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**HUMAN RIGHTS MONITORING UNDER THE EU PACT ON ASYLUM AND
MIGRATION: A PROMISE OF PROTECTION**

Dissertation to obtain a Master's Degree in Law, in
the specialty of International and European Law

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I, Erica Soares da Silva, hereby declare that I am the sole author of this dissertation and that any use of contributions or texts of others has been duly referenced.

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Aos meus avós, Cecília e João, pelo amor incondicional e por me terem transmitido o «vapor di imigrason»¹.

À tia Luísa, no ano em que celebra 90 anos, por continuar a moldar a minha forma de ser, estar e sentir a vida.

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¹ Mayra Andrade – *Vapor di Imigrason* In: *Storia, Storia*. Paris: RCA Victor, 2009.

List of Abbreviations

AMMR – Asylum and Migration Management Regulation

APR – Asylum Procedure Regulation

CEAS – Common European Asylum System

Charter – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

CRPD – Convention on the Rights of Persons with Disabilities

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EO – European Ombudsman

EU – European Union

EU Pact / Pact – EU Pact on Migration and Asylum

FRA – European Union Agency for Fundamental Rights

Frontex – European Border and Coast Guard Agency

GANHRI – Global Alliance of National Human Rights Institutions

Geneva Convention / Geneva Convention on Refugee Status – The 1951 Refugee Convention and 1967 Protocol relating to the Status of Refugees

IMM – Independent Monitoring Mechanism(s)

IT – Information Technology

MS – Member State(s)

NHRI – National Human Rights Institution(s)

NPM – National Preventive Mechanism(s)

OHCHR – Office of the United Nations High Commissioner for Human Rights

OPCAT – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Paris Principles – Principles Relating to the Status of National Institutions

SBC – Schengen Border Code

SPT – Subcommittee on Prevention of Torture

SR – Screening Regulation

TCN – Third-Country National(s)

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UN – United Nations

Venice Principles – Principles on the Protection and Promotion of the Ombudsman Institution

Abstract

This study examines the Human Rights' Independent Monitoring Mechanism (IMM) established under the European Union (EU) Pact on Migration and Asylum, addressing the extent to which its legal design determines its capacity to be an effective safeguard.

Adopting a normative *ex ante* approach, it evaluates the IMM against three key determinants of effective human rights monitoring: legitimacy, independence, and accountability.

The analysis of the Pact's Screening and Asylum Procedure Regulations reveals that the IMM is grounded in a binding legal framework and incorporates references to international standards of independence, specifically the Paris Principles and the Venice Principles. However, structural weaknesses persist, including an EU-level accountability gap, risks of financial dependence and operational fragility arising from the technical complexity of contemporary border control.

By examining a specific national context – the one where the Portuguese Ombudsman is enshrined, as it is the anticipated IMM in Portugal – this study seeks to demonstrate that embedding this new mandate within a constitutionally established institution accredited as a National Human Rights Institution with a National Preventive Mechanism role may mitigate these constraints and reinforce independence and accountability.

It concludes that the IMM is neither inherently a genuine safeguard nor inevitably an empty promise of protection, as its effectiveness depends on implementation conditions. It is therefore understood that the Pact creates a conditional possibility of protection, the potential of which will only be realised if the actors involved are successful in assigning responsibilities and achieving material independence and operational capacity.

Keywords: Accountability; Asylum; Effectiveness; European Union; Human Rights; Independence; Legitimacy; Migration; Monitoring; Pact; Screening.

Resumo

Este estudo debruça-se sobre o Mecanismo de Monitorização Independente (MMI) de Direitos Humanos criado pelo Pacto da União Europeia (UE) em matéria de Migração e Asilo, analisando em que medida a sua conceção jurídica determina a sua eficácia.

Através de uma abordagem normativa *ex ante*, procura aferir o seu potencial para cumprir o propósito que lhe é atribuído, considerando como determinantes três fatores: legitimidade, independência e responsabilização.

São analisados os regulamentos do Pacto relativos ao procedimento de triagem e de asilo, que constituem bases jurídicas sólidas, porquanto vinculativas, nas quais assenta o MMI, e que incorporam ainda padrões internacionais de independência, designadamente os Princípios de Paris e os Princípios de Veneza. Todavia, identificam-se fragilidades estruturais, nomeadamente lacunas na responsabilização da UE, riscos de dependência financeira e fragilidade operacional decorrente da complexidade técnica do controlo contemporâneo das fronteiras.

De seguida, tomando como referência um contexto nacional específico – aquele no qual se insere o Provedor de Justiça, por estar previsto que desempenhará funções de MMI – este estudo visa demonstrar que a integração deste novo mandato num órgão constitucional, acreditado como Instituição Nacional de Direitos Humanos e que exerce igualmente funções de Mecanismo Nacional de Prevenção, pode mitigar os constrangimentos identificados.

Conclui-se, por fim, que o MMI não é, por inerência, uma verdadeira garantia nem, inevitavelmente, uma infundada proteção. A sua eficácia depende das condições de implementação. Entende-se, por isso, que o Pacto cria uma possibilidade de proteção condicionada, cujo potencial apenas se concretizará se os atores envolvidos forem bem-sucedidos na atribuição de responsabilidades, na conquista de independência material e de capacidade operacional.

Palavras-chave: Asilo; Direitos Humanos; Eficácia; Independência; Legitimidade; Migração; Monitorização; Pacto; Responsabilização; Triagem; União Europeia.

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1. Introduction

1.1 Research Context: Human Rights Monitoring and the Pact

Human rights monitoring in the context of asylum and migration is not a novelty²; nonetheless, there is a growing tendency to establish supervisory mechanisms at international, regional and national levels. Within the European Union (EU) legal order, a new set of legal instruments – known as the EU Pact on Migration and Asylum (Pact) – was approved in 2024³. One of its stated objectives is the effective management of the external border while ensuring the human rights of people on the move⁴.

For this purpose, through its Screening Regulation (SR)⁵ and Asylum Procedure Regulation (APR)⁶, Member States (MS) are required to establish an independent monitoring mechanism (IMM) at the national level, to oversee the compliance of screening and border asylum operations with human rights obligations established in applicable international, regional and domestic legal instruments.

Notwithstanding the word ordering and terminology used in the Pact – in which *migration* is placed before *asylum* and reference is made to *fundamental rights* – this study adopts a critical perspective, according to which the Pact's ordering risks blurring the distinction between forced displacement and other forms of mobility. It may dilute the normative priority of international protection grounded in the principle of *non-refoulement*, which requires that no person be sent to a country where there is a risk of persecution or ill-treatment. Furthermore, the monitoring mechanism established under the Pact is required to oversee compliance not

² See Tamás Molnár, «Monitoring Fundamental Rights Compliance in the Context of Screening and the Asylum Border Procedure: Putting Bricks Back into the EU House of Rule of Law?», *EU Immigration and Asylum Law and Policy Blog*, 19 September 2024.

³ Comprising nine regulations and one directive, namely: [Regulation \(EU\) 2024/1351](#) (Asylum and Migration Management Regulation); [Regulation \(EU\) 2024/1359](#) (Crisis and Force Majeure Regulation), [Regulation \(EU\) 2024/1356](#) (Screening Regulation); [Regulation \(EU\) 2024/1352](#) (Regulation for the purpose of introducing the screening at the external borders); [Regulation \(EU\) 2024/1348](#) (Asylum Procedure Regulation); [Regulation \(EU\) 2024/1349](#) (Return Border Procedure Regulation), [Regulation \(EU\) 2024/1358](#) (Eurodac Regulation); [Regulation \(EU\) 2024/1347](#) (Qualification Regulation); [Regulation \(EU\) 2024/1350](#) (Resettlement and Humanitarian Admission Regulation); [Directive \(EU\) 2024/1346](#) (Reception Conditions Directive).

⁴ European Commission, *Striking a balance on migration: an approach that is both fair and firm*, COM(2024) 226 final, p. 2: «The changes the Pact will bring (...) protect our external borders while preserving access to asylum and respect for fundamental rights».

⁵ See [Regulation \(EU\) 2024/1356](#), article 10 and recitals 27–29.

⁶ See [Regulation \(EU\) 2024/1348](#), article 43(4) and recital 71.

only with Union law but also with international law, under article 10(2)(a) of the SR⁷, hence the term *human rights* is used in the title of this thesis to reflect the multilevel legal framework governing asylum and migration, encompassing both the EU fundamental rights regime and the broader system of international law of human rights, to which EU and MS are bound, including instruments such as the Geneva Convention on Refugee Status⁸ and the European Convention on Human Rights (ECHR)⁹. For these reasons, the title of this dissertation also deliberately places *asylum* before *migration* and employs the term *human rights* rather than *fundamental rights* whenever addressing broader international law. Nevertheless, the *fundamental rights* are mentioned in the study when referring specifically to the EU and national contexts, in line with the terminology of the Charter of Fundamental Rights of the European Union (Charter)¹⁰ and national constitutional frameworks.

Given that the Pact's regulatory framework is expected to be fully implemented by July 2026¹¹ and its implementation is still ongoing, the effectiveness of this attempt to institutionalise oversight to deter possible human rights violations within the national and EU legal order remains uncertain. To outline the state of IMM implementation at the time of writing, Annex I provides a table with a chronological overview of selected documents published by EU bodies and agencies, listed from the most recent to the earliest.

1.2 Research Question

Considering this background, the present study proposes to address the following research question: «How does the legal design of the independent monitoring mechanism under the EU Pact on Migration and Asylum influence its potential to safeguard human rights?».

The study challenges the assumption that the mere establishment of IMM automatically ensures the effective protection of human rights. Instead, it argues that effectiveness depends on certain enabling conditions such as legitimacy, independence, and accountability,

⁷ Regulation (EU) 2024/1356, 10(2)(a).

⁸ 1951 Convention Relating to the Status of Refugees, and 1967 Protocol relating to the Status of Refugees.

⁹ European Convention on Human Rights.

¹⁰ Charter of Fundamental Rights of the European Union.

¹¹ European Commission, *Common Implementation Plan for the Pact on Migration and Asylum*, COM(2024) 251 final, p. 3. As for the claim that the EU is already considering tightening certain rules of the Pact before its implementation, Steve Peers, «Asylum Pact 2.0: The EU Moves Towards a More Authoritarian Approach?», *EU Law Analysis Blog*, 13 December 2025.

identified by the doctrine as key determinants of compliance¹² with human rights obligations, which constitute the ultimate purpose of establishing such mechanisms¹³.

