14/2024)[4].

ASGI (2025) warns that these reforms significantly curtail access to justice, especially for asylum seekers: the category most in need of protection. Appeals to the Court of Cassation are restricted to a five-day window, often impracticable for detainees with limited legal access. The resulting regime entrenches legal precarity and diminishes judicial oversight, undermining the constitutional guarantee of personal liberty (Article 13, Italian Constitution).

4.1.3 Italy in comparative perspective and relevance to the Screening Regulation.

Italy's experience with the hotspot model offers a revealing lens into EU migration governance and the structural changes institutionalising emergency responses. The Italian case illustrates

[4] The agreement between Italy and Albania, signed in February 2024, entails the annual transfer of up to 36,000 asylum seekers to detention facilities located within Albanian territory. These centres, which are operated under Italian jurisdiction, provide accommodation for individuals rescued at sea by Italian authorities outside the territorial waters of the European Union. Asylum seekers are detained in Albania while their applications are being processed. If the applications are approved, the asylum seekers may enter Italy. If the applications are rejected, the asylum seekers are subject to repatriation to their country of origin. The initial allocation by the Italian government was €650 million for a period of five years, although it is anticipated that expenditures may exceed one billion euros. The agreement has been met with criticism from human rights organisations and international observers, who regard it as a dangerous precedent and an example of outsourcing asylum procedures beyond the EU's borders.

how mechanisms initially framed as temporary can normalize legal ambiguity, administrative discretion, and *de facto* detention.

The Screening Regulation formalises many of these elements, particularly the pre-asylum confinement of migrants for identity, security, and vulnerability checks. Italy's system, with its inter-agency collaboration and blurred lines between reception, screening, and detention, prefigures key features of the Regulation.

Italy's bifurcated legal framework, where different migrant categories receive differing protections, mirrors risks inherent in the Regulation's design. Screening all irregular arrivals, regardless of asylum potential, replicates the Italian model's most concerning aspects: inconsistent legal access, procedural opacity, and a hierarchy of rights.

Recent reforms, including Law No. 187/2024, which accelerates legal timelines and reduces judicial oversight, reflect a broader trend toward prioritising administrative efficiency over legal safeguards. Similar risks arise if the Regulation is applied in Member States with weaker rule of law protections.

Italy thus serves as both precedent and warning. Screening procedures, even when nominally administrative, function as exclusion tools when embedded in ambiguous legal frameworks and securitised political cultures.

Comparable developments have occurred in Greece and Hungary. In both, accelerated border procedures, closed facilities, and derogations from asylum norms have entrenched a logic of containment. The Screening Regulation, rather than innovating, codifies these elements, biometric collection, early confinement, and pre-asylum processing, into EU law.

This codification raises rights concerns. Parallels between the Regulation's screening forms and Italy's *foglio notizie* reveal how legal trajectories are shaped without oversight, risking due process violations. Article 11 mandates information provision, but the non-appealability of screening outcomes replicates past procedural gaps condemned by the ECtHR (J.A. et al. v. Italy, 2023).

Spatially, the Regulation entrenches the hotspot model's logic of confinement, requiring screening to occur at borders or designated facilities. Practices from Moria or Hungary's transit

zones, once emergency measures, now risk becoming routine infrastructure for exclusion and control.

Scholars locate this within broader border externalisation, where screening centres act as filters selectively admitting or excluding migrants. The Regulation reinforces this approach, elevating containment and status differentiation as core features of EU migration governance.

Given the human rights concerns raised by Italy, Greece, and Hungary's models, including inhumane conditions, legal limbo, and lack of remedies, the Screening Regulation may institutionalise exceptionalism rather than overcome it. Instead of resolving past flaws, it risks formalising them.

By comparing these cases, the next sections will highlight both convergences and divergences in how the Screening Regulation may be implemented across diverse national contexts. While Italy, Greece, and Hungary differ in legal traditions, institutional capacity, and political culture, all three illustrate how screening procedures, once introduced under exceptional circumstances, can evolve into durable tools of deterrence, detention, and diminished rights. These comparative insights are essential for anticipating how the Regulation might function in practice, and for designing safeguards that prevent the erosion of fundamental rights at Europe's borders.

4.2 The extension of the Hotspot model: Greece and Hungary.

The Italian case demonstrates how the hotspot model, initially framed as an emergency and operational measure, laid the groundwork for a long-term regime of deterrence and containment. The experiences of Greece and Hungary further reinforce this pattern, showing how accelerated border procedures, screening mechanisms, and legal fictions of non-entry have become entrenched across multiple national contexts. These cases are highly relevant to the analysis of the Screening Regulation because they reveal how similar practices, have led to systemic rights violations, blurred the line between reception and detention, and undermined the procedural guarantees of asylum seekers. Greece and Hungary thus serve as empirical evidence of the potential consequences of the Regulation's implementation: the normalisation of exceptionalism at EU borders, the institutionalisation of rapid filtering processes, and the erosion of meaningful access to protection.

4.2.1 The Greek experience: Moria and other hotspot facilities.

Designated as a frontline state under the 2015 European Agenda on Migration, Greece became a key site for the rollout of the EU's hotspot approach. In 2015 alone, over 856,000 people arrived in Greece via the eastern Mediterranean route, making it the primary point of entry into the EU that year (UNHCR, 2015). While the hotspot model was formally introduced as a pragmatic tool to manage these arrivals, it in fact extended existing trends in Greek migration policy: particularly those centred on deterrence, confinement, and the outsourcing of protection responsibilities.

Greece's asylum framework was historically underdeveloped. Until the early 1990s, the country had no comprehensive asylum law, and migrants were treated primarily through the lens of border control. Law No. 1971/1991 marked the first substantial attempt to regulate asylum, but was widely criticised for entrusting asylum decisions to the police, restricting procedural access, and for having poor detention conditions (Papapanagiotou & Garipidis, 2017). A major reform came with Law No. 3907/2011, which established an autonomous Asylum Service and Reception Service, reflecting EU pressures to improve compliance. Yet, implementation was delayed by inadequate resources and fragmented governance structures.

The hotspot approach was legally codified in Law No. 4375/2016, which implemented the EU-Turkey Joint Statement of March 2016. This law introduced a border procedure designed to quickly assess asylum claims from those arriving on the Aegean islands and facilitate returns to Turkey in cases of rejection (Tas, 2022). The law marked a shift toward screening-like functions, such as rapid identification, vulnerability assessments, and admissibility checks, all conducted within confined geographic spaces. This framework closely anticipates the core components of the Screening Regulation: a pre-asylum filtering phase, conducted at the border, with limited procedural safeguards and minimal access to legal remedies.

In practice, however, the Greek hotspots deviated from their official function as reception and registration centres. They rapidly became *de facto* detention sites. Facilities such as Moria on Lesbos, originally designed for 2,000 people, often housed over 15,000 in conditions marked by inadequate sanitation, security, and medical care (Human Rights Watch, 2017). Migrants were subjected to informal geographical restrictions, confined to the islands under the pretext of border procedures and unable to move to the mainland while their claims were processed

(Tas, 2022). This created a legal limbo which, while not officially classified as detention, exhibited all its key characteristics.

The European Court of Human Rights (ECtHR) repeatedly condemned Greece's hotspot system. In *H.A. and Others v. Greece* (paras. 176, 2019), the Court ruled that extreme overcrowding and lack of basic services in Diavata amounted to inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR). In *Kaak and Others v. Greece* (paras. 125, 2019), The Court held that the confinement of asylum seekers in the Vial hotspot constituted unlawful detention under Article 5 § 4, as there was no clear legal basis, no notification of the grounds for detention, and no access to effective remedies. The Court found that the remedies available to detainees were neither accessible nor sufficient to meet the standards required by the Convention.

These judgments underscore the risks of embedding screening functions within a framework of legal ambiguity and emergency governance. The Screening Regulation's proposed border procedures, conducted in non-entry zones, under time pressure, and without clear procedural guarantees, mirror the Greek model. Despite Greece's more formal legislative efforts, the result was the same as in Italy: the erosion of asylum guarantees, the expansion of confinement, and the blurring of reception and detention.

In this sense, the Greek experience is a cautionary precedent. It shows that once screening-like practices become embedded in law, they can facilitate a systemic shift away from protection towards securitisation and exclusion, particularly in contexts marked by under-resourced administrations and political pressures to deter irregular migration. The Screening Regulation risks reproducing this model across the EU, formalising practices that have already proven to be deeply problematic.

4.2.2 Hungary's approach: legalising containment and exclusion.

Hungary offers a different but complementary case. Whereas Greece's adoption of the hotspot model was framed as a humanitarian and operational response to EU demands, Hungary's migration policy has been shaped by an overtly securitised and nationalist political agenda. Prime Minister Viktor Orbán's government has portrayed migration as a threat to national identity and public order, enabling the creation of a legal framework that prioritises exclusion, deterrence, and territorial control over protection.

Hungary's regulatory evolution began in the 1990s, following the Yugoslav wars. The Act on Borders (No. 25/1998) and the Act on Asylum (Act CXXXIX/1997) introduced a formal asylum framework and codified border authorities' roles. But even at this stage, a tension was visible between protection and control: the laws granted rights such as legal aid and appeal but also enabled restrictive detention and return measures (Erdal, 2023).

The 2015 migration "crisis" triggered a significant transformation. With over 391,000 arrivals and 177,000 asylum applications, Hungary closed its borders and constructed fences along its southern frontier. Most notably, it established "transit zones" at Röszke and Tompa, where asylum seekers could submit claims but were physically and legally confined in closed facilities. These zones relied on the legal fiction of non-entry, allowing Hungary to claim that individuals held there were not technically on Hungarian territory and therefore not entitled to the full protections of national or EU law (Boldizsar, 2015).

These transit zones functioned effectively as screening and pre-asylum detention centres, recalling the logic of the Screening Regulation. Asylum seekers were subjected to accelerated admissibility procedures, often without access to legal aid or appeal. The focus was on assessing removability and dismissing claims as inadmissible or "safe third country" transfers, particularly to Serbia. Reports by NGOs such as the Hungarian Helsinki Committee (2019) documented widespread *de facto* detention in inhumane conditions, with limited oversight or procedural fairness.

In its landmark ruling in May 2020, the ECtHR found that detaining Afghan and Iranian families in the Röszke transit zone without judicial oversight or time limits violated EU law (*Ilias and Ahmed v. Hungary*, 2020, para. 196). The Court held that the detention constituted a deprivation of liberty, and that Hungary had failed to ensure the legal safeguards required under the Reception Conditions Directive and the Asylum Procedures Directive (Boldizsar, 2020). Despite the ruling, Hungary maintained its restrictive stance, closing the transit zones but further tightening its border procedures and limiting access to asylum altogether.

For the analysis of the Screening Regulation, Hungary's case is deeply instructive. It shows how screening procedures, when implemented within a legal framework that privileges deterrence, can be used to systematically circumvent asylum obligations. The Regulation's provisions for border screening in non-entry zones, the use of fast-track procedures, and limited appeal mechanisms mirror the Hungarian model. The legalisation of containment through

preliminary checks and accelerated decision-making becomes a tool of exclusion, not protection.

