Border Violence Monitoring Network | I HAVE RIGHTS. | MOBILE INFO TEAM

Briefing on Articles 4, 6, 6a, 8 and 13 of the Screening Regulation

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This briefing aims to provide evidence from research conducted in Greece and Italy that can be used to support the Parliament's mandate for Articles 4, 6, 6a 8 and 13 of the Screening Regulation. Aspects of the Regulation have been piloted in Italy's hotspots, the Closed Controlled Access Centre (CCAC) in Samos, and in mainland Greece's Reception and Identification Centres (RICs). In each case, screening mechanisms have subjected people to arbitrary detention in inadequate conditions for extended periods of time which, compounded by a chronic lack of access to information and legal support, deprives them of the possibility to challenge violations of their fundamental rights. Case law at the European Court of Human Rights (ECtHR) upholds that such mechanisms are in violation of the rights to asylum, liberty, effective remedy and freedom from torture.

Article 4: Entry into the territory of a Member State

The jurisprudence of European Courts has unequivocally established that the territory, and territorial waters of EU Member States falls under their jurisdiction. In line with this, the legal fiction of non-entry cannot and will not exempt Member States from bearing legal responsibility for any rights violations against people who have crossed over the border. These will fall under the jurisdiction of national courts and Member States can still be held accountable. Against this background, the practical added value of "non-entry" without accompanying detention measures is difficult to ascertain. The Council position refers only to "provisions to ensure that the person remains at the disposal of the competent authority" (Art. 4(1)), and it is unclear whether these measures amount to detention or not. If they do, it follows that the Regulation should clearly define the grounds for detention and ensure that the measure is applied in accordance with the principles of necessity and proportionality. If detention is not foreseen, then a person entering a Member State will be on the territory and can be asked to remain in screening locations but cannot be mandated to do so. In this case, Article 4 becomes a symbolic statement that only serves to call into question the liberal constitutional foundations of the concept of jurisdiction and state sovereignty. **We therefore recommend the deletion of Article 4 entirely.**

Experience from Italy documented by the Association for Juridical Studies on Immigration (ASGI) has shown that procedures similar to those provided for in the Regulation often result in de facto detention with insufficient safeguards. Over the last six years, people have been held in hotspots for indefinite periods of time without the possibility to leave meaning they are deprived of their liberty during the screening phase before being identified and given access to asylum procedures. ECtHR case law upholds this as a violation of the right to liberty in several cases - J.A. and others v. Italy; A.B. v. Italy; A.M. v. Italy; A.S. v. Italy - and ascertains Italy as responsible with the hotspots being located on Italian territory. **If the legal fiction of non-entry is maintained, in order to avoid arbitrary detention and related rights violations, reception must take place in appropriate open facilities and clear rules must be established on the use of detention that provide a legal basis, and accompanying safeguards.**

Case Law: J.A. and Others v. Italy

In October 2014, four applicants left Tunisia on makeshift vessels and were rescued by an Italian ship which took them to Lampedusa. Upon arrival they were placed in an Early Reception and Aid Centre (CIE), a designated 'hotspot' facility, where they remained for ten days before being transferred to Lampedusa Airport and forcibly removed to Tunisia.

In its ruling, the ECtHR found Italy in violation of Article 5 of the ECHR (right to liberty) stating: *There was no reference in the domestic law to substantive and procedural aspects of detention or other measures entailing deprivation of liberty that could be implemented in respect of the migrants concerned in hotspots. Nor had the Government submitted any legal source stating that the Lampedusa hotspot was to be classified as a CIE – where migrants, under certain conditions, might be lawfully detained under domestic legislation. In addition, reports of independent observers as well as of national and international organisations, had unanimously described the Lampedusa hotspot as a closed area with bars, gates and metal fences that migrants were not allowed to leave, even once they had been identified, thus subjecting them to a deprivation of liberty which was not regulated by law or subjected to judicial scrutiny.*

Article 6: Requirements concerning the screening

Article 6(1): The screening shall be conducted at locations situated at or in the proximity to the external borders.

The Closed Controlled Access Centre (CCAC) in Samos is the most relevant example when considering how the Screening Regulation will function in reality. Samos, and the other hotspot islands of the Aegean, are designated border zones with accelerated fast track border procedures in place. The CCAC is the location designated for the reception and processing of people seeking safety on Samos. Admissibility procedures take place here, including the identification of applicants who travelled through safe third countries - following the EU-Turkey deal - or come from safe countries of origin. The Samos CCAC is operating at 250% capacity at the time of writing, with nearly 5,000 people *de facto* detained in overcrowded and inhuman conditions whilst awaiting the completion of their screening and registration of their asylum claims. Unable to keep up with the rate of arrivals, the Greek authorities are transferring asylum seekers to camps on the mainland before they undergo an initial interview. The inability of the Samos authorities to respond to people seeking safety in the CCAC shows the impracticality of carrying out screening at the external borders. **The Parliament addition of Article 6(5a) mandating that any appropriate and adequate location within the territory can be used for screening** is reflective of current practice as observed in Samos. However, in order to realise this the legal fiction of non-entry must be removed from the Regulation.

