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OHCHR
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Dear Special Rapporteurs,

I would like to thank you for your letter of 15 December 2023 concerning the proposed New Pact on Migration and Asylum of the EU (hereinafter the Pact), and the legislative proposals reforming the EU migration and asylum policy.

Your letter and the referenced reports have received the full attention of the European institutions.

We would like to emphasise first and foremost the historical significance of the political agreement on the key legislative files of the Pact. After the entry into force of the EU Asylum Agency Regulation¹ in January 2022, provisional political agreement was reached between the European Parliament and the Council in December 2022 on the Qualification Regulation², the Reception Conditions Directive³ and the Union Resettlement Framework

1 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30.12.2021, p. 1–54.

2 Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final.

3 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final.

Regulation⁴. The European Parliament and the Council then reached political agreement on 20 December 2023 on five core proposals under the Pact: the Eurodac⁵ Regulation, the Screening Regulation⁶, the Asylum Procedure Regulation⁷, the Asylum and Migration Management Regulation⁸ and the Crisis Regulation⁹.

The co-legislators are finalising the legislative texts with the aim to adopt them under the current legislative mandate. Once implementation starts, the EU will be equipped with a solid and sustainable new migration and asylum system, including a new governance framework and solid implementing and monitoring mechanisms.

Within three months after the entry into force of the adopted legislative texts, and in close cooperation with relevant Union agencies and Member States, the Commission will present a common implementation plan to ensure that Member States are adequately prepared to implement the Pact. On the basis of this common plan, and six months after the entry into force of the legislative texts, each Member State will establish a national implementation plan setting out the actions and the timeline for the implementation of the new acts. Member States may use the support of Union Agencies and Union Funds. The Commission shall closely monitor the implementation of the national plans.

The Pact is a commitment and a legal obligation for the EU Member States and EU institutions to work together within the Union's structures to manage migration in a safe, fair and orderly way in the coming years. It provides more effective rules for the protection of those in need and for the return those who do not have a right to stay, moving from ad-hoc to long-term and sustainable solutions.

The EU is based on the respect for fundamental rights, including the right to seek and enjoy asylum. The principle of non-refoulement is enshrined in the legal foundations of the EU and is a key pillar of the Pact. It is for the Member States to ensure that this principle is upheld in individual cases. The EU remains a place of asylum for people fleeing war and persecution, without discrimination of race, colour, ethnic origin, language, religion, or belief. We are committed to fully respect our obligations under

⁴ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM/2016/0468 final - 2016/0225 (COD).

⁵ Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM/2020/614 final.

⁶ Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final.

⁷ Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final.

⁸ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final.

⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COU Regulation of the European Parliament and of the Council NCIL addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final.

international law and the human rights of migrants and will continue to ensure the wellbeing of thousands of migrants and refugees, reaching European borders, or being rescued at sea. Any allegations of mistreatment are taken very seriously and are properly investigated by the relevant authorities.

The Pact explicitly provides for an automatic suspensive effect of appeals against the negative asylum decision regarding unaccompanied minors subject to the border procedure and when the safe third country concept is applied. For cases where no automatic suspensive effect is foreseen, an applicant can request the right to remain and, until the judge takes a decision, the person cannot be removed. Furthermore, Member States are obliged to ensure an automatic suspensive effect of appeals against return decisions in situations where there is a risk of violating the principle of non-refoulement. The new legislation provides for free legal counselling during the administrative phase of the procedure and free legal assistance and representation during the appeals stage. These are additional guarantees to preserve and protect the applicants' rights.

Detention may only be used when necessary and for the shortest period possible, and only when based on an exhaustive list of specific grounds clearly defined in EU law and as a measure of last resort, i.e., only if other less coercive alternative measures cannot be applied effectively. A decision for detention has to be made on the basis of an individual assessment of each case, including whether the person has special reception needs, and is subject to a speedy and regular judicial review.

As explicitly set out in EU law, in line with the 1989 United Nations Convention on the Rights of the Child, Member States are obliged to ensure that the 'best interests of the child' is a primary consideration of Member States when implementing EU law. Applicants for international protection who are minors may only be detained as a measure of last resort for the shortest period and only when it is in the child's best interest. Member States are obliged to ensure that minors in detention have the possibility for leisure activities, including play and recreation appropriate to their age, and shall have, depending on the length of their stay, access to education. Furthermore, unaccompanied minors cannot be subject to the border procedure (unless there are reasonable grounds that the minor is a danger to public order or national security). Moreover, children can only be subject to the border procedure if their special reception and procedural needs can be met in the context of the procedure. When subject to this procedure, after assessing the best interests of the child, children need to reside in reception facilities appropriate to their needs, with standard of living suitable to the minor's physical, mental, spiritual, moral and social development, in full respect of the requirements of the Reception Conditions Directive.

The Screening Regulation ensures that the existing detention rules in the asylum and return legislation – including all safeguards – are applicable during the screening where relevant.