Hungary's policies diverge from those of Italy and Greece in terms of ideological framing and legal architecture. However, all three cases share a fundamental continuity: the transformation of screening and reception measures into instruments of control, detention, and deterrence. The Hungarian example demonstrates how even legally sophisticated systems can be manipulated to exclude, especially when emergency narratives dominate political discourse.

The experiences of Greece and Hungary offer critical empirical insights for evaluating the Screening Regulation. In both cases, screening-like procedures, initially introduced as exceptional or emergency measures, became embedded within national legal frameworks and were used to restrict rights, accelerate removals, and confine asylum seekers in *quasi*-detention settings. The risks of normalising these practices at the EU level are clear. The Regulation's design, premised on border screening, legal fictions of non-entry, and expedited procedures, mirrors and amplifies national models that have already led to systemic violations of human rights and asylum standards. These precedents highlight the urgent need for critical scrutiny of the Regulation's potential implementation across Member States.

4.3 How the Screening Regulation builds upon the hotspot model.

Following the detailed analysis of Italy, Greece, and Hungary's migration governance models, it becomes clear that the Screening Regulation functions less as an innovative legal instrument and more as a formalisation and entrenchment of the hotspot model's core operational and legal features. The Regulation institutionalises practices such as accelerated identification, biometric data collection, and the confinement of third-country nationals within designated border facilities: measures that were already central to hotspot procedures in frontline states (Rondine, 2024; De la Orden Bosch, 2024; Youbi, 2023). Rather than addressing the systemic deficiencies revealed by the hotspot experience, the Regulation appears to codify these shortcomings within a supposedly coherent and standardised framework.

This codification raises significant concerns regarding fundamental rights protections. The parallels between the Screening Regulation's new preliminary screening form and Italy's "*foglio notizie*" illustrate the persistence of practices that significantly shape migrants' legal trajectories without judicial oversight, thereby risking violations of due process and effective

remedy (Rondine, 2024; Joint Policy Paper, 2024). The Regulation mandates the provision of accessible information during screening (Article 11), but the non-appealability of screening outcomes remains a problematic omission, replicating the procedural lacunae that led to the European Court of Human Rights condemning Italy for collective expulsion violations (*J.A et al. v. Italy*, 2023). This persistent absence of judicial safeguards signals an ongoing structural flaw in EU migration governance that the Regulation fails to remedy.

Moreover, the Regulation's insistence that screening occurs "at the external border" and within designated places of initial processing reproduces the spatial logic of containment inherent in the hotspot model. This reflects a shift from treating border confinement as a temporary emergency measure to embedding it as a routine element of migration management (Gerbaudo, 2022). The Regulation thus entrenches a regime where migrants are spatially and legally fixed at the border, limiting their freedom of movement and access to effective protection mechanisms, much like the closed facilities in Greece (Moria) and Hungary's transit zones (Tas, 2022; Boldiszar, 2015).

Cassarino and Marin (2022) insightfully locate this development within the broader process of externalising EU borders, where hotspots and screening centres serve as legal-administrative filters that selectively admit or exclude migrants from further protection pathways. This "sorting" function deepens the institutionalisation of differentiated statuses within the Union's border regime, reinforcing securitisation and legal exclusion as foundational principles (Youbi, 2023; Cassarino & Marin, 2022). The Screening Regulation, despite its stated aim to streamline and improve asylum access, replicates and perpetuates the hotspot model's underlying logic, emphasising early-stage containment and filtering over substantive protection.

This legal continuity is especially concerning given the documented human rights abuses linked to the hotspot system. The overcrowding and inhumane conditions in Greek hotspots like Moria (Human Rights Watch, 2017; *H.A. and Others v. Greece*, 2019), the extended detention practices in Hungary's transit zones (Hungarian Helsinki Committee, 2019; CJEU, 2020), and the lack of meaningful judicial oversight in Italy (*J.A. and Others v. Italy*, 2023, paras. 97-99) illustrate the consequences of these operational frameworks. By incorporating some of the same measures of the hotspot approach into EU-wide legislation, the Screening Regulation risks legitimising these problematic practices and normalising a regime where exceptional, emergency-driven measures become the standard.

In conclusion, rather than constituting a break from the past, the Screening Regulation consolidates and extends the hotspot model's structural tensions between securitisation imperatives and fundamental rights obligations. It institutionalises a migration governance paradigm that prioritises control, exclusion, and containment: measures often justified as necessary for managing "mixed flows" but which systematically undermine the EU's legal commitments to human rights and asylum protection (De la Orden Bosch, 2024; Gerbaudo, 2022). This formalisation risks embedding legal and operational ambiguities within a new regulatory shell, perpetuating a border management regime that enshrines emergency exceptionalism as a permanent feature.

The following table presents the findings of the comparative analysis.

DIMENSION	**ITALY**	**GREECE**	**HUNGARY**
TYPE OF FACILITY	Reception Centers (*CDA* then *CDSA*), Hotspots (e.g., Lampedusa).	Closed reception centers on islands (Lesvos, Chios, Samos).	Transit zones with Serbia.
LEGAL BASIS	Hotspot approach under MOUs and national decrees; later codified in law	EU-Turkey Statement; national asylum laws; emergency decrees	Transit zone regime under national law; later ruled unlawful by CJEU
DE FACTO DETENTION PRACTICES	Informal confinement before registration.	Automatic containment on islands.	Legalized detention in transit zones.
JUDICIAL OVERSIGHT	Limited and delayed; Law No. 187/2024 reduces judicial involvement.	Minimal; access to courts severely restricted.	Minimal; condemned by ECtHR and CJEU.
EU CASE LAWS	ECtHR: *J.A. et al. v. Italy* (2023) – collective expulsion	ECtHR: *H.A. and Others v. Greece* (2019) – poor conditions	CJEU (2020): unlawful detention; ECtHR rulings on access to justice
IMPACT ON FUNDAMENTAL RIGHTS	Lack of appeal, procedural opacity, risk of collective expulsion.	Documented inhumane conditions, lack of safeguards.	Violation of detention rights, unlawful confinement.
INFLUENCE ON SCREENING REGULATION	Anticipated key mechanisms (pre-asylum filtering,	Informs spatial logic (island containment) and border-first	Model for containment-based screening with

	limited remedies).	processing.	minimal legal guarantees.

In light of what has been explained, one of the central focuses of this thesis is to critically examine the impact of the Screening Regulation on asylum procedures. Specifically, the analysis now explores how the Regulation contributes to the progressive erosion of clear distinctions within migration governance, most notably between asylum seekers and irregular migrants, and assesses the consequent implications for the protection of fundamental rights, access to due process, and the broader asylum framework within the EU.

5. The erosion of the distinction between asylum seekers and irregular migrants.

5.1 The concept of third-country nationals without entry authorization.

One of the most significant consequences of Regulation (EU) 2024/1356 lies in its redefinition of how the EU conceptualises and operationalises access to asylum. At the heart of this shift is the introduction of a new legal category: *third-country nationals who do not fulfil entry conditions.* Codified within the Screening Regulation, this category presumes that individuals arriving at the EU's external borders, even those expressing an intention to seek international protection, should be treated by default as irregular migrants (Abrisketa, 2022). This presumption not only inverts the logic of protection enshrined in international refugee law but also signals a paradigmatic reorientation, from a rights-based framework centred on humanitarian need to a security-focused model rooted in exclusion and control.

Traditionally, the Common European Asylum System (CEAS) has distinguished asylum seekers from other migrant categories, affording them a legally "privileged" status grounded in vulnerability, urgency, and international legal obligations. This distinction reflects both the historical legacy of the 1951 Geneva Convention and its 1967 Protocol, and the moral imperative to protect those fleeing persecution, war, or gross human rights violations. The Convention presumes that the expression of a protection need triggers procedural and substantive safeguards, including the right to remain, access to a fair procedure, and protection against refoulement (ASGI, 2013; Vitiello, 2022).

However, the Screening Regulation disrupts this framework by prioritizing the irregular presence of third-country nationals, being physically present without fulfilling entry conditions, as the primary criterion for categorization and procedural determination. As Jakulevičienė (2024) notes, this reframing subordinates the asylum claim to an initial, *quasi*-administrative security assessment. Rather than serving as a neutral or facilitating mechanism, the screening process functions as a pre-filter: it assesses perceived admissibility, credibility, or threat, rather than protection needs per se. This inversion of priorities introduces what Rondine (2024) describes as a "functional deterrent," whereby the process itself becomes an obstacle to accessing protection.

More concretely, asylum seekers subjected to screening lose access to several key rights that traditionally accompany the lodging of an asylum application. These include: the right to remain on the territory pending the outcome of their claim, as guaranteed by Article 8 of the Asylum Procedures Directive (Directive 2013/32/EU); access to reception conditions under the Reception Conditions Directive (Directive 2013/33/EU), which ensures adequate housing, food, and healthcare; the right to legal counselling and representation, as provided for in Articles 22 and 23 of the Asylum Procedures Directive; and, crucially, access to judicial remedies, protected under Article 46 of the same Directive and Article 13 of the European Convention on Human Rights (ECHR). Instead, these rights are deferred or denied until the screening is completed. In this legal vacuum, there are few procedural safeguards against rights violations, and no clear time limit beyond the maximum seven days set for the screening, an interval that may be extended under certain circumstances, risking further erosion of safeguards.

This logic is further reflected in Recital 6 of the Screening Regulation, which defines the function of screening with regard to applicants for international protection as twofold: on the one hand, it aims to ensure they are referred to the appropriate procedure as soon as possible; on the other hand, it seeks to counter practices where some applicants may abscond after being authorised to enter the territory. This second objective implies a negative presumption: that asylum seekers are potentially deceptive, thus justifying pre-emptive containment measures. However, this raises a critical question: how can screening prevent absconding if not through some form of coercive control, including detention or severe limitations on freedom of movement? By introducing these control-oriented aims, the Regulation implicitly casts suspicion over all applicants, thereby distorting the principle of individualised assessment and undermining the humanitarian rationale of asylum procedures.

From a legal perspective, this shift represents more than a procedural innovation; it constitutes a normative erosion of asylum's foundational principles. The European Court of Human Rights (ECtHR) has repeatedly warned against conflating asylum seekers with irregular migrants, emphasising in cases such as *M.S.S. v. Belgium and Greece* (paras. 251–254, 263–264, 2011) and *Tarakhel v. Switzerland* (2014, paras. 93–104, 115–122) that such conflation can lead to inhuman or degrading treatment in violation of Article 3 of the European Convention on Human Rights. Nonetheless, the Regulation institutionalises this very conflation. As De la Orden Bosch (2024) argues, it entrenches an evidentiary burden at the border, requiring

individuals to demonstrate *prima facie* credibility before accessing even basic procedural guarantees. This shifts the burden of proof from states to individuals at their most vulnerable moment, undermining the declaratory nature of protection enshrined in international law.

Moreover, the Regulation introduces significant legal ambiguity. By applying a homogenised approach to all individuals arriving without formal entry authorisation, it generates what Youbi (2023) calls a "legal grey zone": where people are neither fully outside the legal system, nor granted the rights traditionally associated with territorial presence. This ambiguity not only challenges the coherence of EU asylum law but also places disproportionate pressure on first-entry Member States, which are tasked with implementing fast-track screenings under considerable operational and legal constraints. As De la Orden Bosch (2024) warns, this could lead to systemic rights dilution, including increased reliance on accelerated procedures, summary rejections, or informal pushbacks.