Article 6(3): The screening shall be carried out without delay and shall in any case be completed within 5 days from the apprehension in the external border area, the disembarkation in the territory of the member states. [...] In exceptional circumstances [...] the period of 5 days may be extended by a maximum of an additional 5 days.

Article 40 of Greek Law 4939/2022 provides for restriction of freedom for the purpose of identifying new arrivals for a maximum of 25 days. Member organisation of the Border Violence Monitoring Network (BVMN) based on Samos, I Have Rights (IHR), has monitored that people are unlawfully *de facto* detained for an average period of 1.5 months since August 2023 whilst awaiting registration

Therefore, plans to complete screening across Member States within 5 days are extremely unlikely in practice, given the current situation on Samos.

Regarding extension periods in exceptional circumstances, since the start of 2023 authorities have claimed that Samos is in a state of emergency due to a high number of arrivals. According to UNHCR data, 6,833 people have arrived on Samos between January and November this year. This raises concerns that the current 'emergency state' on Samos claimed by the Greek authorities would mean that the "exceptional circumstances" referred to in Article 6(3) are actually commonplace. Therefore, a lack of clarity on what is meant by "disproportionate number" in Article 6(3) risks Member States using this paragraph to extend the legal time frame and prolong the *de facto* detention of people seeking safety. **We advocate for the removal of extension periods however, failing that, the safeguards in this paragraph could be strengthened with clear definitions of "exceptional circumstances" and "disproportionate number" so as to limit the possibility for derogations in Member States.**

Provisions for extended time periods are particularly concerning as on Samos, not only is the *de facto* detention unlawful and longer than what is provided for by law, but it also occurs in inhuman living conditions. For instance, the authorities do not distribute sufficient food inside the Samos CCAC to feed the entire current population, people are squeezed in overcrowded containers and forced to sleep on the floor and water restrictions prevent people from maintaining good hygiene conditions, leading to outbreaks of scabies and other infectious diseases. As a result, **Article 6(6d) is also a welcome addition from the Parliament mandate that would ensure safeguards by mandating Member States to provide adequate conditions in line with the Charter for individuals undergoing screening.**

Article 6(4): Member States shall notify the Commission without delay about the exceptional circumstances referred to in paragraph 3.
The unlawful *de facto* detention of people seeking safety on Samos has continuously been extended. This in spite of numerous provisions such as the requirement under Article 28(2) of Directive 2013/33/EU that Member States provide the Commission with relevant information to ensure "guidance, monitoring and control of the level of reception conditions", the infringement procedures opened by the Commission against Greece regarding Article 40 of Law 4939/2022 regarding the provisions for 25 day *de facto* detention, and the existence of an EU Commission Representative for the island of Samos sending reports on the CCAC to the Commission on a weekly basis. This indicates that the Commission's awareness of the situation is not sufficient to put an end to the proliferation of rights violations taking place within screening procedures in Greece. **The paragraph is unclear as to the role of the Commission once it has been notified. Specific details regarding the mechanism for notifying the Commission and the procedures that follow must be clarified. We would again recommend removing the caveat of exceptional circumstances for extending screening procedures and, therefore, *de facto* detention of persons seeking safety.**

Article 6(6): The screening shall comprise the following mandatory elements: (a) preliminary health and vulnerability check (b) identification (c) registration of biometric data in the appropriate

databases (d) security check (e) the filling out of a de-briefing form (f) referral to the appropriate procedure.

In the Samos CCAC, all asylum seekers are required by law to undergo a vulnerability assessment during their identification process, carried out by EODY (Hellenic National Public Health Organisation) personnel. However, since the centre opened in September 2021, no permanent doctor has been appointed and so far, one volunteer doctor visits the CCAC on an adhoc basis. This doctor is responsible for carrying out assessments for the entire population of the facility. IHR has found that, in practice, vulnerability assessments either do not occur or take place weeks (or even months) after people arrive at the CCAC. It therefore seems highly unlikely that vulnerability assessments can be completed within the 5 or 10 day maximum period as envisaged in the Regulation.