1.3 Theoretical Premises

This study proceeds from the premise that the IMM must be assessed not merely as a formal legal safeguard, but as an instrument whose effectiveness depends on structural conditions identified in international human rights monitoring theory. It therefore combines a doctrinal analysis of the Pact's legal design with a theory-driven evaluation of its capacity to induce compliance or, more accurately, to deter non-compliance, given that the Pact's aim is not to establish a substantive positive obligation to advance rights protection, but rather an obligation not to undermine existing rights.

1.3.1 Monitoring as a means to promote compliance

From an early stage, international human rights monitoring has served as a bridge between international legal standards and domestic implementation. Unlike domestic legal systems, international human rights agreements typically require the creation of specialised monitoring mechanisms to ensure that treaty obligations are more than rhetorical commitments. As Philip Harvey¹⁴ stated in the 80's, international administrative and judicial institutions were still «embryonic», making monitoring systems indispensable to the practical operation of human rights treaties.

The dominant model across the international human rights monitoring system was, by then, state reporting, whereby governments periodically submit detailed accounts of their implementation efforts to independent expert bodies. This process institutionalised scrutiny through dialogue between treaty bodies and state representatives. While reporting procedures perform a crucial compliance function by shifting the burden of justification onto states, requiring them to demonstrate progress and justify shortcomings, rather than potential victims of non-compliance having to demonstrate violations, they are widely recognised as

¹² See Jasper Krommendijk, «The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies», *Review of International Organizations* 10 (2015), pp. 490–494.

¹³ As Philip Harvey observes in «Monitoring Mechanisms for International Agreements Respecting Economic and Social Human Rights», *Yale Journal of International Law* 12, no. 2 (1987), pp. 396–420), p. 396.

¹⁴ *Ibidem*.

inherently self-serving¹⁵. In this context, independent alternative reports¹⁶ of National Human Rights Institutions (NHRI) introduce factual counterweights that expose protection gaps and challenge state narratives. Through this process, monitoring became corrective, ensuring that international oversight reflects lived realities¹⁷.

In migration contexts, this corrective function has been considered particularly significant. The Office of the United Nations High Commissioner for Human Rights' (OHCHR) recent study on human rights monitoring in the context of migration¹⁸ highlights how independent oversight deters violations, generates evidence for accountability, and promotes systemic reform across borders, detention facilities, return procedures, and reception systems. The physical presence of monitors has, according to this study, been shown to reduce abuse while collecting data that informs legal and policy reform aimed at addressing protection gaps.

Monitoring thus operates not simply as a technical reporting exercise but as a dynamic compliance mechanism, one that exposes violations, ensures political pressure, and connects international legal norms to domestic reform. This logic is reflected in the Pact, which requires MS to establish IMM to monitor compliance with the human rights of asylum seekers and migrants, as protected under international law and the EU law, while MS implement the Pact's secondary legislative instrument.

¹⁵ Chris Sidoti, «National Human Rights Institutions and the International Human Rights System», in Ryan Goodman and Thomas Pegram (eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2011), p. 100. Philip Harvey, *op. cit.*, p.405. Jasper Krommendijk, *op. cit.*, p.496.

¹⁶ These reports include the Universal Periodic Review (UPR), a mechanism unique to the Human Rights Council that requires each UN Member State to undergo a peer review of its human rights record every 4.5 years. On the relevance of the UPR for NHRI, see Corina Lacatus and Valentina Carraro, «National Human Rights Institutions: Independent Actors in Global Human Rights Governance?», *International Affairs* 99, no. 3 (2023), p. 1170.

¹⁷ Global Alliance of National Human Rights Institutions (GANHRI) *General Observations of the Sub-Committee on Accreditation* (21 February 2018), p. 1: «NHRIs are established by States for the specific purpose of advancing and defending human rights at the national level, and are acknowledged to be one of the most important means by which States bridge the implementation gap between their international human rights obligations and actual enjoyment of human rights on the ground».

¹⁸ OHCHR, *Study on Human Rights Monitoring in the Context of Migration* (2025).

1.3.2 Effectiveness as Dependent on Legitimacy, Independence, and Accountability

According to Jasper Krommendijk¹⁹, the *effectiveness* of monitoring is defined by its capacity to induce behavioural changes that would not otherwise have occurred. Effectiveness, therefore, refers to observable policy, legislative, institutional, or budgetary shifts that can be causally linked to monitoring outcomes.

Considering the bodies vested as monitors are usually persuasion bodies, this effectiveness is understood to be grounded in mutually reinforcing pillars, from which the following three have been selected: legitimacy, independence, and accountability.

Legitimacy is defined as the perceived authority, credibility, and impartiality²⁰ of monitoring institutions. When monitoring bodies are seen as operating according to accepted standards of expertise and impartiality, they exert a «pull towards compliance»²¹ on state actors. Government officials are more likely to engage with and act upon recommendations when they perceive the issuing body as competent, balanced, and authoritative.

Independence, the capacity to operate outside influence from governments and other actors²², is a structural precondition for credible monitoring. It encompasses both legal separation from government and functional autonomy in setting agendas, conducting investigations, and issuing findings. The literature²³ consistently distinguishes political monitoring bodies composed of state representatives from unaffiliated expert bodies capable of assuming a genuinely critical stance.

Modern international human rights instruments corroborate this understanding by increasingly codifying independence as a requirement of monitoring. Both the Convention on the Rights of Persons with Disabilities (CRPD)²⁴ and the Optional Protocol to the Convention against Torture (OPCAT)²⁵ explicitly mandate independent national human

¹⁹ Jasper Krommendijk, «The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies», *Review of International Organizations* 10 (2015), p. 492.

²⁰ Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); Jason C. Sharman, «Rationalist and Constructivist Perspectives on Reputation», *Political Studies* 55, no. 1 (2007): 20–37, *apud* Jasper Krommendijk, *op. cit.*, p. 493. See also OHCHR, *op. cit.*, pp. 12–13.

²¹ Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990), *apud* Jasper Krommendijk, *op. cit.*, p. 493.

²² Corina Lacatus and Valentina Carraro, *op. cit.*, pp. 1168.

²³ Chris Sidoti, *op. cit.*, p. 100.

²⁴ [Convention on the Rights of Persons with Disabilities](#), article 33(2).

²⁵ [OPCAT](#), article 3. This Optional Protocol introduces a dual system of preventive monitoring. In order to ensure the establishment of a regime of regular visits to places of detention, the Protocol provides that

rights monitoring mechanisms²⁶. The OHCHR²⁷ study further emphasises that financial, operational, and institutional autonomy are indispensable for monitors to access border zones, detention facilities, and return operations without interference or retaliation.

Accountability is the mechanism through which monitoring findings might be transformed into (legal or political) pressure and make the responsible liable²⁸. Rather than operating directly through enforcement, monitoring generates accountability through mobilisation²⁹ of civil society, journalists and parliamentarians, generating public debate that legitimises criticism and the demand for reforms.

This mobilisation dynamic, which is central to human rights compliance, holds that when domestic actors encounter resistance from their own governments, they mobilise both nationally (as described above) and internationally in order to obtain external validation. This external input is subsequently reintroduced into domestic politics as authoritative pressure. The dynamic may also operate in the opposite direction: when monitoring bodies are international, they often rely on domestic human rights actors to advance the human rights agenda at the national level. Findings produced by international monitoring mechanisms can strengthen the defence of human rights domestically, just as national-level conclusions can contribute to the development of more effective international protection mechanisms. In this way, the balance of power may shift in favour of actors who, at a given moment, lack sufficient support to ensure compliance with human rights standards. This theory further conveys that accountability exercised through soft power can be further strengthened

monitoring should be carried out both by international bodies and by independent national institutions. At the international level, this resulted in the creation of the Subcommittee on Prevention of Torture within the UN. At the national level, States Parties are required to establish, designate, or maintain one or more independent bodies responsible for conducting preventive visits. These bodies are known as National Preventive Mechanisms.

²⁶ EU mechanisms, such as fundamental rights monitoring of the Frontex and the EUAA and the Schengen evaluation monitoring mechanism, are not discussed here because they are neither national mechanisms nor independent in the Paris Principles sense.

²⁷ OHCHR, *op. cit.*

²⁸ Madalina Busuioc, «Accountability, Control and Independence: The Case of European Agencies», *European Law Journal* 15, no. 5 (2009): 599–615: «a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his or the conduct, the forum can pose questions and pass judgment and the actor might face consequences».

²⁹ On domestic mobilisation as a factor enhancing effectiveness, see Krommendijk, *op. cit.*, p. 494. See also Ryan Goodman and Thomas Pegram, «National Human Rights Institutions, State Conformity, and Social Change», NYU School of Law Public Law & Legal Theory Research Paper No. 11-71 (2011), p. 17.

through enforceability whenever persuasion bodies can channel their findings into a binding court's decision³⁰.

1.4 Methodology and Structure

To answer the research question, this study conducts a normative analysis³¹, focusing on the structure, independence, and accountability mechanisms envisaged in the Pact rather than on an empirical assessment of its implementation. It proceeds from the hypothesis that, although the Pact formally integrates human rights monitoring into the EU's restrictive response to increased forced mobility and other migration flows, its legal and institutional design may either strengthen the effectiveness of this safeguard or, conversely, limit its ability to provide meaningful protection and contribute to combat human rights risks that the Pact itself creates.

The research adopts a doctrinal legal methodology grounded in the examination of legislative texts, official reports, and academic scholarship. It is therefore based on a systematic review of both primary and secondary sources. It draws, *mutatis mutandis*, on Jasper Krommendijk's³² analytical framework concerning the domestic effectiveness of international human rights monitoring mechanisms, adapting that reasoning to the assessment of national-level monitoring within the EU legal order and to the specific context of asylum seekers' and migrants' human rights protection.

The primary sources used include EU legal instruments, notably the relevant regulations of the Pact on Migration and Asylum and the Charter³³. The analysis also considers reports, opinions, and guidance issued by EU institutions and agencies, particularly the European Union Agency for Fundamental Rights (FRA). Secondary sources comprise academic literature on independent human rights monitoring, the effectiveness of international human rights frameworks, and accountability mechanisms for human rights violations.