To address this normative gap, a more protective legal framework should explicitly recognise that key rights attach from the very moment an individual expresses an intention to seek asylum. These rights include immediate access to legal assistance, which ensures that applicants understand their rights and the procedures they face; access to basic reception conditions, guaranteeing adequate shelter, food, healthcare, and protection from inhumane treatment; and protection from arbitrary detention or restrictive measures, which preserves personal liberty unless strict legal criteria are met.

Derogations from these fundamental rights should not be the default or applied broadly. Instead, they should be carefully circumscribed, allowed only under exceptional and clearly defined circumstances. Any restrictions should adhere to the principle of proportionality, meaning they must be necessary, appropriate, and the least restrictive option available to achieve a legitimate aim, such as ensuring security or preventing absconding. Crucially, such derogations should be subject to prompt, independent, and effective judicial oversight, allowing individuals to challenge restrictions or detention decisions swiftly and fairly. This oversight serves as a vital safeguard against arbitrariness and abuse. Without these strict limitations and procedural guarantees, the screening process risks becoming a tool of administrative convenience that enables the systematic erosion of asylum seekers' rights.

Crucially, this reconceptualisation is facilitated by the legal fiction of "non-entry." Under this construct, individuals physically present at the EU's borders are treated as though they have

not legally entered EU territory, and thus are not entitled to the full spectrum of rights attached to presence. While this fiction may serve administrative efficiency and deterrence goals, its implications are deeply problematic. As Corcodel (2024) highlights, the fiction of non-entry allows Member States to suspend key procedural and substantive safeguards, such as legal assistance, individual assessment, or judicial oversight, thereby institutionalising a form of legal limbo. Asylum seekers caught in this framework are present, but not recognised; procedurally visible, yet legally invisible.

In summary, the creation of the category "third-country nationals without entry authorisation," combined with the application of the non-entry fiction, signifies a profound shift in EU asylum governance. This change extends beyond administrative adjustments, fundamentally altering the legal and ethical framework guiding the EU's interpretation of its international refugee obligations (Abrisketa, 2022; Jakulevičienė, 2024). Central to this development is the non-entry fiction, a legal construct that allows Member States to treat individuals physically present at their borders as if they have not officially arrived. The following section explores this fiction in detail, highlighting its significant consequences for access to protection, legal safeguards, and the principle of non-refoulement.

5.2 The legal implications of the fiction of non-entry for asylum seekers.

A fundamental prerequisite for accessing international protection has traditionally been the physical presence of the asylum seeker within the territory of a State. This requirement is closely linked to the principle of reception found in Article 6 of Regulation 343/2003 (the Dublin Regulation), which designates the Member State of first entry as responsible for processing asylum claims, barring certain exceptions such as family reunification. Under this regime, arrival at the EU's external border legally constitutes presence on State territory, triggering access to procedural and substantive rights associated with international protection (Vitiello, 2022).

International law reinforces this standard. The 1951 Geneva Convention relating to the Status of Refugees implicitly assumes territorial presence as a condition for protection, particularly through Article 33, which enshrines the principle of non-refoulement for persons found "in the territory or at the border" of a contracting State. Presence, either at or within the border, thus serves as the threshold for activating refugee protections (ASGI, 2013).

This legal foundation, anchored in the concept of territorial presence, provided asylum seekers with a relatively clear path to rights under both EU and international frameworks. However, the Screening Regulation disrupts this logic through its reliance on the legal fiction of non-entry, which formally denies entry to individuals who are, in fact, physically present at the EU's borders.

This shift risks undermining the clarity and effectiveness of access to asylum rights historically guaranteed by physical presence, raising serious concerns about compliance with both EU and international law. Although the non-entry fiction was already present in Article 43 of the Asylum Procedures Directive, where it regulates border procedures, its application was previously limited to specific contexts such as airports or transit zones. The Screening Regulation, however, extends this fiction to cover virtually all asylum seekers arriving at the external borders, as most asylum seekers enter through land borders (Apatzidou, 2023).

This expansion introduces a state of "semi-inclusion": asylum seekers exist in a paradoxical legal space where they are physically present and thus subject to national criminal or civil law, yet are denied legal entry and the corresponding rights under immigration and asylum law (Apatzidou, 2023). This creates serious normative consequences. The first is the erosion of the right to an effective remedy, a fundamental guarantee under both Article 47 of the EU Charter of Fundamental Rights and Article 46 of Directive 2013/32/EU. If asylum seekers are not formally recognized as having entered the territory, access to legal challenge mechanisms becomes uncertain, exposing them to summary procedures or informal expulsions in breach of non-refoulement obligations (ASGI, 2013; Vitiello, 2022).

Secondly, the fiction appears incompatible with key EU legal provisions. For example, Article 10 of Regulation (EU) 2024/1351 guarantees the right of asylum seekers to remain in the Member State during the procedure. Similarly, Article 6(5)(c) of the Schengen Borders Code permits derogations from entry conditions for humanitarian or international obligations. Yet the Screening Regulation undermines the application of these provisions by framing applicants as legally non-present, creating a contradictory legal regime that limits rather than expands access to protection (De la Orden Bosch, 2024; Abrisketa, 2022).

More broadly, the fiction facilitates strategic legal avoidance, allowing Member States to argue that obligations are not triggered until formal entry occurs. This legal posture risks normalizing rights-restrictive practices, such as refusal to register claims or pushbacks, by asserting that

border arrivals fall outside the scope of legal protections. However, as international jurisprudence makes clear, such strategies cannot shield States from legal responsibility. In *M.K. and Others v. Poland* (2020) and *M.A. and Others v. Lithuania* (2018), the European Court of Human Rights (ECtHR) held that States cannot deny access to asylum procedures or summarily return individuals merely by invoking a lack of formal entry. Physical control at the border is sufficient to establish jurisdiction under Article 1 of the ECHR, triggering corresponding human rights obligations.

These rulings reinforce the principle that jurisdiction is defined by effective control, not formal legal status. The fiction of non-entry may delay legal recognition, but it does not suspend or nullify binding legal norms. Where it is used to obstruct or circumvent access to protection, it is likely to violate key provisions of both the ECHR, such as Articles 3 and 13, and the EU Charter, particularly Articles 18 and 19 on the right to asylum and protection against refoulement.

The implications are particularly severe for vulnerable applicants, such as unaccompanied minors or survivors of trauma. EU law (Articles 21–25 of Directive 2013/33/EU) mandates special procedural safeguards for such individuals, yet the Screening Regulation's framework makes timely identification and support less feasible. Without legal acknowledgment of their presence, there is a serious risk that these individuals will be excluded from the very mechanisms designed to protect them.

It is fundamental to underline that the fiction of non-entry is, at most, a procedural construct, not a waiver of substantive legal obligations. Member States remain fully bound by their duties under the Geneva Convention, the ECHR, and the EU Charter. Attempts to instrumentalize the fiction to reduce legal accountability contradict the purpose of asylum law and risk entrenching practices already deemed unlawful by international courts.

Thus, while the Screening Regulation introduces the fiction of non-entry, this cannot be interpreted as a legal vacuum. Rather, Member States remain fully bound by their positive obligations to uphold fundamental rights at their borders. Any attempt to instrumentalize the non-entry fiction to bypass these obligations not only distorts the purpose of EU asylum law but also risks institutionalizing practices that have already been declared unlawful by international courts.

The next section examines how the design and implementation of the Screening Regulation increase the likelihood of breaches of the principle of non-refoulement, a core tenet of both international and EU refugee law, enshrined in Article 33 of the 1951 Geneva Convention, Article 3 ECHR, and Article 19(2) of the EU Charter of Fundamental Rights.

5.3 The risk of refoulement.

The Screening Regulation raises significant concerns in relation to the principle of non-refoulement, the principle that obliges states to assess every request for international protection in a thorough and individualised manner before proceeding with removal, to ensure that no one is returned to a place where they would face persecution, torture, or inhuman or degrading treatment. However, several structural features of the Regulation risk undermining this safeguard in both design and implementation.

One of the most problematic aspects lies in the increasing reliance on border procedures as the default pathway for handling asylum claims. While these procedures are ostensibly intended to simplify asylum processing, they often come at the expense of procedural guarantees. As Jakulevičienė (2020) observes, the screening process cannot be viewed in isolation: it is functionally and legally intertwined with border control, asylum determination, and return mechanisms. Its central objective appears to be the rapid channeling of asylum seekers, particularly as already mentioned those perceived as having "low merit" claims, into fast-track border procedures.

This shift is highly problematic for several reasons. First, border procedures inherently involve limited access to legal assistance, NGOs, and courts, particularly in remote or high-security zones. Unlike regular procedures, where external actors can more effectively monitor compliance and intervene when rights are at risk, the border environment is marked by opacity and institutional constraints (UN High Commissioner for Refugees, 2020; UNHCR, 2025). Second, the compressed timelines imposed by the Screening Regulation, often as short as five days, make it extremely difficult for applicants to gather evidence, prepare their claims, or appeal negative decisions in a meaningful way (Apatzidou, 2025).

Furthermore, under the Asylum Procedures Regulation, claims can be diverted to the border procedure on the basis of the applicant's nationality if that nationality has a low recognition rate, or if the claim is deemed clearly abusive or a threat to public order (Article 41.1-3). While

such filters are presented as efficiency measures, they undermine the obligation to conduct individual assessments and may effectively exclude legitimate claims from serious consideration. Conversely, the Regulation does not appear to create a counterbalancing mechanism for fast-tracking high-merit claims, those from applicants with a strong likelihood of protection, into the regular procedure, thus revealing an underlying bias toward deterrence over protection (Jakulevičienė, 2020).

Moreover, the lack of procedural safeguards during the screening stage compounds these risks. The Screening Regulation does not provide for a right to an effective remedy at this early stage. Any inconsistencies or misidentifications, such as errors in determining nationality, must be noted by the applicant themselves and are only reviewable later, during the asylum or return procedure. As Guild (2024) warns, this is highly problematic, as the authorities conducting the screening may differ from those handling the subsequent asylum claim or return decision, making it procedurally difficult to challenge or correct earlier mistakes. In practice, issues identified during the screening phase may remain unaddressed until judicial review is initiated, often under highly restrictive timelines and with limited access to legal assistance.

This structural shortcoming is explicitly confirmed by Article 17(3) of the Screening Regulation, which provides that the information collected and registered in the screening form shall be recorded in a way that is amenable to administrative or judicial review during subsequent procedures. While this may suggest some form of retrospective oversight, it actually confirms the absence of any direct or immediate appeal mechanism during the screening itself. In other words, the Regulation institutionalizes the idea that errors made during the screening process cannot be challenged or corrected in real time, but must instead await future proceedings, by which point procedural damage may already be irreversible. As highlighted by Corcodel (2024), being identified as "returnable" during the screening may depend on the perceived likelihood of successfully contesting a return decision, creating a presumption against protection from the outset. Moreover, when the debriefing results in referral to the asylum border procedure, applicants are more likely to receive rejections, given that such fast-track procedures are premised on the assumption that the individuals concerned are "suspected irregular migrants." This approach, therefore, undermines both the principle of legal certainty and the applicant's ability to effectively defend their rights from the very beginning of the process.