The expectation to carry out the six mandatory elements listed in paragraph 6 within a 5-10 day period is clearly unrealistic in light of the actual practices as observed on Samos. The current wording of Article 6 risks either that some of these essential elements will not be undertaken and/or that the screening procedure will require more than a maximum of 10 days. **To avoid the unlawful detention of asylum seekers and any breach of international law (including of Article 31 of the 1951 Convention), the removal of any provision requiring the detention or restriction of freedom of people on the move awaiting the completion of their screening procedure is necessary.**

Article 6a: Obligations of third country nationals submitted to screening

Article 6a(3): Member States may introduce penalties, in accordance with their national law, in case of non-compliance with the obligations referred to in this Article. Those penalties shall be effective, proportionate and dissuasive.

The Council's proposal to introduce sanctions in cases of non-compliance with obligations is particularly concerning. On the one hand, the symbolic use of penalties against individuals who have just arrived on the territory or been rescued at sea will build upon their criminalisation despite their behaviour not constituting a concrete criminal offence. On the other hand, it is difficult to see the added value of such provisions: fines will be ineffective and difficult to enforce in practice, whilst penalties involving detention are not proportionate. This provision will only place additional burdens on the already strained administrative and penal apparatus of Member States. **Due to its punitive nature and impracticality to enforce, paragraph 3 should be deleted.**

Article 8: Provision of information

The right to be informed of the purpose, modalities and outcome of procedures is one of the most violated and disregarded rights. Whilst the Regulation contains some measures to uphold the rights of individuals with the obligation to provide them with information, practice in Greece and Italy, where the 'hotspot approach' has already been widely implemented for years, shows that the effectiveness of such guarantees is severely limited. Access to information is a fundamental precondition to exercise the right to asylum and the right of defence. The proposal, as it stands, does not address the serious shortcomings observed in Greece and Italy's hotspots as there is no obligation to provide information on the right to asylum prior to the screening. The only provision is for a written information sheet, exclusively for those who have already applied for asylum or where

there are indications that they intend to do so. This may constitute discriminatory treatment for those who, for various reasons, are unable to understand the written information. In the case of Italy, the ECtHR has found that, on several occasions, the right to apply for asylum has been violated through a lack of information provision - see J.A. and others v. Italy; A.B. v. Italy; A.M. v. Italy; A.S. v. Italy. In the case of A.B. v Italy the applicant, a Tunisian who reached the Italian coast in October 2017 on a makeshift vessel, was de facto detained in the Lampedusa hotspot and later forcibly removed to Tunisia. The Court found that the applicant was held in the Lampedusa hotspot with no legal grounds for the detention, and no information provided to enable him to challenge the grounds for his de facto detention. Access to information is, therefore, synonymous with access to defence and the right to legal remedies in the face of rights violations.

Case Law: D v. Bulgaria
Legal precedent that a lack of information can contribute to a violation of procedural guarantees can also be found in Bulgaria. Whilst Bulgaria has not explicitly implemented a hotspots approach like Italy and Greece, as a Member State at the external border of the bloc it has also been pressured into developing stringent and effective fast-tracked border procedures.

In the case of D. v. Bulgaria, a Turkish journalist was returned to Turkey from Bulgaria in 2016 despite expressing fear of ill-treatment in the context of the ongoing military coup. The Court found that the applicant was not provided with an interpreter or translator, did not receive information about his rights, and did not have access to a lawyer. This case, again, reflects how information provision is an oft-disregarded right that precludes the right to ask for asylum.

In Greece, research conducted by BVMN member organisation Mobile Info Team (MIT) into mainland Greece's Reception and Identification Centres (RICs) further evidences a chronic lack of information provision in practice. In this case, the research relates to screening centres as referred to in Article 5 in which people who are found within the territory of a Member State and can be held for a period of up to 3 days for identification to take place. This practice has been implemented in Greece since September 2022 through a system whereby applications for asylum on the mainland can only be lodged after undergoing reception and identification procedures at two RICs. Entry to these facilities is regulated by an online appointment booking system, operated by the Greek Ministry of Migration and Asylum. Once inside, applicants are unable to exit the facility for a maximum of 25 days while they undergo screening consisting of a police interview, medical check, vulnerability assessment, and the registration of an asylum claim for those who wish to apply for international protection.

Article 8(1): Third-country nationals subject to the screening shall be succinctly informed about the purpose and the modalities of the screening.
As per Article 39 of Greek Law 4939/2022, applicants undergoing reception and identification procedures should be informed of their rights and obligations during the screening phase, including in relation to the asylum procedure and the internal rules and operations of the RIC. However, research by MIT evidences that:

- ➔ 83% of respondents who underwent the screening procedure said that they did not receive information regarding their rights and obligations during the procedure.

- ➔ 17% reported receiving partial or misleading information, including one case in which the respondent reported that he was told by the authorities at Malakasa RIC that the screening would be completed within 7-10 days, but was subsequently detained for the legal maximum of 25 days.
- ➔ In one case a survivor of torture was left for two weeks without any contact with the authorities at Malakasa RIC.