This study further examines a national institutional framework selected because it is considered a suitable setting for embedding the IMM. Specifically, it focuses on the

³⁰ Krommendijk, *op. cit.*, p. 494

³¹ Such an assessment can only be fully validated *ex post*, after a period of operation of the independent monitoring mechanisms under the Pact.

³² For the analytical framework adopted here, see Krommendijk, *op. cit.* While the author develops his framework in relation to international human rights monitoring bodies, the present study adapts that reasoning to the assessment of national human rights monitoring mechanisms.

³³ The Charter has the same value as other founding treaties, as per article 6(1) of the Treaty on European Union.

Portuguese Ombudsman; particular emphasis is therefore placed on official documents of this institution, including its constitutional and statutory framework.

This choice is justified as the institution has been identified by a European Commission recent document as a potential candidate to assume the role of the IMM³⁴. Moreover, due to the fact its existing constitutional and legal mandates already encompass monitoring functions relevant to the Pact's context, thereby providing a robust point of reference for the present analysis.

Portugal is also one of the EU MS where the institutional framework of the Ombudsman simultaneously encompasses the functions of Ombudsman³⁵, National Human Rights Institution (NHRI)³⁶, and National Preventive Mechanism (NPM), whose involvement in monitoring is expressly envisaged in the Screening Regulation³⁷, which provides that they shall participate in the operation of the IMM.

Furthermore, the institution holds the highest accreditation status under the Principles Relating to the Status of National Institutions (Paris Principles)³⁸ – which are regarded as providing strong guarantees of independence and thus enable a meaningful assessment of the EU monitoring mechanism against established international standards – the relevance of which is also pointed by the Pact.

In sum, this study offers a prospective assessment of the normative and institutional potential of the proposed monitoring mechanism. Drawing on the Portuguese legal framework, it formulates recommendations of legal strategies aimed at strengthening independence,

³⁴ European Commission, *Second State of Play on the Implementation of the Pact on Migration and Asylum*, Annex to the COM(2025)795 final, p. 13, fn. 60: «In most cases, the task is or will be attributed to existing ombudspersons (Austria, Bulgaria, Cyprus, Czechia, Latvia, Lithuania, Estonia, Poland, Portugal, Romania, Slovakia), though there are exceptions such as Croatia and the Netherlands. In Romania, the ombudsperson has already formally taken up the task. Ireland proposes the establishment of an independent oversight mechanism through a Chief Inspector for Asylum and Border Procedures, supported by an advisory board».

³⁵ Despite the preference for gender-neutral terminology such as ombudsperson – see [Max Planck Encyclopedia of Public International Law, «ombudsperson»](#) – this study nevertheless uses the term *ombudsman* for reasons of terminological consistency.

³⁶ On the role of NHRI in this context, see Cristina Pugnale and Mathilde Bénard, «National Human Rights Institutions: An Emerging Human Rights Actor in the European Union», in P. Czech et al. (eds.), *European Yearbook on Human Rights 2021* (Cambridge/Antwerp/Chicago: Intersentia, 2021), pp. 499–538.

³⁷ Regulation (EU) 2024/1356, article 10(2): «Member States shall put in place adequate safeguards to guarantee the independence of the independent monitoring mechanism. National Ombudspersons and national human rights institutions, including national preventive mechanisms established under the OPCAT, shall participate in the operation of the independent monitoring mechanism and may be appointed to carry out all or part of the tasks of the independent monitoring mechanism».

³⁸ UN General Assembly Resolution 48/134, *Principles Relating to the Status of National Institutions (Paris Principles)*, 20 December 1993.

accountability, and effectiveness in human rights monitoring under the Pact. In doing so, it seeks to contribute both to the academic debate on human rights protection within the EU and to the fulfilment of the human rights³⁹ of asylum seekers and migrants during a period that remains particularly challenging both for the protection of their rights and for those who advocate on their behalf.

The proposed analysis is structured as follows. Chapter 2 examines the legal foundations of the Pact, with particular attention to the provisions establishing the IMM, and assesses them against principles identified in the literature as conducive to effective human rights monitoring. Chapter 3 analyses the interaction between the IMM's design and an existing national monitoring institution within the selected MS and explores the legal tools and institutional strategies available within the chosen national legal order to enhance the effectiveness of monitoring mechanisms. Finally, Chapter 4 summarises the key research findings and outlines possible directions for future research.

2. The EU Pact on Migration and Asylum: A Critical Overview

The Pact's recently adopted instruments, described below, may be understood as an ambitious reform that brings together the Common European Asylum System (CEAS) and elements of the Schengen acquis on migration management. Together, these instruments establish a comprehensive regulatory framework governing entry, asylum procedures, responsibility allocation, return, reception conditions, and crisis management within the EU.

In this context, the Qualification Regulation⁴⁰ replaces the previous Qualification Directive⁴¹ and establishes uniform standards for granting international protection and defining the rights attached to refugee and subsidiary protection status. By transforming the previous directive into a regulation, it seeks to increase harmonisation across MS and reduce divergences in recognition practices, while maintaining the substantive criteria governing eligibility for protection.

³⁹ Pugnale and Bénard, *op. cit.*, p. 531: «Human rights monitoring is not an end in itself; rather, it should serve as a means to promote more compliant behaviour».

⁴⁰ [Regulation \(EU\) 2024/1347](#), that shall apply from 1 July 2026 (article 42(2)).

⁴¹ [Directive 2011/95/EU](#).

The APR⁴² replaces the Asylum Procedures Directive and introduces a fully harmonised common procedure for granting and withdrawing international protection. Among its key innovations are mandatory border procedures for certain categories of applicants and accelerated examination processes, designed to increase efficiency and reduce secondary movements within the Union.

The Return Border Procedure Regulation⁴³ complements the asylum border procedure by establishing a specific return procedure at the external borders for applicants whose protection claims have been rejected. The regulation also introduces temporary derogations applicable in crisis situations and reinforces the link between asylum decisions and return measures.

The Resettlement and Humanitarian Admission Framework Regulation⁴⁴ establishes, for the first time, a permanent Union framework for resettlement and humanitarian admission, enabling MS to admit third-country nationals (TCN) or stateless persons directly from third countries. The framework aims to expand legal pathways to protection, while coordinating MS' commitments through a common EU mechanism.

The Asylum and Migration Management Regulation (AMMR)⁴⁵ replaces the Dublin III Regulation⁴⁶ and establishes a new system for determining MS responsibility for examining asylum applications, combined with a solidarity mechanism allowing MS to contribute through relocation, financial contributions or return sponsorships. While preserving the core logic of the Dublin system, it seeks to introduce greater flexibility in responsibility-sharing.

The SR⁴⁷, together with the related amending Regulation (EU) 2024/1352⁴⁸, introduces a mandatory pre-entry screening procedure for TCN arriving irregularly at the external borders or found within MS territory without having undergone border checks. The procedure includes identity, health, vulnerability and security checks, as well as referral to either asylum

⁴² [Regulation \(EU\) 2024/1348](#), that shall apply from 12 June 2026 (article 79(2)).

⁴³ [Regulation \(EU\) 2024/1349](#), that shall apply from 12 June 2026 (article 14(2)).

⁴⁴ [Regulation \(EU\) 2024/1350](#), that entered into force 20 days after publication in the Official Journal of the European Union; Article 9(24) that shall apply from 12 June 2026 (article 16).

⁴⁵ [Regulation \(EU\) 2024/1351](#), that shall apply from 1 July 2026, although several provisions have applied since 11 June 2024 (article 85).

⁴⁶ [Regulation \(EU\) No 604/2013](#).

⁴⁷ On the territorial scope of the Screening Regulation, see FRA, *Monitoring Fundamental Rights during Screening and the Asylum Border Procedure* (2024), pp. 19–20.

⁴⁸ [Regulations \(EU\) 2024/1356](#) and [\(EU\) 2024/1352](#), that shall apply from 12 June 2026 (article 25, second subparagraph, and article 3, second subparagraph respectively).

or return procedures. Importantly, the Regulation determines there should be an IMM in each MS to oversee compliance with human rights during screening operations.

The Eurodac Regulation⁴⁹ significantly reforms the Eurodac database by expanding the categories of individuals whose biometric data may be collected and stored and by strengthening its role in identifying irregular migrants, detecting secondary movements and supporting asylum responsibility determinations. The system also enables broader law-enforcement access to biometric data for the prevention and investigation of serious crimes and terrorism.

The Crisis and Force Majeure Regulation⁵⁰ establishes temporary derogation mechanisms applicable in situations of exceptional migratory pressure, instrumentalisation by third countries, or force majeure. It allows MS to adapt certain procedural rules while introducing reinforced solidarity measures within the Union.

Finally, the Reception Conditions Directive⁵¹ updates the EU framework governing minimum standards for the reception of applicants for international protection, including rules on accommodation, healthcare, access to employment and detention conditions. Unlike the other instruments of the Pact, this measure remains a directive and therefore requires transposition into national law by MS.

All those Pact instruments have been widely criticised in academic literature for their potential implications on human rights protection. Following is an overview of the critical reviews that are particularly pertinent to the perspective adopted in this study.

Authors such as Filipe Nunes⁵² argue that the Pact, in general, contributes to the normalisation of practices that risk undermining human dignity, particularly through intensified categorisation of migrants, expanded detention practices, accelerated return procedures and the externalisation of migration management responsibilities reflecting the growing securitisation of migration policy⁵³. According to Nunes, the literature identifies three recurrent analytical dimensions underlying these critiques: humanitarian classification,

⁴⁹ [Regulation \(EU\) 2024/1358](#), that shall apply from 12 June 2026, except for article 26 which shall apply from 12 June 2029 (article 63(2)).

⁵⁰ [Regulation \(EU\) 2024/1359](#), that shall apply from 1 July 2026.

⁵¹ [Directive \(EU\) 2024/1346](#), that must be transposed by Member States by 12 June 2026 (article 35(1)).

⁵² Filipe Nunes, «O novo pacto europeu para a migração e asilo: entre os direitos humanos e a securitização», *Relações Internacionais* 88 (2025), pp. 8-9 and 20.