In conclusion, the Screening Regulation establishes a procedural framework that significantly restricts the rights and safeguards traditionally provided to asylum seekers at the EU's external borders. Its reliance on opaque eligibility criteria, limited access to procedural remedies, and accelerated timelines heightens the risk of systemic violations of the principle of non-refoulement. These findings underscore enduring structural challenges within EU migration governance and demonstrate that, despite its reformist discourse, the Regulation ultimately consolidates a securitized and crisis-driven paradigm that undermines legal certainty and diminishes fundamental rights protections within the EU asylum framework.

Extending this discussion, the next chapter turns to the Regulation's impact on personal liberty. It critically examines how the operational logic of the screening process gives rise to forms of geographical confinement that may amount to *de facto* detention, without a clear legal basis or adequate procedural safeguards. These practices raise serious concerns regarding compliance with the fundamental right to liberty, as protected under both the EU Charter of Fundamental Rights and the European Convention on Human Rights. By examining the legal ambiguities surrounding these measures, the chapter investigates how detention-like conditions are being normalized within the screening framework and their broader impact on the rights and freedoms of individuals subjected to these measures.

6. Personal freedom and detention in the screening process: geographical confinement and legal ambiguities.

6.1 Unclear definitions of "appropriate" screening locations: potential for systemic arbitrary detention.

One of the most contentious aspects of the Screening Regulation lies in its ambiguous approach to personal liberty during the screening process. Although the Regulation does not explicitly establish a systematic detention regime, it nonetheless creates a legal framework that enables, and potentially normalizes, the deprivation of liberty, particularly when interpreted in conjunction with the legal fiction of non-entry (De la Orden Bosch, 2024). The Regulation's overarching structure, aimed at preventing formal entry into the territory during screening (Article 6), effectively imposes both spatial and legal confinement on third-country nationals. It obliges Member States to "lay down in their national law provisions to ensure that persons remain available to the authorities responsible for carrying out the screening," which must occur "in the locations as referred to in Article 8," with the express aim of preventing absconding and addressing perceived threats to internal security (Article 6).

However, Article 8 fails to clearly define what constitutes such screening locations, referring only to "any adequate and appropriate location designated by each Member State." While the provision generally envisions locations near the external borders, it also allows screening to occur elsewhere within the national territory, without any additional normative criteria. This striking vagueness grants Member States wide discretion, raising serious concerns about legal certainty and the potential for rights-limiting practices. As Rondine (2024) notes, this lack of clarity gives rise to three interrelated problems: the extent of restrictions imposed on individuals, the applicable legal framework governing those restrictions, and the legal status of the site where screening takes place.

Critically, the final version of the Regulation ignored several recommendations aimed at clarifying this ambiguity. In its 2020 comments, the European Council on Refugees and Exiles (ECRE) warned that permitting screening in vaguely defined "appropriate" places, especially outside formal border infrastructure, would allow for excessive discretion and heighten the risk of abuse. ECRE (2020) thus recommended that screening be conducted exclusively in officially recognised facilities within Member States to guarantee a baseline of safeguards. These recommendations, however, were not reflected in the final text.

Given the Regulation's enduring vagueness, the term "appropriate" screening locations should be interpreted at the very least in line with the more detailed guidance provided in ECRE's 2025 comments. These suggest that screening should primarily take place at official border crossing points, rather than in remote or *ad hoc* sites. Facilities should ensure adequate living conditions, with attention to gender sensitivity, child protection, and the needs of vulnerable people. Furthermore, screening centres should not be located in areas where access to legal counsel, independent organisations, or oversight mechanisms is severely limited, as this would compromise procedural guarantees and deepen the isolation of affected individuals. Similarly, for screenings conducted within the territory, placing facilities near borders or in hard-to-reach areas should be explicitly avoided. In the absence of such specifications, the broad discretion granted to Member States heightens the risk that screening will occur in restrictive or legally ambiguous environments, including *de facto* detention facilities lacking proper safeguards.

As Brandl (2024) highlights, the central legal question is whether the obligations imposed during screening amount to a restriction on freedom of movement or a deprivation of personal liberty. This distinction is crucial, as only the latter triggers the full range of procedural and substantive safeguards under EU and international human rights law. Yet the Regulation provides insufficient normative content to prevent one from slipping into the other. Article 8's lack of clear guidance thus constitutes a structural weakness that could lead to the institutionalisation of confinement without accountability. And Civil society organisations and legal scholars (PICUM, 2022, 2024; ECRE, 2022; Grześkowiak, 2024; Brandl, 2024) have repeatedly warned that, in practice, the Regulation's provisions are likely to result in d*e facto* detention

The boundary between restricted movement and detention becomes increasingly blurred, particularly when territorial access is formally denied through the legal fiction of non-entry (Brandl, 2024). This opens the door to the proliferation of remote spaces of confinement where the full set of rights guaranteed under EU law is either delayed or rendered inaccessible. Such spaces echo what Campesi (2020) has termed "anomalous zones": legal grey areas in which fundamental rights are partially suspended and where the formal denial of entry is used to justify withholding protections that would otherwise apply under EU and international law.

Within this paradigm, spatial control becomes a key instrument of migration management. By manipulating both the physical location and legal status of screening facilities, states can reassert sovereign discretion over mobility while maintaining a formal commitment to the rule

of law (Rondine, 2024). This strategy reflects broader trends in the securitisation and externalisation of migration governance: by controlling where and how entry and legal processes occur, states prioritize sovereignty at the expense of procedural fairness and rights protection. The remoteness of such zones further obstructs access to legal aid, independent monitoring, and basic services, deepening the isolation and legal precarity of third-country nationals. In this sense, the Screening Regulation reinforces the logic of confinement that characterised earlier tools of border governance, notably the hotspot approach and Hungarian transit zones (Campesi, 2020).

Finally, although the Regulation does not require Member States to use existing hotspot facilities, it does permit screening to occur "in existing infrastructures" (recital 10). The European Commission's implementation plan further encourages Member States to adapt or expand these structures (SWD(2024) 251 final, p. 13), many of which have already faced severe criticism for lacking legal safeguards. As Tazzioli and Garelli (2018) documented, hotspots, particularly on the Greek islands and in southern Italy, functioned as *de facto* detention centres, isolating individuals in remote areas with limited access to legal aid and oversight. The Regulation's endorsement of such practices through continuity in infrastructure signals not a break from, but a deepening of, problematic past policies. It normalises the use of remote, restrictive, and legally ambiguous zones as a routine feature of EU migration control.

This legal and spatial indeterminacy underscores a broader and more troubling concern: while Recital 11 frames detention as a measure of last resort, it ultimately fails to articulate a clear and consistent legal regime governing the conditions under which deprivation of liberty may occur during the screening process. In this context, it becomes essential to examine more closely the nature of detention practices likely to emerge under the Screening Regulation and the extent to which existing legal safeguards are capable of constraining the erosion of personal liberty within this evolving framework.

6.2 Detention conditions and the limits of legal safeguards.

As just mentioned, Screening Regulation does not lay down a detailed or explicit legal framework governing the use of detention. Rather, Recital 11 provides limited guidance, stating that detention may be imposed by Member States, where necessary and based on an individual assessment, insofar as less coercive alternative measures cannot be effectively applied. It further stipulates that detention should constitute a measure of last resort, must comply with

the principles of necessity and proportionality, and should be subject to an effective remedy in accordance with national, Union, and international law. Regarding the detention conditions, the legal framework diverges depending on whether the third-country national (TCN) has applied for international protection. In cases where an application for protection has been lodged, the safeguards set out in the new Reception Conditions Directive (Directive (EU) 2024/1346) apply. Conversely, for TCNs who have not applied for protection, detention is governed by the Return Directive (Directive 2008/115/EC).

For TCNs applying for international protection, Article 10 of the Reception Conditions Directive becomes relevant. This provision stipulates that detention may only be imposed on one or more of the grounds listed in paragraph 4, such as for identification purposes: thus aligning closely with the objectives of the screening procedure. Importantly, the Directive explicitly prohibits detention solely on the basis of an asylum application or the applicant's nationality, and it emphasises that detention must not be punitive in nature. Furthermore, it affirms the principles of detention as a last resort and of individual assessment prior to any deprivation of liberty.

However, doctrine (De la Orden Bosch, 2024; Cornelisse, 2023) has pointed out that the revised Reception Conditions Directive broadens the circumstances under which the "risk of absconding" may justify detention, in comparison with its predecessor. Recital 28 of the new Directive establishes that asylum seekers are required to reside in a designated location, and any deviation from this obligation can be interpreted as indicative of a risk of absconding. Additionally, Article 2(11) permits Member States to define the concept of risk of absconding in national law. The notion of "absconding" is defined broadly as a failure to remain available to the authorities, for instance, by leaving the territory without authorisation.

Under the legal fiction of non-entry, individuals who apply for international protection at the border are considered not to have officially entered the territory. Consequently, they are systematically assigned to a specific place of residence, typically a transit zone or border facility (De Bruycker, 2024). This assignment results in a de facto restriction on their freedom of movement, as they are required to remain within the designated area throughout the processing of their application. Although this confinement is not formally classified as detention, it effectively limits their ability to move freely, thereby restricting access to legal counsel, social services, and broader community support. In practice, this spatial confinement

imposes significant limitations on personal liberty, functioning similarly to detention despite the absence of explicit legal recognition as such.

Concerning legal safeguards, Article 11(2) of the Reception Conditions Directive (Directive 2013/33/EU) requires that detention be ordered through a written decision, subject to prompt judicial review. A court must assess the legality of the detention within 15 days, extendable to a maximum of 21 days. If no judgment is issued within this period, the applicant must be immediately released (Article 11(3)). Thereafter, detention must be reviewed at reasonable intervals by a judicial authority. Should the detention be found unlawful, release must occur without delay.

Furthermore, Articles 29(3)-(5) RCD guarantee access to free legal assistance and representation during judicial review of detention. However, under the Screening Regulation, Articles 8(6) and 11(1)(c) only state that organisations and individuals offering advice and consultation should be granted effective access to TCNs during the screening process. While legal advice or counselling is not explicitly mentioned, it is also not explicitly excluded, creating ambiguity around the extent of procedural guarantees at this critical stage (Mikolajczyk, 2024).

With regard to third-country nationals (TCNs) who do not apply for international protection, Article 8(7) of the Screening Regulation specifies that the Return Directive (Directive 2008/115/EC) governs their detention during screening. However, this application is significantly weakened by the border-related exclusion clause in Article 2(2)(a) of the Return Directive. As already highlighted, this provision allows Member States to exclude from the scope of the Directive individuals apprehended at the border or in connection with irregular border crossing, where they have not subsequently obtained authorisation to remain.

This exclusion has serious implications: it removes the applicability of Article 15, the key provision regulating detention under the Return Directive. Article 15 establishes a strict legal framework: detention must be a measure of last resort, limited to situations where there is a risk of absconding or obstruction of return, must be ordered in writing, and subject to judicial review. Where Article 2(2)(a) is invoked, these safeguards do not apply, raising significant concerns about unchecked deprivation of liberty in border-zone detentions (Rondine, 2024).