Article 8(3): The information provided during the screening shall be given in a language which the third-country national understands or is reasonably supposed to understand.

Article 39 of Greek Law 4939/2022 has similar provisions, stipulating that information can be provided in a language they are "reasonably considered" to understand. This raises significant concerns by introducing ambiguity thus allowing Member State authorities to individually assess - without criteria and or adequate training in languages and dialects - what an applicant may or may not be able to understand. The failure to provide correct interpreters deprives asylum seekers the opportunity to navigate the procedure or meaningfully present their case. MIT's research shows that:

- ➔ 100% of respondents reported lack of access to information, appropriately translated information or legal support, significantly impacting their ability to navigate the asylum procedure.
- ➔ Arabic speaking respondents reported difficulties in understanding information that was not specifically in their dialect, limiting their ability to navigate the asylum procedure in the RIC.
- ➔ No respondents reported that they received the decision to restrict their liberty up to 25 days in a language they could understand, although eight respondents reported that they received a document written in Greek which they did not understand and were not offered translation assistance, amounting to deprivation of their rights under legal safeguards for detained asylum seekers (Art. 50, 4939/2022).

Case Study: Algerian detained in Diavata RIC

"I was taken to a caravan where I found one laptop and one interviewer. The translator was remote and the other guy was just interviewing me [...] The translator didn't understand what I was saying well, he was just translating randomly. I realised that I tell him something and he says something else; back then and now I do understand some Greek; I understood that what I was telling him and what he was saying was not aligned. This is a big problem for my interview, he wasn't good enough, he didn't understand my language. He was from a different country. According to his accent he was maybe Syrian, Palestinian, I don't know actually "

In order to ensure that information provision is adequate during screening procedures, the caveat "or is reasonably supposed to understand" in Article 8(3) must be removed. The Council's mandate suggesting information and be given "in at least five of those languages which are most frequently used and understood by illegal migrants entering the Member State concerned" is particularly concerning. Individuals speaking a wide range of languages and dialects will be subject to screening procedures and selecting five languages only would preclude a large number of people from exercising their rights to access information which could subsequently damage their ability to apply for asylum. **Additionally, as per the Parliament mandate, it is incredibly important that information is given "in writing in a concise and easily accessible format, using clear and plain language and**

where necessary, orally using interpretation services". The addition of a legal representative in cases of unaccompanied minors is equally welcomed. The right to information is synonymous with the right to apply for asylum, the Parliament position provides for strong safeguards in that respect and must be upheld.

Article 13: Screening Form

ASGI has continuously criticised the 'foglio notizie' as one of the most critical elements in the implementation of the hotspot approach in Italy - a pre-printed form containing a list of pre-established reasons for the irregular border crossing which individuals are asked to complete upon disembarkation. This is set to be replicated across the bloc with the 'screening form' envisioned in Article 13. Both in the Regulation and in practice in Italy, the 'screening form'/'foglio notizie' is filled in by the authorities and there is no obligation to issue a copy of this document to the person it concerns nor any possibility to challenge the information it contains at the moment of issuance nor later on. Even though the form represents a fundamental moment for the determination of the status of the person, there are no mechanisms by which to challenge its effects. Moreover, in the Regulation, the right to access legal protection during this procedure does not seem to be provided for and Member States do not appear to be obliged to adopt measures to guarantee this right. **Article 13(5) in the Parliament mandate is particularly pertinent in ensuring the right to defence and must be maintained**. In order to be coherent with the data protection lex generalis, where rights to access, rectification and erasure are all provided for, **specific provisions for access to remedies must also be included in the Regulation.**

Article 13(3a) Reason for unauthorised arrival, entry, and, where appropriate, illegal stay or residency; (6b) Information obtained on routes travelled; (7) information obtained during the screening on assistance provided to the third country national by a person or an organisation in relation to the unauthorised crossing of the border.

The word "obtained" is particularly problematic when considering how information has been obtained from non-consenting parties as a part of asylum procedures in Member States. National court cases have been won in both the UK and Germany where it was found that the mobile phones of asylum seekers were being seized en masse and data was extracted from them to obtain information on routes travelled and assistance given in transit. In both cases the practice was ruled in breach of the fundamental right to privacy. BVMN member organisation I Have Rights has also observed that phone confiscation is standard practice in the Samos CCAC, and Pushback Alarm Austria have monitored the same practice in police stations on the Austrian-Slovenian border. Furthermore, in 2022, the Hellenic Coast Guard published a tender for software that would allow them to intercept the phones of individuals crossing into Greece and have access to their contacts, maps and search histories among other things. There is a trend of violating privacy rights in order to "obtain" information from people entering into European Member States, **the word must either be removed and replaced with "provided" or safeguards around how information can be obtained should be included.**