⁵³ Nunes, *op. cit.*, pp. 8-9 and 20.

through which individuals on the move are segmented according to perceived protection worthiness; spatial coordination, involving the concentration of asylum seekers and migrants in border zones functioning as spaces of containment; and temporal control, whereby accelerated procedures prioritise administrative efficiency at the expense of procedural safeguards. The author further highlights the absence of preventive impact assessments – a criticism also echoed by Steve Peers⁵⁴ and referenced below with regard to Eurodac – evaluating the compatibility of the Pact with human rights obligations prior to its adoption.

Specifically concerning the Screening Regulation, Steve Peers notes that although the instrument «provides for a filtering process, not a final decision⁵⁵», it initially use an euphemistic formulation to refer detention, stating that individuals undergoing screening must «remain available to the authorities»⁵⁶, as a result, «for many people subject to screening it will be the detention condition (...) which will be relevant in practice»⁵⁷. Peers further notes that the Regulation contains «an overarching obligation to comply with human rights obligations, including the principle of non-refoulement, as well as a requirement to have an independent human rights monitoring mechanism»⁵⁸. However, he criticises the legislative design for failing to expressly provide for procedural safeguards such as the right to an effective remedy against screening results, in accordance with article 47 of the Charter. Furthermore, in Nunes' view, the screening procedure aims to assess security risks and IMM dependence on MS discretion raises doubts regarding its institutional independence⁵⁹.

Regarding the Resettlement and Humanitarian Admission Framework Regulation, Nunes⁶⁰ and Peers⁶¹ both argue that it falls short in ensuring safe and legal migration routes, due to its voluntary nature for MS and that it «should be seen in the broader context of the other measures that regulate the position of everyone else seeking asylum—whom the EU is leaving at the mercy of those vile smugglers and unsafe journeys»⁶². As such, in Peers' view, it raises questions concerning the compatibility with the core international protection

⁵⁴ Steve Peers, «The New EU Asylum Laws: Taking Rights Half-Seriously», *Yearbook of European Law* 43 (2024), p. 141.

⁵⁵ Peers, *op. cit.*, p. 123.

⁵⁶ Regulation (EU) 2024/1356, recital 11, articles 6 and 7(1). Peers, *op. cit.*, p. 122.

⁵⁷ Peers, *op. cit.*, p. 122.

⁵⁸ Peers, *op. cit.*, p. 124.

⁵⁹ Nunes, *op. cit.*, pp. 17 and 21.

⁶⁰ Nunes, *op. cit.*, p. 20.

⁶¹ Peers, *op. cit.*, p. 130. D. Čanji, «European Union's New Pact on Migration and Asylum: Enhancing the Legal Protection of Refugees and Asylum Seekers or Restoring the Old Paradigm?», *European Studies*, vol. 9, no. 1, 2022, pp. 41–60, *apud* Filipe Nunes, *op. cit.*, p. 14.

⁶² *Ibidem*.

guarantees, particularly the prohibition on penalising refugees for irregular entry under article 31 of the 1951 Refugee Convention and article 18 of the Charter, and the broader principle of *non-refoulement*. This principle applies regardless of whether refugees entered a territory lawfully, as reflected in article 33 of the Geneva Convention and articles 19(2) and 4 of the Charter, as well as article 3 of the ECHR.

In relation to the AMMR, Peers highlights several provisions that may significantly affect procedural safeguards, including «the restrictions on appeals against transfer, the (conditional) loss of benefits and rights to have an application considered due to secondary movements, the explicit obligations to comply, the wider grounds for detention, longer time periods for responsibility for applications, and shorter deadlines for administrative decision-making»⁶³. These elements raise questions, particularly concerning the limited in timing for appeals and their loss of automatic suspensive effect, regarding their compatibility with article 47 of the Charter, and articles 6 and 13 of the ECHR. Moreover, Peers argues that the new solidarity mechanism does not fundamentally resolve the structural problem of insufficient solidarity within the EU asylum system, and the literature surveyed by Nunes further claims the weakening of solidarity through flexible contribution mechanisms that allow MS to replace reception responsibilities with financial payments or return sponsorships⁶⁴.

The reform of the Eurodac system has also attracted criticism, particularly concerning the absence of a comprehensive impact assessment prior to the adoption of the new regulation⁶⁵. As the system expands the categories of individuals whose biometric data may be collected and stored, including the collection of new types of data for longer periods and from younger individuals⁶⁶, concerns arise regarding proportionality and data-protection safeguards.

Similarly, the revised Reception Conditions Directive has been criticised for introducing deterrent measures aimed at reducing secondary movements. As Peers observes, «attempts to deter such movements by sanctioning asylum seekers for them, as regards access to employment and some material reception conditions, as well as detaining them more

⁶³ Peers, *op. cit.*, p. 138.

⁶⁴ Lina Vosyliūtė, «When Principles Are Compromised: EU Return Sponsorship in Light of the UN Global Compacts», in Sergio Carrera and Andrew Geddes (eds.), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights* (Florence: European University Institute, 2021), pp. 291–313, 2026, *apud* Nunes, *op. cit.*, p. 12

⁶⁵ Peers, *op. cit.*, p. 141.

⁶⁶ Peers, *op. cit.*, p. 141.

frequently»⁶⁷, and such measures raise potential concerns regarding their compatibility with human rights, including the protection of human dignity, under article 1 of the Charter and, this study argues, right to liberty under article 6 of the Charter and 5 of the ECHR.

The APR has also been subject to criticism due to its expanded use of accelerated and border procedures. As Peers notes, these procedures may be «fully mandatory (accelerated procedures), or mandatory for a significant number of people (border procedures)». One key concern in terms of human rights protection relates again to the shortened deadlines for challenging negative asylum decisions (articles 47 of the Charter, 6 and 13 of the ECHR). More fundamentally, he argues that provisions allowing the refusal to examine asylum applications due to secondary movements may be incompatible with article 18 of the Charter and 3 of the ECHR protecting the right to asylum, stating that «[i]t is submitted that this is a breach of the right to seek asylum in Article 18 of the Charter that cannot be justified based on article 52 of the Charter, because it breaches the essence of that right»⁶⁸.

With regard to the Crisis and Force Majeure Regulation, Peers notes that although the derogations introduced by the regulation are formally limited in time and scope, they nevertheless allow delays in the registration of asylum applications, extensions of responsibility deadlines and longer application of border procedures. While these measures do not formally eliminate the right to asylum, the practical implications for access to protection remain uncertain.

Taken together, these critiques suggest that although the Pact presents itself as a balanced framework combining migration management and humanitarian commitments, its institutional design may reveal a structural bias towards security-oriented governance. As Peers concludes, «there are various default protections against non-refoulement, but it is uncertain how they will work in practice. And while the multiple fast track procedures are all subject to the observance of basic standards on paper, there are doubts about whether that is true in practice»⁶⁹

This assessment outlines the Pact tendency towards securitisation⁷⁰, that potentially compromises the protection of asylum seekers. Among the concerns raised in the literature

⁶⁷ Peers, *op. cit.*, p. 152.

⁶⁸ Peers, *op. cit.*, p. 167.

⁶⁹ Steve Peers, *op. cit.*, p. 183.

⁷⁰ Nunes, *op. cit.*, p. 22.

and central to this research is the potential non-independence of the IMM, given the present study focuses on the role of these mechanisms in safeguarding human rights compliance, the SR and the APR occupy a central position within the Pact's architecture, as they establish the legal framework governing the IMM responsible for overseeing these operations. The following section therefore examines in greater detail the legal framework governing these procedures and the monitoring mechanisms associated with them.

2.1 Screening and Asylum Border Procedures under the Pact

The Screening Regulation

The SR has as one of its stated objectives⁷¹ the reinforcement of control over unauthorised border crossings by complementing the Schengen Border Code (SBC)⁷². The Regulation intends to respond to the acknowledged inability of the SBC to address situations where TCN do not undergo border control⁷³. As such, screening operates as a tool aimed at addressing this issue at the earliest possible stage. For this purpose, it brings together the fiction of non-entry⁷⁴ already existing in the Schengen rules, combining it with mandatory security, health and vulnerability assessments⁷⁵ and with the crystallisation of the hotspot approach (previously circumscribed to Greece and Italy⁷⁶) in the EU legal order.

⁷¹ European Commission, *A New Pact on Migration and Asylum*, COM (2020) 609 final, p. 4: «To ensure that the same checks are conducted for all irregular arrivals before legal entry to the territory of a Member State».

⁷² [Regulation \(EU\) 2016/399](#).

⁷³ [Regulation \(EU\) 2024/1356](#), recital 18.

⁷⁴ Since the 90s, the ECtHR has held, notably in the case of *Amuur v. France* ([Application no. 19776/92](#)), that transit zones cannot be considered extraterritorial spaces and that the so-called «legal fiction» of non-entry cannot exempt states from their obligations to provide legal safeguards, ensure human rights compliance, and assume responsibility for violations. This jurisprudence is binding on EU MS as parties to the ECHR and, through Article 52(3) of the Charter, also guides the interpretation of the Charter rights in line with the case law of the ECtHR, notwithstanding the still pending accession of the EU to the ECHR under Article 6(2) TEU. See also [European Parliament Research Service, briefing on legal fiction of non-entry in EU asylum policy](#).

⁷⁵ Nunes, *op. cit.*, p. 16.

⁷⁶ Marco Gerbaudo, «The European Commission's Instrumentalization Strategy: Normalising Border Procedures and De Facto Detention», *European Papers* 7, no. 2 (2022): 615–626. The author notes that the hotspot approach, introduced in 2015 as an «emergency» response during the so-called migration crisis, became a permanent feature of migration management in Italy and Greece despite declining arrivals. He claims that, particularly after the EU-Turkey Statement, hotspots evolved into spaces of containment marked by overcrowding and limited access to healthcare and legal assistance. The Covid-19 pandemic further entrenched restrictive practices, culminating in the Moria destroyed by a fire in 2020 and the subsequent launch of the New Pact on Migration and Asylum under the motto «no more Morias».

Despite its previous existence, the legal fiction of non-entry is further expanded under the Pact from TCN⁷⁷ detected at the external borders without authorisation to enter, to also include TCN illegally staying within the territory of a MS where they have crossed the external border in an unauthorised manner⁷⁸. Consequently, persons subject to screening are legally considered not to have entered the territory of the MS during the procedure, even if in practice they have already entered and remained within it.