As previously discussed, the increasing use of border procedures under the EU Pact on Migration and Asylum renders it highly likely that a large number of return cases will fall into

this “border case” category, thus circumventing the Directive’s protections. This is especially concerning given the jurisprudence of the ECtHR, which has stressed in *Khlaifia and Others v. Italy* (paras. 92, 102–103, 106, 2016) that even in border contexts, detention must conform to the standards of Article 5 ECHR: it must be lawful, based on clear legal grounds, and subject to effective judicial control.

Nevertheless, Article 4(4)(a) of the Return Directive affirms that, even in situations falling under Article 2(2)(a), certain core rights must still be guaranteed. In particular, Member States must ensure treatment no less favourable than that provided in Articles 16 and 17 of the Directive. Article 16 mandates that detention be carried out in specialised facilities, and that detainees must be given the opportunity to contact legal counsel. Article 17 establishes specific protections for detained minors and families, including the obligation to take the best interests of the child into account and to use detention only as a measure of last resort and for the shortest appropriate period.

However, the practical enforceability of these minimum standards in border facilities remains questionable. The ECtHR in *M.S.S. v. Belgium and Greece* (paras. 232–233, 2011) and *Rahimi v. Greece* (paras. 72–79, 81, 84–87, 2011) found that conditions of detention and lack of procedural safeguards in Greek border zones violated Article 3 (prohibition of inhuman or degrading treatment) and Article 5 (right to liberty and security) of the Convention. These rulings reinforce the concern that the fiction of non-entry and the widespread application of Article 2(2)(a) can facilitate informal and arbitrary detention practices, especially when coupled with limited legal assistance and oversight.

In conclusion, although the Screening Regulation does not formally classify individuals as detained, all third-country nationals arriving irregularly are required to remain in designated border zones or transit facilities outside EU territory. This effectively confines them to specific locations with severely restricted freedom of movement, often under unclear and inconsistent conditions. Because they cannot leave these areas during the screening process, their liberty is significantly curtailed in practice. This spatial confinement, combined with limited access to legal assistance and essential services, could lead to *de facto* detention, despite the absence of explicit legal recognition. Flexible interpretations of the “risk of absconding” and the normalization of border procedures risk making deprivation of liberty systemic rather than exceptional.

Meanwhile, procedural guarantees under EU secondary law remain diluted and ambiguous in border contexts. This growing disparity between legal commitments and operational practice raises serious concerns under fundamental rights law, particularly Article 5 of the European Convention on Human Rights, which protects the right to liberty. The following section critically examines these tensions by analyzing the Screening Regulation, considering relevant case law from the European Court of Human Rights and the Court of Justice of the European Union.

6.3 Between restriction and deprivation: the Screening Regulation in light of Strasbourg and Luxembourg case law.

As noted earlier, a key point of legal contention surrounding the screening procedure is whether the "holding" of individuals amounts to a deprivation of liberty under Article 5 of the European Convention on Human Rights (ECHR) or merely constitutes a restriction on freedom of movement. The Regulation remains notably silent on this distinction, leaving significant interpretive discretion and legal uncertainty. It is therefore foreseeable that national and international courts will play a central role in clarifying the nature and legality of such measures.

As De La Orden Bosch (2024) observes, the possibility for migrants to be "kept" at the border, without any clear legal definition of the conditions or nature of such confinement, may well amount to a deprivation of liberty, in line with the threshold established by the Court of Justice of the European Union (CJEU) in *FMS and Others v. Hungary* (2020, para. 223). According to the Court, detention occurs when a coercive measure deprives the applicant of their freedom of movement and isolates them from the general population by requiring them to remain permanently within a restricted and closed perimeter.

This ambiguity reflects a broader pattern in EU migration governance, where operational measures often advance ahead of legal clarity on fundamental rights safeguards. Indeed, both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have already been called upon to determine whether restrictions on movement in border zones or transit zones constitute deprivations of liberty. In light of their established jurisprudence, it is very likely that this trend will continue.

In *Amuur v. France* (para.49, 1996), the ECtHR concluded that the assertion that asylum seekers in a French airport transit zone "could leave France at any time" was purely

hypothetical; this, it held, amounted to a deprivation of liberty. Subsequent caselaw reinforced this interpretation, underscoring that effective freedom depends on the readiness of another state to admit the person concerned.

The Grand Chamber's judgment in *Ilias and Ahmed v. Hungary* (paras. 210–249, 2019) marked a rare divergence. It held that the applicants in a Hungarian transit camp between Serbia and Hungary were not deprived of liberty, as they could leave toward Serbia. However, the Court simultaneously found that returning them to Hungary would breach Article 3 due to the unsafe nature of Serbia, a country unwilling to accept them.

Not long afterwards, the ECtHR reverted to its established stance. In *R.R. v. Hungary* (paras. 74–87,2021) and *H.M. and Others v. Hungary* (paras. 29–32, 2022) the Court reaffirmed that obliging individuals to remain in closed border facilities constitutes an unlawful deprivation of liberty, underscoring that restrictions on movement of this severity meet the threshold of detention.

In parallel, the CJEU's decision in *FMS and FNZ* v. Hungary (para.231, 2020) further solidified this legal trajectory. Analyzing conditions in a transit zone, the Court determined that a permanent obligation to stay in a confined and sealed area, without legal means of exit, amounts to "detention" under EU directives. Distinguishing clearly from *Ilias and Ahmed v. Hungary* (para.241, 2019), the CJEU emphasized that in this case individuals truly could not leave voluntarily in any direction.

The jurisprudence just analysed affirm that the formal classification of a measure as a "restriction" does not determine its legal character. What matters is the individual's lived reality, whether they can genuinely leave the location, whether onward or return travel is feasible, and the specific conditions and duration of their confinement. In this light, the distinction between restriction and deprivation of liberty should not rest on state characterisation alone, but instead be guided by the cumulative assessment criteria established in ECtHR jurisprudence: the type, duration, effects, and manner of implementation of the measure.

Even where confinement does not amount to detention, international legal standards remain applicable. Under instruments such as the International Covenant on Civil and Political Rights (ICCPR), individuals lawfully present on a state's territory are entitled to freedom of movement. Restrictions on this right are permissible only if they are (1) clearly defined by law

(legality), (2) serve a legitimate aim (e.g. national security or public order), and (3) are necessary and proportionate to achieving that aim. Applying these criteria to screening facilities would help ensure that any restrictions imposed are not excessive or arbitrary.

Moreover, the Regulation grants Member States significant discretion in determining both the location and modalities of the screening process, including whether and how confinement occurs. This institutional design enables a governance model in which operational expediency may take precedence over individual rights, and where effective judicial oversight risks becoming fragmented, delayed, or absent.

In this sense, the Regulation contributes to what scholars (Carrera et al., 2016; Cornelisse, 2023) have termed the *delawification* of the EU's Area of Freedom, Security and Justice: a process in which legal safeguards are gradually undermined through mechanisms such as the legal fiction of non-entry, physical confinement at borders, and expansive discretion conferred on national authorities. These practices normalise exceptional restrictions on liberty under the appearance of procedural neutrality, thereby diluting the protective function of EU and international human rights law at the Union's external frontiers.

In conclusion, the Screening Regulation substantially expands the potential for both formal and *de facto* detention, embedding these within its legal and operational architecture through vague definitions and broad discretionary powers. This framework reflects and institutionalises practices already observed in various EU border zones, particularly under the hotspot approach and in Hungary's closed transit zones, where confinement often amounted to detention in all but name. A wide range of actors, including scholars, international organisations, and NGOs (Carrera et al., 2016; Council of Europe Commissioner for Human Rights, 2018; Amnesty International, 2020), have long warned that such provisions risk entrenching a detention regime masked by legal ambiguity and a lack of effective oversight.

In this context, the independent monitoring mechanism introduced under Article 10 of the Screening Regulation emerges as the only substantive new safeguard. Yet, its ability to ensure meaningful compliance with fundamental rights remains open to question. The next chapter critically examines whether this mechanism can effectively mitigate the structural risks of arbitrary or *de facto* detention embedded in the Regulation's design.

7. Assessing the fundamental rights protection mechanism introduced by the Regulation.

As previously discussed, Article 10 of the Screening Regulation provides for the establishment of an Independent Monitoring Mechanism (IMM) to oversee compliance with fundamental rights during the screening process. Before examining the main features of this mechanism and its interaction with existing national and supranational monitoring frameworks, it is necessary to contextualise its development within the broader negotiation process that shaped the Regulation. This background is important to critically assess both the scope and the limitations of the final provision.

As Molnar (2024) observes, one of the most divisive issues during the negotiations of the Pact on Migration and Asylum was precisely the monitoring of fundamental rights. While Commissioner Johansson initially announced that the IMM would serve to prevent pushbacks at the EU's external borders, a key objective highlighted in her 2020 speech launching the Pact, the final version of the mechanism seems unlikely to achieve this objective. Instead, the IMM as adopted reflects a carefully balanced compromise between competing institutional actors: the Council, the European Parliament, and the Member States. Notably, while the European Commission's original proposal included relatively strong safeguards, the Council advocated for minimal provisions, whereas the Parliament pushed for an expanded mandate covering the full range of border activities (Molnar, 2024).

As Lang (2024) argues, the narrow mandate of the final mechanism also reveals a deeper tension between the Commission's stated ambition to ensure fundamental rights compliance at the borders, and the Member States' resistance to enhanced oversight of their border enforcement and surveillance practices.

This shift is also evident when comparing the 2022 and 2024 versions of the Fundamental Rights Agency's (FRA) guidance on the IMM. While it is significant, and ultimately positive, that the Regulation incorporates elements of the FRA's guidance, the final text departs in important ways from the Agency's initial recommendations. In its 2022 guidance, the FRA advocated for a comprehensive monitoring mandate encompassing all border procedures, including surveillance and checks. However, as will be further explained in details, the 2024 revision introduces considerable discretion for Member States, stating that they *may* extend the

mechanism to such activities "where appropriate and advisable considering the national circumstances and operational situation," thus weakening the original intent.

It is also important to note that fundamental rights monitoring at the EU's external borders is not a novel development. Various mechanisms already exist at both national and EU levels. Article 10 explicitly encourages Member States to either build upon existing mechanisms or to ensure their effective cooperation with the new IMM. A meaningful evaluation of the IMM's potential therefore requires a careful analysis of how it aligns with, complements, or diverges from these pre-existing monitoring frameworks.

7.1 The interaction between the independent monitoring mechanism and existing oversight bodies.

7.1.1 The role of national and European monitoring bodies in migration governance.

Over the past two decades, a variety of monitoring mechanisms both international and EU-based, have already been operating in this space, illustrating that the new Independent Monitoring Mechanism (IMM) is more an evolution than a revolution.

Historically, the United Nations High Commissioner for Refugees (UNHCR) has played a pioneering role in promoting border monitoring frameworks. As early as the 2000s, UNHCR facilitated the creation of tripartite arrangements involving border guards and civil society organisations in several Central and Eastern European states (Molnar, 2024). These mechanisms were particularly significant at a time when those countries were preparing to join the EU, and they aimed to ensure border practices conformed to international standards.

In parallel, the Office of the UN High Commissioner for Human Rights (OHCHR) has maintained an active role in monitoring through its field presence, offering additional oversight based on international human rights law. Similarly, more formalised monitoring bodies were established through the 2002 Optional Protocol to the Convention against Torture (OPCAT), which introduced National Preventive Mechanisms (NPMs) tasked with conducting independent visits to places of detention, including border facilities, in order to prevent mistreatment.