The Screening Regulation provides an obligation for a preliminary health check of all screened persons by qualified medical personnel who may, based on the medical circumstances concerning the general state of each individual, decide that no further

health checks during the screening are necessary. The Screening Regulation also stipulates that a preliminary vulnerability check must be carried by specialised personnel trained for that purpose, with a view to identifying any indication that a third-country national may be a stateless person or that there is any indication of vulnerability, of being a victim of torture or other inhuman or degrading treatment or having special needs.

The trained personnel carrying out vulnerability checks may involve, where appropriate, representatives of national child protection authorities and national authorities in charge of detecting and identifying victims of trafficking or equivalent mechanisms.

The Screening Regulation also provides that organisations and persons providing advice and counselling will have effective access to third-country nationals during screening.

Under the new legislation, Member States have jurisdiction over any screened person physically staying on their territory, and persons being screened enjoy the legal protection set up by the EU legal framework, be it the asylum acquis, if they are asylum seekers, or the Schengen one. These rules apply because of the physical presence of the person at the border and on the territory of a Member State, irrespective of whether the presence is authorised or not. The Screening Regulation will ensure a seamless process between screening and the ensuing appropriate procedure (asylum, return).

The screening within the territory establishes a uniform EU framework of not only rules but also, and more importantly, safeguards and guarantees that Member States will need to abide by when performing checks on irregular migrants apprehended within their territory who have crossed an external border to enter in an unauthorised manner and they have not been already subjected to screening in a Member State.

The independent monitoring mechanism that each Member State will have to set up under the Screening Regulation will also apply to screening within the territory and it will contribute to a uniform protection of the fundamental rights of irregular migrants, including by handling any allegations of racial profiling.

The legal instruments that are part of the Pact on Migration and Asylum do not apply in isolation but are complemented by other EU and national legislation, as well as international instruments. In the context of trafficking in human beings, this includes Directive 2011/36/EU¹⁰ (Anti-trafficking Directive) and the national provisions that transpose it in national legal systems. On 23 January 2024, the European Parliament and the Council reached a political agreement on the revision of the EU Anti-trafficking Directive¹¹.

The EU and its Member States are parties to the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the

¹⁰ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

¹¹ Proposal for a Directive of the European Parliament and the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, COM/2022/732 final.

UN Convention against Transnational Organised Crime. All EU Member States are also parties to the Council of Europe Convention on Action against Trafficking in Persons.

Assistance and support measures included in the Anti-trafficking Directive are not conditional on the victim's willingness to cooperate in criminal investigations, prosecution or trial, and apply as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been a victim of trafficking¹². The Anti-trafficking Directive provides for high-level standards of protection, support and assistance to victims, addressing the specific vulnerability of children and unaccompanied minors with targeted provisions¹³. These are centred on the best interests of the child and include the appointment of guardians or representatives.

The EU legal framework features the principle of non-punishment of victims, going beyond the Council of Europe Convention, as it covers also non-prosecution.

The Anti-trafficking Directive also established that investigations into and prosecutions of trafficking offences are not to be dependent on reporting or accusations by a victim, and criminal proceedings may continue even if the victims have withdrawn their statement¹⁴.

Civil society organisations have a prominent role in both the Anti-trafficking Directive and the EU Strategy on Combatting Trafficking in Human Beings 2021-2025, especially in relation to prevention and in the assistance and support to victims of trafficking. This is further reinforced in the political agreement on the revision of the Anti-trafficking Directive. The EU Anti-trafficking Coordinator engages with the EU Civil Society Platform, the EU Network of National Rapporteurs and Equivalent Mechanisms and International Organisations. Civil society organisations were also consulted during the preparatory phase of the EU Strategy and of the Commission proposal revision of the Anti-trafficking Directive. The Strategy also focuses on the need to ensure a multi-agency and multi-disciplinary approach.

The Anti-trafficking Directive requires Member States to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations. Based on the Commission proposal, the political agreement also aims to improve identification and referral.

The Anti-trafficking Directive also requires the promotion of regular training for officials likely to come into contact or to deal with victims or potential victims, including frontline police officers¹⁵. The political agreement on the revision of the Anti-trafficking Directive explicitly mentions further categories of professionals, including court staff, assistance and support services, labour inspectors, social services and healthcare workers. It also specifies that human-rights based, victim-centred, gender-, disability- and child-sensitive

¹² Article 11, Directive 2011/36/EU.

¹³ Articles 11-16, Directive 2011/36/EU.

¹⁴ Article 9, Directive 2011/36/EU.

¹⁵ Article 18(3), Directive 2011/36/EU.

training is aimed to prevent and combat trafficking in human beings and avoid re-victimisation, as well as to detect, identify, assist, support and protect the victims.

In conclusion, the EU legal framework guarantees the highest standards of protection, support and assistance to victims and potential victims of trafficking in human beings.

Yours sincerely,

Belén Martínez Carbonell