In addition, the Pact expands the obligation to undergo screening in certain situations for persons authorised to enter the MS territory. Under the SR, third-country nationals exceptionally authorised to enter pursuant to article 6(5) of the SBC are generally not subject to screening⁷⁹. However, those authorised to enter under article 6(5)(c)⁸⁰ – on humanitarian grounds, on grounds of national interest, or because of a MS’ international obligations⁸¹ – of the SBC who subsequently apply for international protection remain subject to the screening procedure.

As such, according to articles 5 and 7 of the SR, the screening procedure personal scope includes four main categories of TCN: (i) those who have crossed the external border irregularly⁸²; (ii) those who apply for international protection during border checks⁸³; (iii) those disembarked following search and rescue operations⁸⁴; and (iv) those found irregularly staying within the territory of a MS and who appear not to have undergone border checks⁸⁵.

The SR approach reinforces the existing tendency to blur the distinction between asylum seekers and migrants⁸⁶ by treating both as unauthorised entrants, disregarding the fact that

⁷⁷ [Regulation \(EU\) 2024/1356](#), article 2(4) and recital 9, according to which a TCN is any person who is not a Union citizen and who does not enjoy the right of free movement under Union law, a definition that also includes stateless persons.

⁷⁸ Consequently, it does not include overstayers, who entered lawfully but remained beyond the period authorised.

⁷⁹ [Regulation \(EU\) 2024/1356](#), article 5(3): «Third-country nationals who have been authorised to enter pursuant to Article 6(5) of Regulation (EU) 2016/399 shall not be subject to the screening».

⁸⁰ [Regulation \(EU\) 2024/1356](#), article 5(3): «However, third-country nationals who are authorised to enter pursuant to Article 6(5)(c) of that Regulation and who make an application for international protection shall be subject to the screening».

⁸¹ Which, pursuant to article 31 of the Geneva Convention, should always be the case of asylum seekers.

⁸² [Regulation \(EU\) 2024/1356](#), article 5(1)(a). On unauthorised external border crossers not subject to screening, see Steve Peers, «The New EU Asylum Laws: Taking Rights Half-Seriously», *op. cit.*, p. 120, noting that the exception applies to «those whom Member States are not obliged to take biometric data from under the 2024 Eurodac Regulation, ‘for reasons other than their age’».

⁸³ [Regulation \(EU\) 2024/1356](#), article 5(2).

⁸⁴ [Regulation \(EU\) 2024/1356](#), article 5(1)(b).

⁸⁵ [Regulation \(EU\) 2024/1356](#), article 7(1).

⁸⁶ On the legal significance of the distinction between *irregular migrants* and *asylum seekers*, see Shamin Asghari, «Migrant or Asylum Seeker: Is the Distinction Still Relevant?», Leiden Law Blog, 4 January 2021.

an asylum seeker's need for protection overrides ordinary entry requirements⁸⁷ – as argued by Jakulevičienė⁸⁸ – it paradoxically results in less favourable treatment for asylum seekers. In particular, asylum seekers authorised to enter on humanitarian or international law grounds that remain subject to screening under article 5(3) *in fine* of the SR, whereas migrants in comparable situations are not. This creates the impression that asylum seekers are effectively penalised for exercising their right to seek protection, in line with critics previously addressed.

The duration of the screening process is strictly limited, generally up to seven days⁸⁹, which casts «doubt on this initiative, including the accuracy of a rapid assessment»⁹⁰, especially on the reliability of vulnerability identification, as during this time, entity responsible for screening is also required to identify individuals, conduct health and security checks, before channelling them into the asylum or return procedure.

During this time, all persons under screening are deprived of liberty in «adequate and appropriate» places⁹¹, a requirement that entails accepting *de facto* detention⁹² justified on the text with the need to prevent absconding or security risk, regardless of proportionality consideration, and to provide the personal and biometric data required under EU law. Screening operation concludes with the completion of a screening form and referral to either an international protection procedure or a return procedure⁹³.

From a human rights perspective, the limited availability of effective remedies⁹⁴ abovementioned where the Regulation does not expressly provide for procedural rights

⁸⁷ On this reading, it could also be argued that this interpretation is grounded in the Pact itself, as reflected in article 3 of [Regulation \(EU\) 2024/1356](#), which provides that «[w]hen applying this Regulation, Member States shall act in full compliance with (...) the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, including the obligations related to access to international protection (...)». Nonetheless, see also [COM\(2020\) 609 final](#), p. 4, which states that «[w]hilst asylum applications made at the EU's external borders must be assessed as part of EU asylum procedures, they do not constitute an automatic right to enter the EU».

⁸⁸ Lyra Jakulevičienė, «Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?» (2022), p. 84.

⁸⁹ [Regulation \(EU\) 2024/1356](#), article 8(3).

⁹⁰ Shamin Asghari, «Migrant or Asylum Seeker: Is the Distinction Still Relevant?», *Leiden Law Blog*, 4 January 2021.

⁹¹ On the uncertainty surrounding in-territory screening and its monitoring, see [Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration on the Development of Independent Monitoring Mechanisms at Borders](#) (30 January 2026), p. 8.

⁹² ECtHR, *Amuur v. France*, *op. cit.*

⁹³ [Regulation \(EU\) 2024/1356](#), article 1(3).

⁹⁴ European Council on Refugees and Exiles (ECRE), *ECRE Comments on the Regulation of the European Parliament and of the Council Introducing the 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* (February 2025), p. 5.

allowing individuals to challenge the screening decision itself, nor does it establish a specific right to appeal the outcome of the screening process. As a result, judicial review is generally limited to the final decisions adopted in the subsequent asylum or return procedures, rather than to the screening phase that determines the procedural pathway in which the individual will be placed. This study thus subscribes the concerns regarding access to justice and effective judicial protection, particularly given the potentially decisive role that this filtering process plays in directing individuals towards accelerated asylum procedures or return processes. As noted in the literature, despite the absence of express procedural guarantees in the Regulation, it may nevertheless be argued that, in light of articles 47 of the Charter⁹⁵ 6 and 13 of the ECHR, individuals should at least be able to challenge the application of the screening procedure where there is no legal basis for subjecting them to screening or where the procedure exceeds the maximum duration permitted by the Regulation.

Nonetheless, doubts remain as to how realistic judicial challenges may be in practice within the highly accelerated and geographically constrained context of border procedures in the absence of automatic suspensive effect. As per Case-law of the European Court of Human Rights (ECtHR), an effective remedy against removal must, in principle, have suspensive effect where there is a risk of ill-treatment, and the Court of Justice of the European Union (CJUE) has held that a remedy cannot be considered effective where it lacks automatic suspensive effect in situations where there are substantial grounds for believing that removal would expose the individual to ill-treatment⁹⁶, in accordance with the principle of *non-refoulement*.

Against this background, the Regulation nonetheless affirms that persons subject to screening remain entitled to the rights guaranteed by the Charter and by the international human rights instruments binding upon the MS⁹⁷. In this respect, the Regulation requires MS

⁹⁵ See Steve Peers, *op. cit.*, p. 124. Also, Rita Aroso Duarte, «A New Pathway for Effective Judicial Protection at EU Level? A Reflection on the Impact of *Hamoudi* and *WS and Others v Frontex*», *EU Law Live*, Weekend Edition No. 263, 21 February 2026.

⁹⁶ Lyra Jakulevičienė, «EU Screening Regulation: Closing Gaps in Border Control While Opening New Protection Challenges?», *EU Immigration and Asylum Law and Policy Blog*, 28 June 2024: «The lack of suspensive effect of the appeal may raise legal issues under the standards established by the Charter (Art. 47(1)), ECHR (Art. 13), and the case-law of the European courts. For the remedy to be effective, besides other requirements, it should have a suspensive effect on the expulsion decision (e.g., ECtHR, *A.M. v. the Netherlands*, para. 66, *M.K. and Others v. Poland*, paras. 219-220 and others). The CJEU also found that a remedy cannot be considered effective with no automatic suspensive effect when there are substantial grounds to believe that the person would be subject to ill-treatment if removed (e.g., *Abdida*, *Gnandi*, *FMS*). So how realistic are appeals at the border?».

⁹⁷ [Regulation \(EU\) 2024/1356](#), article 3.

to ensure a standard of living sufficient to guarantee subsistence and to protect the physical and mental health of individuals undergoing the screening process.

The Regulation also establishes some specific procedural rights. Persons subject to screening must be informed about the screening procedure itself, as well as about the relevant legal frameworks governing asylum and return procedures, the SBC, national immigration law, the General Data Protection Regulation, and any prospects of relocation. At the same time, the obligations imposed on persons subject to screening are significant, in particular the requirement to remain at the disposal of the authorities throughout the procedure.

Special safeguards apply to minors, with the best interests of the child claimed as a primary consideration, but with a practical scope that is expected to be limited, although notably present in the obligation to assign a representative to unaccompanied minors. Emergency healthcare and essential treatment must be ensured for all persons undergoing screening. Safeguards largely mirror those found in the Reception Conditions Directive.

Finally, organisations and individuals providing legal advice and counselling must be granted effective access to persons undergoing screening. While MS are granted the possibility to impose restrictions on this right for security or administrative reasons, provided that such access is not severely limited or made impossible.

These limitations on procedural guarantees, together with the treatment of deprivation of liberty as a rule rather than an exception, are particularly relevant to this study, as they illustrate the types of risks to human rights that may arise during the screening phase. Since screening constitutes the first formal interaction between asylum seekers or other TCN and MS authorities under the Pact, it represents a critical stage at which IMM are expected to function in order to ensure compliance with international human rights standards.

The Asylum Procedure Regulation

Turning now to the APR⁹⁸, where individuals subject to screening apply for international protection at the border, the outcome of the screening feeds directly into the asylum procedure⁹⁹. This regulation introduces a directly applicable mandatory border procedure for

⁹⁸ On the territorial application of the APR, see recitals 106 and 107. See also FRA, *op. cit.*, pp. 19–20.