At the EU level, there are also various relevant precedents for fundamental rights oversight mechanisms. Notably, Article 8(6) of the Return Directive already obliges Member States to ensure monitoring of fundamental rights during forced return operations. In addition, the

European Border and Coast Guard Agency (Frontex) has developed its own monitoring structure under the supervision of the Fundamental Rights Officer. Furthermore, fundamental rights considerations are increasingly integrated into other monitoring tools within the EU's migration and border management framework. The revised Schengen Evaluation Mechanism, operational since 2023, explicitly includes the assessment of compliance with fundamental rights in the national implementation of Schengen rules. Likewise, Frontex's vulnerability assessments, which evaluate Member States' capacity to manage their borders, now incorporate human rights dimensions, signalling a shift toward more holistic forms of border governance (Molnar, 2024).

In light of this complex web of existing mechanisms, the IMM introduced by the Screening Regulation should not be seen in isolation. Rather, it should be understood in continuity with, and ideally complementing, the existing multi-level architecture of rights monitoring. Whether it will succeed in doing so, however, remains contingent on its mandate, operational independence, and the political will of Member States to engage meaningfully with oversight.

Moreover, the relationship between the new Independent Monitoring Mechanism (IMM) and existing oversight structures must be understood in light of the Screening Regulation's explicit reference to international standards: most notably, the Paris Principles and the Venice Principles. These frameworks set out the normative foundations for National Human Rights Institutions (NHRIs) and Ombudsperson institutions, suggesting that the IMM should align, at least in part, with their mandates and operational standards.

This normative anchoring makes it especially relevant to begin the analysis with these two categories of mechanisms, before turning to other relevant structures such as the National Preventive Mechanisms (NPMs) established under the Optional Protocol to the Convention against Torture (OPCAT), as well as EU-level instruments like the Schengen Evaluation Monitoring Mechanism (SEMM, introduced in 2022), and the fundamental rights monitoring roles within Frontex and the recently reformed European Union Agency for Asylum (EUAA).

7.1.2 NHRIs, Ombudsperson institutions and NPMs: frameworks for Independent Monitoring.

Starting from the National Human Rights Institutions (NHRIs), the UN has defined them as «a body which is established by a Government under the constitution, or by law or decree, the

functions of which are specifically designed in terms of the promotion and protection of human rights» (Council of Europe, Parliamentary Assembly, 2015). Their importance is relevant for different reasons but the first one is that they are bound to one of the new IMM standards, namely the Paris Principles. These refer to a set of criteria for evaluating the independence of the NHRIs from governments and their effectiveness in promoting and protecting human rights (Porchia, 2022). The The Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC) of NHRIs evaluate the compliance of the various NHRIs with the Paris Principle, the process of evaluation concludes with the assignment of a "mark", NHRIs can get A-, B-, C- status. It must be pointed out that in the EU 11 of the 27 Member States have NHRISs that don't get an A- status, and first arrival States such as Italy and Malta do not have a NHRIs at all.

A Paris Principles-compliant NHRI can carry out national inquiries even without an explicitly defined "inquiry power," drawing on its broader investigatory functions. While the Paris Principles do not directly mention inquiry powers, they establish the foundational requirements for such activities: the NHRI's ability to independently examine any issue within its mandate, hear individuals, and access relevant evidence (Porchia, 2022). Additionally, compliant NHRIs can engage with international and regional human rights bodies and provide training to national actors, including border authorities, on their human rights responsibilities. Some NHRIs also have the mandate to receive and handle individual complaints, including from migrants who allege human rights violations. In doing so, they may function as *quasi*-judicial bodies: investigating cases, hearing testimonies, and issuing formal conclusions or recommendations to the relevant authorities (Porchia, 2022). While not all NHRIs have the authority to bring legal action on behalf of victims, many offer various forms of support, from basic legal guidance to more substantial assistance such as legal aid, financial support for legal representation, or referrals to pro bono lawyers. Given these functions, the active involvement of NHRIs in the Independent Monitoring Mechanism (IMM) should be strongly encouraged. Their established mandate, independence, and capacity to address rights violations position them as key actors in ensuring the IMM aligns with the Paris Principles.

While NHRIs are well-positioned to contribute meaningfully to the Independent Monitoring Mechanism (IMM), several persistent challenges limit their effectiveness and must be acknowledged. A primary concern is maintaining an appropriate distance from government institutions. National inquiries often provoke resistance or outright hostility from state

authorities, diminishing the political traction of NHRI findings and contributing to the typically incremental nature of their impact (Porchia, 2022).

Another major constraint lies in financial and operational independence (Porchia, 2022). While the Paris Principles call for NHRIs to be autonomous from state interference, including in administrative and budgetary matters, the reality is that most NHRIs are state-funded. This dependence poses a structural risk to their independence and long-term sustainability, as their operational viability remains tied to continued state support.

Given these limitations, it is essential that their participation is accompanied by sufficient resources, clear mandates, and safeguards to ensure their continued independence and effectiveness.

Turning now to the Ombudsman Institutions, they are present in the majority of MS institutional frameworks, while their mandate and scope can differ from one country to another (Porchia, 2022). The first Ombudsman institution was established in Sweden in 1809, and since then the institution has been evolving on specific needs of the country. Its classical definition is "an office provided by the constitution or by the action of the Legislature or Parliament and headed by an independent high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his [or her] own motion and who has the power to investigate, recommend corrective action, and issue reports" (Ombudsman Committee, 1974).

The Council of Europe has actively promoted the development of Ombudsman institutions, culminating in the 2019 adoption of the Venice Principles by the Venice Commission, analogous to the Paris Principles for National Human Rights Institutions (NHRIs). They emphasize essential values including independence, impartiality, transparency, and fairness, alongside the necessity of adequate resources and financial autonomy. Principle 15 guarantees that all individuals and legal entities, including NGOs, foreigners, and stateless persons, enjoy free and unhindered access to submit complaints to the Ombudsman.

While not all Ombudsman institutions possess an explicit human rights mandate, many, particularly those designated as human rights Ombudsmen, are legally empowered to protect and promote human rights (Porchia, 2022). Within the European Union, most Ombudsman bodies apply human rights standards and are formally authorized to receive and investigate

complaints concerning fundamental rights violations by public authorities, notably in areas such as border control, surveillance, and expulsion practices.

Integrating Ombudsman institutions into the Independent Monitoring Mechanism (IMM) could enhance its independence, legitimacy, and effectiveness, given their experience in handling complaints and monitoring public authorities. Their alignment with the Venice Principles and human rights standards makes them valuable actors in safeguarding fundamental rights during the screening process.

However, structural and political limitations must be considered. Many Ombudsman institutions lack binding powers and rely on non-enforceable recommendations, weakening their capacity to act effectively. Moreover, in some Member States, their independence is increasingly challenged, particularly in politically sensitive areas like migration. Without adequate safeguards, such as legal authority, resources, and protection from political interference, their role in the IMM risks being symbolic rather than substantive.

To conclude the overview of national-level institutions, the National Preventive Mechanisms (NPMs), established under the 2002 Optional Protocol to the United Nations Convention against Torture (OPCAT), are particularly relevant to the Independent Monitoring Mechanism (IMM). NPMs serve as the primary reference point for monitoring detention conditions, a core area in which the IMM will have to ensure compliance with both national and international standards and obligations.

National Preventive Mechanisms (NPMs), established under the OPCAT, aim to protect individuals deprived of their liberty from torture and ill-treatment. Their mandate, grounded in constitutional or legislative frameworks, must align with the Paris Principles to ensure functional, operational, and financial independence. However, this independence is context-dependent and not solely the responsibility of States, as the Subcommittee on Prevention of Torture (SPT) also plays a key oversight role. According to the United Nations (2006), States must guarantee NPMs unrestricted access to all places of detention within their jurisdiction and allow them to conduct visits independently and as frequently as they deem necessary.

In countries like Greece and Italy, NPMs have increasingly focused on immigration detention facilities and hotspots, publishing detailed reports on conditions and compliance (Porchia, 2022). In light of their established mandate and international legal standards, NPMs are well positioned to play a crucial complementary role alongside the future Independent Monitoring

Mechanism (IMM). Given that the screening process raises significant concerns about deprivation of liberty, the OPCAT framework clearly affirms that such detention sites, including at borders and in extraterritorial zones, fall within the NPMs' monitoring remit.

The European Court of Human Rights (Amour v France, 1996 para 64) and article 29 of the Vienna Convention on the Law of the Treaties (1969) both reaffirm that human rights obligations apply across a state's entire territory, regardless of the legal framing of specific zones. As detention under screening, border, and return procedures is likely to occur in the same facilities, the IMM must operate in a way that reinforces rather than duplicates or undermines the independent functioning of NPMs (Porchia, 2022). Crucially, the IMM's implementation should preserve the full autonomy of NPMs, allowing them to continue conducting unannounced visits and monitoring all places of deprivation of liberty, in accordance with their OPCAT mandate.

7.1.3 The new IMM and the EU-Level Institutional oversight mechanisms.

When examining the EU-level institutional framework for fundamental rights oversight, particular attention should be paid to the Schengen Evaluation and Monitoring Mechanism (SEMM), which was revised by a new Regulation adopted in June 2022. This reform was ostensibly introduced to enhance the assessment of Member States' compliance with fundamental rights obligations within the Schengen area. According to the European Commission, the updated SEMM was intended to strengthen the monitoring of fundamental rights, reflecting growing concerns over rights violations at the EU's external borders (FRA, 2020).

The revised SEMM does provide the Commission with the possibility of incorporating findings from external oversight mechanisms, including national independent monitoring mechanisms such as those established under Article 10 of the Screening Regulation (Porchia, 2022). The information collected by these mechanisms may inform the planning and execution of evaluation activities under the SEMM framework. Notably, this includes the potential for unannounced on-site visits where there are credible indications that a Member State is seriously neglecting its obligations under the Schengen acquis.

While this linkage theoretically enhances coordination between national and EU-level monitoring instruments, its practical impact remains uncertain, particularly in the absence of stronger enforcement provisions or mandatory follow-up on fundamental rights breaches.

Moreover, the Screening Regulation explicitly clarifies that the activities of the Independent Monitoring Mechanism (IMM) are to be carried out without prejudice to existing oversight frameworks. These include the work of just mentioned SEMM, the Fundamental Rights Officer and the pool of fundamental rights monitors established under the European Border and Coast Guard (Frontex) Regulation, and the mechanism operated by the EU Agency for Asylum to oversee the operational and technical implementation of the Common European Asylum System (CEAS).

Moreover, looking at the monitoring mechanisms within Frontex, it is essential to start from the highly controversial nature of the Agency's operations. Persistent allegations of human rights violations in the context of Frontex-supported border activities, well-documented by NGOs (Human Rights Watch, 2022), international organisations (Council of Europe Commissioner for Human Rights, 2023), and investigative journalists, have raised serious concerns about the Agency's accountability and compliance with EU fundamental rights standards.