⁹⁹ [Regulation \(EU\) 2024/1348](#), article 27(1) and recital 57; and [Regulation \(EU\) 2024/1356](#), article 17(3) and recital 18.

certain cases¹⁰⁰, such as those involving national security concerns or those of applicants from countries with low recognition rates (below 20%)¹⁰¹. Thus, as explained by the Commission «[a]sylum claims with low chances of being accepted should be examined rapidly without requiring legal entry to the Member State's territory»¹⁰².

As such, the border procedure framework extends the duration of the fiction of non-entry, which can be applied for a much longer period (up to 12 weeks, with the possibility of extension) than the initial screening process. The APR further requires that, alongside with or as part of negative asylum decisions, return decisions be issued, with the stated aim of increasing efficiency and reducing the risk of absconding¹⁰³. These accelerated procedures and the strict deadlines associated with them often place applicants at a procedural disadvantage and weaken effective access to protection, as noted above.

Whereas SR aims to prevent unauthorised entry, the central objective of the APR is to prevent secondary movements¹⁰⁴ within the EU, which are perceived as resulting from disparities between MS in procedures, recognition rates, and reception conditions. By harmonising procedural rules, the APR may undermine previously recognised higher standards of protection¹⁰⁵, imposing a uniform, but potentially lower level of rights guarantee, with the aim of ensuring equal treatment of applicants irrespective of the MS in which an application for international protection is made. The border asylum procedure may apply to applications lodged at external borders, in territorial waters, or in transit zones¹⁰⁶, and determines whether applications are examined on the merits or rejected and channelled into return border procedures, which may entail prolonged periods of detention until return¹⁰⁷.

¹⁰⁰ [Regulation \(EU\) 2024/1348](#), article 45.

¹⁰¹ [Regulation \(EU\) 2024/1348](#), article 42(1)(j), pursuant article 45(1).

¹⁰² See [Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration](#), *op. cit.*, p. 4.

¹⁰³ [Regulation \(EU\) 2024/1348](#), recital 40.

¹⁰⁴ [Regulation \(EU\) 2024/1348](#), recital 7. See Steve Peers, *op. cit.*, p. 113, regarding the containment of secondary movements.

¹⁰⁵ See Steve Peers, *op. cit.*, p. 119: «(...) the Directives on qualifications and procedures have not only been replaced by Regulations; also, the general possibility for Member States to have higher standards than the rules in those two Directives (...) has been dropped».

¹⁰⁶ [Regulation \(EU\) 2024/1348](#), articles 43 and 45.

¹⁰⁷ [Regulation \(EU\) 2024/1348](#), articles 44 and 37; and [Regulation \(EU\) 2024/1349](#), articles 1(1), 4(1), (2) and recitals 2 and 11.

Nevertheless, while these instruments reflect a clear trend towards securitisation¹⁰⁸, their claimed objectives and wording are not, in themselves, overtly ill-intended¹⁰⁹. As such, they do not necessarily preclude the possibility of effective human rights monitoring and, consequently, compliance. Indeed, the regulatory framework leaves room for implementation practices that are compatible with human rights standards. For example, MS may organise access to the asylum procedure in ways that do not result in the systematic detention of applicants. For instance, where high admissibility rates are applied in practice, the negative effects associated with accelerated or restrictive procedural logics may likewise be significantly reduced. However, the decision to introduce a specific IMM – absent from the previous CEAS and SBC frameworks – raises questions as to why such oversight was deemed necessary.

One explanation lies in the restrictive nature of the new measures and the associated risk of regressions in human rights protection. Civil society organisations¹¹⁰ and other stakeholders¹¹¹ have repeatedly warned that accelerated procedures, expanded border controls and reduced safeguards heighten the risk of violations. Another explanation may be found in the growing recognition that borders are structurally sensitive spaces where violations are more likely to occur and where existing EU oversight mechanisms have proven insufficient¹¹².

The official justification¹¹³ is that the IMM aims to increase transparency, accountability, and fundamental rights protection during screening and border procedure. Whether it constitutes

¹⁰⁸ Nunes, *op. cit.*, p. 20.

¹⁰⁹ «Still less are they a shift towards a radical abolition of border control. But nor can they plausibly be characterized as a *de facto* abolition of the right to asylum in the EU—at least on paper», See Steve Peers, *op. cit.*, p.183.

¹¹⁰ See, inter alia, the various ECRE comments on the Pact instruments and related legislation, including the comments on the [Asylum Procedure Regulation](#), the [Screening Regulation](#). See also PICUM, [open letter on the human rights risks in the Migration Pact \(2023\)](#).

¹¹¹ Letter of 15 December 2023 by [the Special Rapporteur on the human rights of migrants, the Working Group on Arbitrary Detention, the Special Rapporteur on contemporary forms of slavery, and the Special Rapporteur on trafficking in persons](#), Ref.: OL OTH 144/2023.

¹¹² On the limitations of Frontex's internal accountability mechanisms, see the Grand Chamber judgments in *Hamoudi v Frontex* (C-136/24 P) and *WS and Others v Frontex* (C-679/23 P). See also Duarte, *op. cit.*

¹¹³ European Commission, [Explanatory Memo on the Pact on Migration and Asylum](#) (Brussels, 14 May 2024): «All Member States will need to ensure a new independent monitoring mechanism, which will enhance transparency and accountability during screening and border procedure, while at the same time promote the respect of fundamental rights». See also [Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration](#), *op. cit.*, p. 3 «[m]onitoring aims (...) at providing impartial reporting, thereby protecting both migrants' rights and authorities from unjustified criticism (...)».

a genuinely effective safeguard or merely a «fig leaf»¹¹⁴ remains a critical question that only states implementation will truly answer. Until then, in order to assess the preconditions that express possibilities and limitations, it is essential to examine the legal basis and functions assigned to the IMM established under the Pact.

2.2 The Independent Monitoring Mechanism under the Pact

At the time of writing, the legal design of the monitoring mechanism is incomplete, for the responsibility of design completion lies on MS. In accordance, SR mandates the FRA to assist MS with this task¹¹⁵, by issuing general guidance, which it has already done issuing «non-binding recommendations cover the screening process and the examination of asylum claims at external borders, including in the exceptional situations of crisis and force majeure under applicable EU legislation»¹¹⁶; to support MS, upon request, to develop their IMM, including advising on the independence safeguards; as well as on the elaboration of monitoring methodologies currently under development the monitoring methodology¹¹⁷ and provide for appropriate training schemes.

The EU legal instruments, currently in force, provide for the following grounds of analysis: normative foundation, basis for safeguarding the independence of the IMM, operational powers and its integration into broader oversight and accountability structures. The very fact that the IMM was established reflects, in itself, the recognition that respect for human rights at borders requires specific oversight¹¹⁸. Furthermore, it should be noted that the IMM is designed as a binding supervisory mechanism, with a solid legal basis as it is enshrined in two directly applicable EU legal instruments¹¹⁹, the SR and the APR, that leave circumscribed space for MS discretion.

In the opening provisions of the Regulation of the SR, the existence and purpose of this mechanism are clearly established, as the first reference to the existence of the IMM can be

¹¹⁴ Kelly Söderström, *An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation* (ECRE Commentary, 2022), p. 5.

¹¹⁵ Regulation (EU) 2024/1356, article 10(2) and recital 27.

¹¹⁶ FRA, *Monitoring Fundamental Rights during Screening and the Asylum Border Procedure*, *op. cit.*, p. 4.

¹¹⁷ European Commission, *Second State of Play on the Implementation of the Pact on Migration and Asylum*, *op. cit.*, p. 14.

¹¹⁸ European Commission, *European Annual Asylum and Migration Report (2025)*, p. 9: «[E]nsuring the respect of fundamental rights at the border remains a common challenge, especially in the context of weaponised migration».

¹¹⁹ TFEU, article 288.

found in article 1 of the SR. This is followed by article 10 of the SR, supplemented by article 43(4) of the APR¹²⁰, which extends the requirements for independent monitoring to asylum procedures at the borders, all of which must be interpreted with due regard to recitals¹²¹ 27 to 29 of the SR and recital 71 of the APR. Together, these provisions establish a framework for supervision covering the initial control phase upon entry, the processing of asylum applications at the border and the control on the territory after unauthorised entry.

2.2.1 Mandate and Scope of Application

The IMM mandate constitutes the legally conferred authority and responsibility to oversee compliance with Union law, namely the Charter, international human rights law, and relevant national provisions on detention. Under article 1 and article 10(2) SR, the mechanism must monitor respect for human rights, with particular emphasis on access to the asylum procedure, the principle of *non-refoulement*, the best interests of the child.

Beyond observation, the IMM is tasked with ensuring that substantiated allegations of rights violations are addressed effectively and without undue delay.

The scope of application of the IMM extends to all activities carried out within the screening and border procedures framework, including situations involving all forms of deprivation of liberty. Its supervisory reach, therefore, encompasses not only formal procedural guarantees but also the broader conditions under which asylum requests are processed at the border.

Importantly, the IMM is not conceived as a merely advisory body. Its mandate includes ensuring that substantiated allegations of human rights violations are effectively examined and addressed without undue delay. This entails the capacity to prompt follow-up action concerning the handling of judicial or criminal complaints or investigations, reflecting an accountability-oriented institutional design.

¹²⁰ [Regulation \(EU\) 2024/1348](#), article 43(4): «(...) each Member State shall provide for a monitoring of fundamental rights mechanism in relation to the border procedure that meets the criteria set out in Article 10 of Regulation (EU) 2024/1356». See also recital 71 of the same regulation: «The border procedure should be carried out in full compliance with the Charter and Union law. Each Member State should in that context provide for a monitoring of fundamental rights mechanism in relation to the border procedure that meets the criteria set out in Regulation (EU) 2024/1356 of the European Parliament and of the Council».

¹²¹ TFEU, article 296, reference to recitals: «Legal acts shall state the reasons on which they are based». On the interpretative function of recitals see Tadas Klimas and Jurate Vaiciukaite, «The Law of Recitals in European Community Legislation» (2008), pp. 25–26.

2.2.2 Operational Functions and Monitoring Powers

The IMM's functions translate its mandate into concrete monitoring activities. The lack of concretisation on the pact is compensated by FRA's guidance, which specifies that monitoring should assess, among other aspects:

- (i) dignified treatment of persons subject to screening and border procedures;
- (ii) protection of vulnerable individuals and children;
- (iii) living conditions in reception and detention facilities;
- (iv) access to asylum procedures and effective remedies;
- (v) compliance with *non-refoulement* obligations; and
- (vi) the human rights impact of exceptional crisis management measures.