In response to mounting criticism, the 2011 revision of the Frontex Regulation introduced the position of a Fundamental Rights Officer (FRO) and established a Consultative Forum on Fundamental Rights to enhance oversight. However, these measures proved insufficient in curbing fundamental rights abuses (Porchia, 2022). Reports of pushbacks and ill-treatment, particularly at the EU's external borders, continued unabated (Fink, 2017). Recognising these ongoing failures, the 2019 EBCG Regulation further reformed the Agency by introducing a dedicated corps of Fundamental Rights Monitors tasked with overseeing operations on the ground.

Despite these developments, concerns remain regarding the effectiveness and independence of Frontex's internal monitoring structures. The structural tension between the Agency's dual mandate, to support Member States operationally and to monitor their compliance with fundamental rights, continues to undermine the credibility of its oversight mechanisms.

Establishing a functional relationship between the Independent Monitoring Mechanism (IMM) and the Fundamental Rights Monitors within Frontex could offer a promising step toward addressing persistent accountability gaps. On one hand, the IMM, if genuinely independent and capable of handling complaints impartially, could provide Frontex's Fundamental Rights Officer with a credible, external body to which complaints related to the screening phase might

be referred. This would enhance the complaint mechanism's effectiveness, particularly in national contexts where no adequate fundamental rights bodies currently exist.

On the other hand, the IMM's presence could serve as a counterbalance to Frontex's structural tensions by ensuring that any actor involved in the screening process, including EU Agencies, can be scrutinised when implicated in rights violations. While the Regulation does not explicitly extend the IMM's mandate to include oversight of EU agencies during their operational support, its independent role could nonetheless help close accountability loopholes. For this potential to be realised, however, meaningful cooperation between the IMM and EU-level monitoring actors would be essential, both in practice and through formalised procedural links.

A further recent development at the EU level that completes the institutional landscape of fundamental rights oversight is the transformation of the European Asylum Support Office (EASO) into the European Union Agency for Asylum (EUAA), following the adoption of Regulation (EU) 2021/2303. This change marks the first concrete implementation of the European Commission's broader agenda to reform the Common European Asylum System (CEAS). In light of this analysis, it has to be highlighted the novelty of the appointment of a Fundamental Rights Officer (FRO), who reports directly to the EUAA's Management Board. The FRO is responsible for designing and overseeing the implementation of the Agency's Fundamental Rights Strategy, which sets out key principles such as legality, equality, transparency, and accountability.

In parallel, the agency has also established a complaints mechanism intended to provide redress for individuals who consider their fundamental rights to have been violated during EUAA operations (Porchia, 2022). The mechanism is open to complaints concerning both EUAA personnel and national experts participating in asylum support teams. While the FRO is responsible for determining the admissibility of complaints and ensuring appropriate follow-up, a significant limitation lies in the fact that complaints involving Member State staff must be forwarded to the respective national authorities. In such cases, it is up to the Member States to pursue any disciplinary or corrective measures. As noted earlier in relation to Frontex, the model of shared accountability can risk diluting responsibility and undermine the credibility of rights protection, especially if Member States are slow or unwilling to act on complaints.

In this context, the Independent Monitoring Mechanism (IMM) could play a complementary, and potentially corrective, role. While it does not replace internal agency oversight mechanisms, the IMM may offer an additional layer of accountability, particularly in the screening phase of border procedures, where EUAA support teams are increasingly active.

Moreover, the existence of parallel monitoring pathways might reinforce a more coherent and coordinated oversight landscape, provided that these mechanisms operate transparently and share information where appropriate (Porchia, 2022). However, whether this multi-level architecture will enhance rights protection in practice or simply result in fragmented responsibilities remains an open question, one that will ultimately depend on political will, institutional coordination, and the effective empowerment of the IMM itself.

In this context of institutional complexity and overlapping mandates, it is essential to closely examine the newly established Independent Monitoring Mechanism (IMM) itself. Understanding its structure, mandate, and relationship with both national and EU-level frameworks is fundamental to evaluating whether it can truly serve as a meaningful safeguard for fundamental rights at the EU's external borders.

7.2 Independence and effectiveness of the new monitoring system.

7.2.1 Establishing the independent monitoring mechanism (IMM): scope and objectives.

As Molnár (2024) aptly observes, safeguarding fundamental rights becomes especially crucial when state practices unfold in concealed or remote areas, such as at the EU's external borders. This insight is particularly pertinent in light of the Screening Regulation and the broader border procedure framework, which explicitly mandate the kind of oversight to which Molnár refers. The urgency of such monitoring is further underscored by the systemic concerns highlighted throughout this analysis, particularly those relating to detention conditions, restricted access to asylum procedures, and broader patterns of fundamental rights violations.

A detailed analysis of Article 10 of the Screening Regulation reveals the foundational legal framework for the establishment of national Independent Monitoring Mechanisms (IMMs). Under Article 10(1), Member States are required to adopt legislative measures to ensure that all allegations of fundamental rights violations related to the screening process are duly investigated. Article 10(2) introduces the IMM as a new institutional instrument tasked with

monitoring compliance with Union and international law, including the EU Charter of Fundamental Rights, particularly in relation to access to asylum procedures, the principle of non-refoulement, the best interests of the child, and detention standards under both EU and national law.

In principle, IMMs are mandated to ensure that substantiated allegations of fundamental rights violations are addressed effectively and without undue delay. They must have the capacity to initiate, or "trigger," investigations into alleged fundamental rights violations and to monitor the progress of those investigations. However, Article 10(2) of the Screening Regulation is strikingly imprecise regarding the actual scope of these investigatory powers. It remains unclear whether the obligation to "trigger investigations" simply entails that the IMM issue recommendations to competent national authorities, or whether it implies a more robust and enforceable duty to formally refer cases to national prosecution services (Lang, 2024). This ambiguity raises serious concerns about the IMM's functional effectiveness. Without a clearly defined and binding mandate to initiate referrals to prosecutorial bodies, there is a risk that the IMM will lack the procedural tools needed to ensure accountability. To fulfil its intended role, the IMM should not only be authorised but also required to make formal referrals and to track their outcomes, thereby reinforcing its role as a meaningful safeguard against rights violations at the border (Lang, 2024).

The Regulation implicitly upholds international standards by requiring that IMMs operate independently, in line with established guidelines: namely, the OPCAT standards for National Preventive Mechanisms (NPMs), the Paris Principles for National Human Rights Institutions (NHRIs), the Venice Principles for Ombudsman institutions, and UN General Assembly Resolution A/RES/77/224. While this alignment offers critical safeguards for the IMM's credibility and accountability, it also imposes a substantial implementation burden on Member States, particularly those with limited institutional capacity or political will to meet such stringent requirements (Porchia, 2022).

Closely linked to this emphasis on independence is another defining feature of the IMM: its coordination with existing fundamental rights monitoring bodies. The Regulation requires the IMM to promote the participation of such bodies and, where they are not already involved, to establish and maintain close cooperation with them. This collaborative dimension is essential for ensuring coherence, consistency, and complementarity within the broader monitoring architecture. Moreover, such coordination would be mutually beneficial. The Regulation's

commitment to international standards can be most effectively realized through the integration of actors like NHRIs, Ombudspersons, and NPMs: institutions whose mandates are already rooted in the very principles the IMM is expected to uphold. Their long-standing experience and normative grounding offer a practical and credible means of safeguarding the IMM's independence, transparency, and operational effectiveness (Porchia, 2022).

Conversely, the IMM could reinforce existing European monitoring mechanisms by providing them with independent, high-quality data and insights. For instance, the IMM could enhance the Schengen Evaluation and Monitoring Mechanism (SEMM) by supplying more reliable, cross-institutional information, potentially informing Commission decisions on suspending funding to non-compliant Member States. Furthermore, the IMM could play a key role in addressing the persistent structural weaknesses of the complaint mechanisms within Frontex and the EUAA, notably by mitigating concerns over their lack of institutional independence (Porchia, 2022).

In terms of operational capacity, the IMM is empowered to issue annual recommendations to Member States and to conduct both scheduled and unannounced on-site visits. The inclusion of random, unannounced checks should be welcomed as a valuable tool for ensuring accountability and effectiveness of the mechanism. However, the discretionary nature of the IMM's reporting obligations, combined with the absence of any binding national follow-up procedures, weakens the mechanism's potential impact. As Lang (2024) emphasised, it would undoubtedly have been preferable if Article 10(2) included a mandatory reporting obligation, along with clear and enforceable follow-up procedures to be undertaken by national authorities.

Moreover, the IMM should have full access to all relevant locations (including reception and detention centres), people, and documentation. While the regulation allows for this, it does not explicitly guarantee access to police information systems and pending administrative files within ministries responsible for asylum and migration (Lang, 2024). This would help to compensate for the likely limitations in the IMM's resources and frequency of monitoring visits, particularly at green borders where rights violations are harder to detect.

Also, the Screening Regulation explicitly provides that the IMM's mandate is without prejudice to the monitoring roles of other EU actors, such as the Fundamental Rights Monitors of Frontex and the oversight activities of the European Union Agency for Asylum (EUAA). Similarly, overlap with national institutions, such as Ombudspersons or National Human Rights

Institutions, must be addressed in a way that promotes complementarity rather than duplication or jurisdictional conflict.

Finally, the role of the EU Agency for Fundamental Rights (FRA) is also central to the effective implementation of IMMs. Although FRA is not mandated to carry out on-the-ground monitoring, it is tasked with issuing detailed guidance to assist Member States in establishing independent and effective mechanisms. Building on its advisory role, FRA's role seeks to offer concrete guidance to support the practical establishment of IMMs across Member States. This support is particularly crucial given the complex legal and operational requirements attached to ensuring genuine independence. The following section examines the scope and substance of the FRA's guidance, along with the concluding remarks on the IMM's potential.

7.2.2 Towards effective implementation? The FRA's Guidance and the way forward for the IMM.

To begin with, it is important to recall the evolution between the FRA's initial 2022 guidance and the final version issued in 2024. This shift reflects the broader and persistent tension, frequently observed in this analysis, between the need to uphold fundamental rights and the entrenched practices of Member States in migration management, which often favour securitisation, crisis-driven responses, and the externalisation of border control.

The European Union, as a supranational entity composed of sovereign Member States, has long faced the challenge of handing over national control in favour of a harmonised approach, an issue particularly evident in the field of migration, where sovereignty concerns are most acutely felt. In this light, any genuine attempt to address these imbalances, such as through the establishment of Independent Monitoring Mechanisms (IMMs) and the FRA's accompanying guidance, should be cautiously welcomed. While the potential of these tools to strengthen rights protection is notable, their actual effectiveness will depend on how the already-identified structural and operational limitations are addressed in practice.

A central pillar of the FRA's Guidance for the implementation of Independent Monitoring Mechanisms (IMMs) is the emphasis on independence and operational autonomy. Effective fundamental rights monitoring can only take place when the mechanisms are legally established and clearly mandated by national legislation, in full alignment with EU law. The

Guidance recommends that Member States prioritise existing independent human rights bodies, as the natural candidates to lead or be part of these mechanisms.

To ensure autonomy, the IMM should operate free from any external influence, particularly from migration authorities. National law should guarantee institutional separation from bodies responsible for asylum, border, or migration management, thus preserving impartiality. Operational independence is equally essential: IMMs must be able to act on their own initiative, define their own procedures, and respond autonomously to emergencies or crises.