It must pay particular attention to deprivation and restriction of liberty, procedural safeguards, healthcare provision, and material reception conditions.

In operational terms, the SR grants the IMM the authority to conduct random, unannounced on-site visits¹²² and requires MS to provide access to relevant locations, documents and individuals¹²³. The SR also empowers the IMM to issue annual recommendations to MS, and its findings are to be integrated into the EU funding conditionality framework, with the Commission required to take them into account when assessing compliance of EU funds programming and implementation with the Charter¹²⁴. The findings may further be referred for the initiation of civil or criminal proceedings¹²⁵. In this way, the IMM can address both individual incidents and systemic deficiencies, enhance transparency, and serve as an accountability tool.

¹²² [Regulation \(EU\) 2024/1356](#), article 10(2): «The independent monitoring mechanism shall carry out its tasks on the basis of on-the-spot checks and random and unannounced checks».

¹²³ [Regulation \(EU\) 2024/1356](#), article 10(2): «National Ombudspersons and national human rights institutions, including national preventive mechanisms established under the OPCAT, shall participate in the operation of the independent monitoring mechanism and may be appointed to carry out all or part of the tasks of the independent monitoring mechanism. The independent monitoring mechanism may also involve relevant international and non-governmental organisations and public bodies independent from the authorities carrying out the screening».

¹²⁴ [Regulation \(EU\) 2024/1356](#), article 10(2): «The Commission shall take into account the findings of the independent monitoring mechanisms in its assessment of the effective application and implementation of the Charter according to Article 15(1) and Annex III of Regulation (EU) 2021/1060 of the European Parliament and of the Council».

¹²⁵ [Regulation \(EU\) 2024/1356](#), article 10 (1): «Member States shall ensure, where appropriate, referral for the initiation of civil or criminal justice proceedings in cases of failure to respect or to enforce fundamental rights, in accordance with national law».

2.2.3 Institutional Composition and Effectiveness Safeguards

Member States retain flexibility regarding institutional form and are not required to create new bodies. Instead, existing independent institutions – including NHRI, Ombudsmen, and NPM under OPCAT – may be designated, provided they meet EU requirements. However, on the latest Pact implementation state of play, the European Commission reveals concern about possible division of IMM function between different actors¹²⁶, stating it could compromise clear lines of responsibility and accountability and, therefore, recommending avoiding dividing the IMM function between different actors or, when composite agreements are chosen, clearly defining a leadership role.

Recital 27 of the SR explicitly anchors the IMM in internationally recognised standards of institutional independence, including: (i) the Paris Principles for NHRI; (ii) the Principles on the Protection and Promotion of the Ombudsman Institution (Venice Principles)¹²⁷; (iii) UN General Assembly Resolution on mediators and ombudsmen¹²⁸; (iv) and the OPCAT monitoring standards. This design choice seeks to leverage established expertise, pluralism, and credibility while avoiding the institutional fragility often associated with newly created bodies. By referencing these frameworks, the Regulation situates the IMM within an existing ecosystem of international monitoring standards designed to guarantee institutional independence, operational effectiveness and credibility in the protection of human and fundamental rights. This design choice seeks to leverage established expertise, pluralism and institutional legitimacy while avoiding the fragility that can accompany newly created monitoring bodies.

¹²⁶ European Commission, *Second State of Play on the Implementation of the Pact on Migration and Asylum*, *op. cit.*, p. 14: «Member States who have not yet defined arrangements related to legal counselling or the independent fundamental rights mechanism should do so. All Member States should address any outstanding issues relating to ensuring competence and adequate independence and define clear lines of responsibility and accountability. This implies avoiding splitting this role amongst different actors or, where composite arrangements are chosen, clearly defining a lead role».

¹²⁷ See the European Commission for Democracy through Law (the Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles)*.

¹²⁸ UN General Assembly Resolution A/RES/75/186, *The role of the Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law*, adopted on 16 December 2020.

The possibility of entrusting this task to existing Paris Principles-compliant bodies¹²⁹, rather than establishing entirely new ones, is also viewed as a cost-efficient way to build upon established expertise and existing high standards of independence and pluralism¹³⁰. The Paris Principles establish the international minimum standards for the establishment and assessment of NHRI, providing a benchmark for their independence, legitimacy, and operational efficacy¹³¹. They provide the primary benchmark, requiring a strong legal basis (the mandate and composition must be clearly outlined in a constitutional or legislative text), adequate funding (institutions should be adequately resourced without undue interference that might affect the institution's independence), and pluralistic composition (composition should ensure representation from various societal forces, including non-governmental organisations). It can be read that the Pact's choice is to link IMM's legitimacy with compliance with these standards, a decision that we can also see reflected in instruments such as the CRPD and OPCAT, which also require IMM compliant with these principles¹³².

The Venice Principles adopted by the Council of Europe constitute an international framework designed to standardise and protect the institutional role of Ombudsman offices. They emphasise that, although institutional models may differ across countries, all Ombudsman institutions must be anchored in a solid legal or constitutional framework guaranteeing their independence from executive interference. The Principles also require transparent and merit-based appointment procedures, security of tenure for the office-holder, and adequate budgetary resources enabling the institution to investigate maladministration and potential human rights violations without external pressure. In the context of the IMM, these standards reinforce the expectation that Ombudsman institutions designated to perform monitoring functions possess the structural safeguards necessary to operate as independent accountability actors within the EU's border governance system.

¹²⁹ GANHRI, *Chart of the Status of National Institutions Accredited by the GANHRI* (4 December 2025), where EU entities accredited under Paris Principles are listed. According to these document 23 of the 27 EU Member States are accredited by GANHRI, 20 countries with at least one NHRI with A status: Austria, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and Portugal and Sweden. Three countries have only institutions with B status: Belgium, Slovakia and Hungary. Four countries currently have no institutions accredited by GANHRI: Czechia, Italy, Malta and Romania.

¹³⁰ Pugnale and Bénard, *op. cit.*, p.505.

¹³¹ UN General Assembly Resolution 48/134, *Principles Relating to the Status of National Institutions* (Paris Principles), 20 December 1993.

¹³² Sidoti, *op. cit.*, p. 95.

United Nations (UN) General Assembly resolution on mediators and ombudsmen¹³³, recalling the Paris Principles and acknowledging the Venice Principles, further emphasise the important role played by these institutions in promoting human rights, good governance and the rule of law. These resolutions call upon MS to establish or strengthen such institutions by ensuring their functional independence, adequate investigative powers and stable funding, enabling them to protect individuals from administrative maladministration and unfairness. They also highlight the need to protect ombudsmen and mediators from reprisals, intimidation or undue interference, while encouraging international cooperation through the exchange of good practices. These resolutions reinforce the normative expectation that Ombudsman institutions operate as independent guardians of administrative legality and individual rights, a role that aligns closely with the objectives pursued by the IMM under the Pact.

The OPCAT¹³⁴ introduces a dual system of preventive monitoring. In order to ensure the establishment of a regime of regular visits to places of detention, the Protocol provides that monitoring should be carried out both by international body the Subcommittee on Prevention of Torture (SPT) and by independent national institutions the National Preventive Mechanisms (NPM) at the national level. Both bodies conduct regular visits to places of detention and are granted broad powers of access to information, facilities and detainees, including the possibility of conducting private interviews. Their work is guided by the principles of independence, impartiality, confidentiality and the no harm principle, meaning that monitoring activities must be carried out in a way that does not expose detainees or other interlocutors to retaliation, intimidation or any other adverse consequences. These preventive monitoring standards are particularly relevant in the context of the Pact, as screening procedures may involve situations of restricted liberty at borders or in reception facilities, thereby requiring oversight mechanisms capable of identifying risks of ill-treatment at an early stage.

The literature surveyed suggests that EU law has increasingly recognised the role of NHRI¹³⁵, viewing them as valuable checks and balances against executive power. However, this study

¹³³ UN General Assembly Resolution A/RES/75/186, *The role of the Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law*, adopted on 16 December 2020.

¹³⁴ UN General Assembly Resolution A/RES/57/199, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002.

¹³⁵ Pugnale and Bénard, *op. cit.*, pp.510-511.

notes that the Pact represents one of the clearest formal recognitions within EU secondary legislation of the potential role of such institutions in monitoring compliance with fundamental rights obligations, even though similar expectations may indirectly derive from earlier monitoring obligations under EU law¹³⁶.

NHRI and NPM are particularly well positioned to fulfil IMM functions due to their experience in detention monitoring, complaint handling, engagement with civil society, and systemic rights advocacy. Furthermore, their dual familiarity with domestic institutional contexts and international human rights standards enables them to operate as both national accountability actors and guardians of supranational legal commitments. This dual positioning allows these institutions to bridge national governance structures and international human rights obligations within the multilevel legal order of the EU.

Thus, in a context of crisis of international law compliance, this very position may justify the recourse of EU regional law to national institutions that function – here too in a manner similar to how they operate in certain cases in relation to the constitution – as guardians of the system, insofar as they are closer in influence to the various governments that collectively constitute the regional and international legal order, more knowledgeable about national political contexts and opportunities, and at the same time defenders of international standards of protection when these appear more rights-protective. As such, one might ask whether the EU legislator employed the strategy of mobilising national actors, along the lines theorised above in chapter 1, in order to internally persuade EU MS to comply at the national level with the human rights commitments by which they are bound at the international level.

Therefore, this analysis concludes that the theoretical premises for the IMM's effectiveness¹³⁷ are *de jure* enabled by the provisions of the Pact, as MS are required to ensure a level of *independence* consistent with the aforementioned international principles. This entails a strong

¹³⁶ For recognition of NHRI monitoring role under the Pact, ENNHRI *Opinion on Independent Human Rights Monitoring Mechanisms at Borders under the EU Pact on Migration and Asylum* (2021) and *Updated Common Position on Independent Monitoring Mechanisms under the EU Pact on Migration and Asylum* (2024). For indirect recognition of NHRI monitoring role in other EU law context, see Regulation (EU) 2021/1060, articles 8(1)(c) and 39. See also FRA, *EU Funds: Ensuring Compliance with Fundamental Rights* (2023).