Beyond independence, the thematic scope of the IMM needed to be broad enough to capture the full complexity of border procedures. The mechanism is expected to monitor all activities relating to the screening of third-country nationals, regardless of location. This included oversight of individuals subject to the border asylum procedure and, where appropriate, the extension of monitoring to related operations such as return procedures and border surveillance.

The FRA also underlines the need for robust monitoring powers. IMMs should have full access to all relevant procedures and locations, including reception and detention facilities, and be able to carry out unannounced visits. They should be able to speak confidentially with individuals involved in border procedures, shadow operations such as registration and asylum interviews, and make use of audio-visual recording tools where necessary. Furthermore, access to documents and electronic systems must be unhindered, with safeguards in place for sensitive information such as medical data.

The Guidance also stresses the need for adequate staffing and expertise. Monitoring teams should be multidisciplinary, including legal experts, healthcare workers, psychologists, and child protection specialists. Teams must also reflect gender and cultural diversity. Continuous training and capacity-building are essential to maintain high standards, with the FRA encouraging Member States to draw on its resources and collaborate with civil society, academia, and other human rights actors.

None of this is possible without adequate resources and funding. The IMM should also be provided with sufficient, stable, and independent financial resources, with a dedicated budget line akin to that of ombudsman institutions. Importantly, the mechanism should be eligible to access EU funds and be consulted in national budget planning processes.

The FRA also recognises the value of synergies with existing mechanisms. Cooperation with NHRIs, Ombudspersons, and other rights-monitoring bodies should be pursued to enhance coherence and avoid duplication. At the same time, IMMs should share their findings with EU institutions such as the Commission, Frontex, and the EU Asylum Agency, and support the work of EU-level oversight bodies like the Frontex Fundamental Rights Officer.

Finally, the Guidance emphasises the importance of structured cooperation with other authorities and actors. National laws should require border and asylum authorities to cooperate with the IMM and respect its mandate. Engagement with data protection bodies and broader collaboration with international organisations, NGOs, and other independent oversight institutions is also encouraged. Cross-border collaboration between IMMs in different Member States could further promote harmonisation and good practice.

In conclusion, while the establishment of the Independent Monitoring Mechanism (IMM) represents a meaningful step toward embedding fundamental rights protections within the EU's border governance, several critical limitations remain that temper its transformative potential. Among these is the overwhelming reliance on national law to operationalise the core safeguards of the mechanism, most notably its independence. Although the Regulation outlines key principles and the FRA provides detailed guidance, it is ultimately left to each Member State to translate these requirements into binding domestic legal provisions. This creates a high degree of variability and discretion, particularly in political environments where independence from migration authorities is not a priority (Apatzidou, 2024).

A similar challenge concerns the allocation of financial resources. While the Regulation and the FRA guidance underscore the necessity of adequate and autonomous funding, the responsibility to ensure such funding rests primarily with the Member States. The possibility of drawing on EU funds is not precluded, but it is framed as an auxiliary option rather than a structural guarantee. This financial ambiguity further weakens the IMM's potential, especially in Member States with limited budgetary capacity or competing political priorities (Apatzidou, 2024).

However, as also different analyses have highlighted (Molnar, 2024; Lang, 2024; Apatzidou, 2024), the biggest limit of the mechanism lies in the narrow scope of its mandate. By focusing primarily on screening procedures, the mechanism risks failing to address the broader set of practices and conditions that frequently give rise to fundamental rights violations, such as

pushbacks, returns, and inhumane treatment during border surveillance. While Member States are *encouraged* to extend the mechanism's mandate to include such areas, this remains entirely optional. As such, the effectiveness of the IMM is inherently contingent upon national discretion.

The FRA may support Member States in broadening the scope of their IMMs and aligning them more closely with human rights standards, but this support must be actively requested. In the absence of a binding obligation, much depends on the political will of individual governments. In other words, despite the normative architecture offered by EU law and the FRA's interpretative guidance, the ultimate success or failure of the IMM framework lays on domestic commitment. Without robust legal transposition, sufficient resourcing, and a willingness to go beyond the minimal scope required, the IMM risks becoming a procedural formality rather than a meaningful tool for rights protection at the EU's borders.

Conclusions

The Screening Regulation (EU) 2024/1356 marks an important development in EU migration governance, marking a shift toward the securitization and crisification of migration management that initially emerged as emergency responses to past crises. The Regulation moves away from a rights-based asylum framework by incorporating exceptional, crisis-driven practices, such as expedited screening, identification, and return, into permanent legal norms. In doing so, it contributes to the normalization of the hotspot model, transforming border confinement and accelerated procedures from temporary crisis instruments into standard governance mechanisms.

Although formally claiming to adopt a holistic, coherent, and effective approach, the Regulation fundamentally prioritizes border control and externalization strategies, reflecting a Eurocentric security bias that marginalizes human rights. This securitized paradigm contributes to the entrenchment of the "Fortress Europe" narrative, promoting containment and control both within and beyond EU borders, often through asymmetrical partnerships with third countries. The broad and ambiguous personal scope of the Regulation conflates asylum seekers with irregular migrants, thereby eroding the critical legal distinctions that underpin asylum protections.

Central to the Regulation's architecture is the "legal fiction of non-entry," which denies migrants physically present at the border the procedural rights ordinarily afforded by territorial presence. It has been shown how the use of the fiction could lead to the exclusion of asylum seekers from fundamental safeguards, enabling the normalization of *de facto* detention during screening without adequate procedural guarantees or judicial oversight. The non-appealability of screening outcomes further exacerbates this erosion of due process, undermining access to effective remedies and increasing the risk of arbitrary detention, refoulement, and other fundamental rights violations.

Although independent monitoring mechanisms (IMM) are formally established to protect fundamental rights during screening, their limited scope, inadequate resources, and reliance on national political will undermine their effectiveness as accountability tools.

The June 2025 Commission report highlights ongoing challenges in the Regulation's practical application. Delays in designating border procedure locations, none of which have been finalized by any Member State, raise concerns over insufficient preparation of infrastructure,

funding, and procurement. While some Member States possess adequate reception facilities and trained personnel, others remain in early planning stages, struggling to meet the demands of fluctuating migratory flows. The Commission, Frontex, and the EUAA are responding with a "screening toolbox," operational tests, and guidance documents. Proposals for "multipurpose centres" integrating screening with asylum and return procedures, along with new guidelines on alternatives to detention, represent promising steps toward operational coherence. Nevertheless, the report stresses that successful implementation hinges on enhanced cooperation with the judiciary and the robust activation of independent monitoring bodies, both vital for ensuring procedural fairness and safeguarding rights.

In conclusion, while Member States retain sovereign authority to control their borders, the extensive discretionary powers granted, particularly to those with restrictive policies, risk deepening a securitized approach that undermines core asylum principles. This risk is heightened by frontline states' disproportionate burden in managing complex operational demands, as implementation heavily depends on national structures and coordination with multiple EU agencies. Such fragmentation increases the likelihood of inconsistent practices and rights violations, especially where administrative capacity is stretched. Thus, the oversight roles of courts and independent monitors remain indispensable in steering implementation and preventing fundamental rights infringements.

Finally, to ensure that the implementation of the Screening Regulation complies with fundamental rights standards, this thesis **recommends** a set of legal and institutional amendments, as well as a stronger commitment to evidence-based monitoring.

First, the Regulation should clarify the *legal nature of confinement* during the screening procedure and reinforce judicial safeguards. As established in ECtHR case law (namely *Amuur v. France*, 1996; *Khlaifia and Others v. Italy*, 2016; and *R.R. and Others v. Hungary*, 2021) situations in which individuals are unable to leave a location freely, even in the absence of a formal detention order, may constitute *de facto* deprivation of liberty. Therefore, the Regulation should explicitly align its definitions with Strasbourg jurisprudence, guarantee access to legal counsel and judicial review for any confinement-like situation, and ensure that any deprivation of liberty is lawful, necessary, proportionate, and time-limited. Without such amendments, the Regulation risks enabling Member States to bypass established safeguards under Article 5 ECHR and Article 6 of the Charter of Fundamental Rights (CFR).

Second, the Regulation should more precisely define the minimum standards for the *location* and conditions of screening facilities to ensure accessibility and effective independent oversight. The current language permitting sites "at or near the border" remains too vague and risks enabling the establishment of facilities in locations where access to justice and monitoring is significantly constrained, as exemplified by practices in Greek and Italian hotspots. In line with ECRE's 2025 Comments, such sites must remain accessible to legal representatives, NGOs, and ombudspersons; they should guarantee adequate material reception conditions and avoid any form of isolation or confinement without judicial oversight.

Third, the Regulation should formally recognise the legal weight of the *screening form*, which has a decisive role in determining whether individuals are channelled into asylum or return procedures. While the form is currently framed as an informal tool, its conclusions have clear legal consequences. To protect the right to an effective remedy under Article 47 CFR, individuals should be given the right to challenge the form's content and outcomes, including access to interpretation, legal advice, and clear written notification of their rights throughout the process.

Fourth, *access to* fundamental rights should be guaranteed immediately upon the expression of an intent to apply for *asylum*. The principle of non-refoulement applies from the moment an individual indicates the need for protection, yet the Regulation currently delays access to essential safeguards. It should be revised to ensure that legal assistance, medical care, and basic information are available from the outset, and to prevent any form of arbitrary or preventive confinement. These changes are necessary to comply with both the CJEU's interpretation of Article 17 of the Reception Conditions Directive and Article 47 CFR.

Fifth*, greater coherence* is needed between the Screening Regulation and other EU instruments. At present, Article 2(2)(a) of the Return Directive permits the exclusion of individuals undergoing screening from its scope, thus depriving them of critical procedural protections. This creates a legal limbo that undermines access to remedies and violates the right to effective legal protection. Revising this clause, or at a minimum, explicitly incorporating the Directive's core safeguards into the Screening Regulation, would ensure that return decisions are subject to fair process and fundamental rights oversight. As the CJEU clarified in *Gnandi* and *QY*, any deprivation of liberty must be accompanied by accessible and effective judicial remedies.

Similarly, the Regulation fails to align with the Reception Conditions Directive, which guarantees reception conditions from the moment asylum is requested (Article 17). Instead, it relies on an undefined "standard of living" clause (Article 8(8)), granting Member States wide discretion and deviating from CJEU case law (*La Cimade and GISTI*). To ensure consistency, the Regulation should be amended to affirm the immediate applicability of RCD standards during screening, thus reinforcing both material support and procedural guarantees from the outset.

Sixth, the *Independent Monitoring Mechanism* (IMM) should be legally reinforced and institutionally empowered. To ensure its effectiveness, IMMs should be enshrined in national law with a clear mandate, full operational independence, and robust safeguards against interference. Importantly, its scope must extend beyond the screening phase to include all relevant aspects of border management, such as returns, detention, and pushbacks. Harmonised EU-wide thematic standards would help prevent disparities in implementation, while binding legal provisions (rather than soft guidance) would reduce reliance on national political will.

Finally, this thesis calls for the establishment of a long-term, EU-level research agenda to monitor and evaluate the real-world impact of the Screening Regulation. Legal scholars, institutions, and civil society organisations should conduct systematic assessments of whether procedural safeguards are upheld in practice. Empirical fieldwork should document material conditions in screening centres, while national courts and administrative bodies should track divergences in implementation.

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