¹³⁷ *Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration*, *op. cit.*, p.5: «For monitoring to be effective, Ms Hernandez [OHCHR representative] underscored the need for institutional independence, adequate and predictable financial resources, access to sites, persons, and information, including unannounced visits and private interviews, as well as proper follow-up mechanisms with parliaments and oversight bodies to ensure that findings lead to concrete investigations and remedies».

legal basis, adequate financing, and a pluralistic composition. Compliance with these standards also confers *legitimacy* on the IMM. The Pact further fosters an *accountability* environment, including through unrestricted access to border areas and relevant information, the possibility of channelling investigation results to judicial authorities and to the Commission for conditioning MS access to EU funds, as well as the power to issue annual recommendations to MS.

However, the existence of these formal safeguards does not in itself guarantee the effective functioning of the IMM. Although the IMM's legal basis establishes mandate, functions and safeguards that together constitute a potential robust monitoring framework, a more in-depth analysis contextualised within the broader framework of the EU legal order and established monitoring practices reveals certain omissions and structural deficiencies that this framework does not fully address. The following section therefore examines these potential gaps in greater detail, while the subsequent chapter assesses whether they can be mitigated through careful implementation.

2.3 Potential Structural Weaknesses

2.3.1 Perpetuating the EU Human Rights Accountability Gap¹³⁸

Screening and asylum border operation under the Pact will not necessarily be carried out exclusively by national authorities. EU agencies, such as European Border and Coast Guard Agency (Frontex), may also play a role when deployed¹³⁹ in a MS or when participating in joint operations. Consequently, the need for oversight extends beyond activities carried out solely by domestic authorities.

At EU level, the European Ombudsman (EO) plays a central role in promoting transparency, accountability and the protection of fundamental rights in the activities of Union institutions, bodies, offices and agencies. Established to investigate cases of maladministration within EU institutions and agencies, the EO constitutes a key component of the Union's system of

¹³⁸ On the origin of the expression, see Duarte, *op. cit.*, p. 6.

¹³⁹ See [Regulation \(EU\) 2024/1356](#), article 8(9): «[t]he screening authorities may be assisted or supported in the performance of the screening by experts or liaison officers and teams deployed by the European Border and Coast Guard Agency and the European Union Agency for Asylum within the limits of their mandates, provided that such experts or liaison officers and teams have the relevant training as referred to in the first and second subparagraphs». About the reasoning behind the deployment of Frontex officers in this context, see *op. cit.* [COM\(2020\) 609 final](#), p. 8.

administrative accountability. Appointed by the European Parliament, the EO performs its duties in full independence and is expressly prohibited from seeking or receiving instructions from any government or organisation. This independence is guaranteed by article 228 of the Treaty on the Functioning of the European Union (TFEU) and article 43 of the Charter, and further reinforced by Regulation (EU) 2021/1163, which governs the Ombudsman's Statute.

Despite providing for an independent national monitoring mechanism, the Pact does not envisage an equivalent level of scrutiny at the EU institutional level¹⁴⁰, particularly by the EO, which remains the only EU body that fulfils the independence requirements reflected in the international standards Paris Principles and Venice Principles codify. By framing fundamental rights monitoring under the Pact exclusively as supervision of MS' actions (and never as a potential partnership between national and EO in overseeing EU agencies alongside MS compliance), the legislative framework overlooks what should be an important dimension of independent monitoring. If the IMM objective were truly to increase transparency, accountability, and fundamental rights protection during screening and border procedure should the system not encourage the referral of EU-related maladministration and fundamental rights concerns to the EO, rather than merely stating that the IMM operates without prejudice to the monitoring mechanisms established for the operational and technical application of the CEAS and to the role of fundamental rights monitors within the Frontex?

Recital 27 of the SR illustrates this narrow approach by providing that: «The independent monitoring mechanism should be without prejudice to the monitoring of fundamental rights provided by the European Border and Coast Guard Agency's fundamental rights monitors provided for in Regulation (EU) 2019/1896, the monitoring mechanism for the purpose of monitoring the operational and technical application of the CEAS as set out in Regulation (EU) 2021/2303, the evaluation and monitoring mechanism established by Council

¹⁴⁰ Sergio Carrera, «Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum», in Sergio Carrera and Andrew Geddes (eds.), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights* (Florence: European University Institute, 2021), p. 7: «The increasing involvement of these EU agencies on the ground and their inputs in border procedures, however, raises a number of unresolved legal dilemmas related to their weak legal accountability and the lack of an independent monitoring mechanism of their activities and decisions (Carrera and Stefan, 2020)».

Regulation (EU) 2022/922, and monitoring carried out by existing national or international monitoring bodies.»

Notably, even guidance issued by FRA, when referring to «synergies with existing monitoring mechanisms»¹⁴¹, envisages communication of findings with the Commission, Frontex itself, the EUAA, and national monitoring committees responsible for EU funds conditionality, but does not foresee any role for the EO in receiving findings concerning the conduct of EU agencies during joint operations¹⁴². This omission is striking, given that «only truly independent and effective monitoring can ensure trust in public institutions and fill the current gap created by the absence of systematic, independent monitoring and oversight at borders»¹⁴³.

Although the Paris Principles do not apply, as they are intended for NHRI, nor do the Venice Principles, which were designed for national Ombudsmen and do not formally apply to EU bodies, the EO appears to satisfy the standards of substantive independence that they codify. Consequently, the exclusion of this institution from the monitoring architecture of the Pact cannot be justified on grounds of independence. On the contrary, the lack of provision for independent monitoring of EU bodies under the Pact can be interpreted as the intentional perpetuation of an accountability gap already identified by academics¹⁴⁴ and the EO itself¹⁴⁵.

Notwithstanding its own recognition of the limitations of its mandate, in the conclusions following the inquiry into how Frontex complies with its human rights obligations in the

¹⁴¹ FRA, *Monitoring Fundamental Rights during Screening and the Asylum Border Procedure*, *op. cit.*, p. 14.

¹⁴² [Regulation \(EU\) 2019/1896](#), article 110 on Frontex Fundamental Rights Officer. On the deployment of Frontex in Portugal, see also media reports from January 2026 indicating the reinforcement of border patrols at Portuguese airports: <https://www.infomigrants.net/en/post/68349/portugal-frontex-to-reinforce-border-patrols-at-airports-from-january-2026> (last accessed 12 March 2026). These developments further illustrate the relevance of examining the potential effectiveness of the IMM in the Portuguese context.

¹⁴³ *Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration*, *op. cit.*, p. 3.

¹⁴⁴ Duarte, *op. cit.*

¹⁴⁵ European Ombudsman, *Conclusions of the European Ombudsman on EU search and rescue following her inquiry into how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations in the context of its maritime surveillance activities, in particular the Adriana shipwreck*, Correspondence, 5 December 2024: «The European Ombudsman is not in a position to make a determination either way.» and «is regrettable that, at EU level, there is no single accountability mechanism that could independently investigate all related issues, including the role of the Greek authorities, the role of Frontex, and the role of any other relevant institution, such as the European Commission, which has responsibility for ensuring compliance with fundamental rights provisions under the EU Treaties».

context of maritime surveillance activities, including particularly the Adriana shipwreck¹⁴⁶, the EO made two particularly significant observations that go beyond the reach of the IMM's mandate and point directly to broader EU-level accountability. First, it raised serious questions regarding Frontex's relationship with national authorities, but also with regard to its own understanding and application of its human rights role and obligations in such circumstances, calling on EU legislators to reflect on, and address, this clear human rights gap. Further it observed that «it is regrettable that, at EU level, there is no single accountability mechanism that could independently investigate all related issues [to the Adriana shipwreck], including the role of the Greek authorities, the role of Frontex, and the role of any other relevant institution, such as the European Commission»¹⁴⁷, and called upon the European Parliament, the Council and the European Commission to establish an independent commission of inquiry to assess the reasons for the high number of deaths in the Mediterranean.

Accordingly, the absence of any structured linkage between the IMM and the EO in the Pact constitutes the maintenance of a structural accountability weakness, particularly in contexts where activities are jointly carried out by national border authorities and Frontex¹⁴⁸. While the IMM's mandate focuses on MS conduct, the EO's mandate expressly covers maladministration by EU agencies, thereby enabling the mitigation of the accountability gap left by the Pact's design.

Although the Pact does not formally integrate the EO into its monitoring architecture, current EU law and institutional practice can compensate for this omission. Under article 43

¹⁴⁶ According to the European Ombudsman, *ibidem*: «[o]n 14 June 2023 over 600 people drowned in (...) the Mediterranean Sea, off the coast of Pylos in Greece, when their boat – a severely overcrowded fishing vessel called the Adriana - capsized and sank.

The tragedy of the Adriana was described by EU Commissioner for Home Affairs, Ylva Johansson as “one of the worst shipwrecks in this century worldwide”, and stressed the need to “establish the facts of what happened every step of this fatal journey”».

¹⁴⁷ See footnote 145.

¹⁴⁸ On integrated administrative action involving both national and EU authorities, see Ana Rita Gil, «“Query Procedures” in the European Union: A Challenge or a Guarantee to the European Rule of Law? / Os procedimentos de consulta na União Europeia: um desafio ou uma garantia do princípio da União de Direito?», *e-Pública*, vol. 9, no. 1 (2022), p.14: «Indeed, there are increasingly multilevel and integrated administrative actions, in which national and European administrations intertwine or collaborate closely. While it may be possible to assign the final decision either to the European or to the national body, this criterion may prove to be limited in cases of complex or joint decision-making. For example, in the case of the action by Frontex, a European agency that works with the collaboration of national entities, it may be difficult to establish, for example, whether a return operation of illegal immigrants was taken by the European administration or by the Member State's entities that have assisted in the operation».

of the Charter, any citizen or legal person residing or having its registered office in a MS may refer cases of maladministration by EU institutions or bodies to the Ombudsman. article 228(3) TFEU further guarantees that «the Ombudsman shall be completely independent in the performance of his duties». Moreover, pursuant to Articles 1(3) and 3(3) of the EO's Statute and article 8 of its Implementing Provisions, the Ombudsman may conduct own-initiative inquiries, enabling it to act even in the absence of a formal complaint.

In addition, the EO could play a crucial role in ensuring that EU-level actors comply with their own obligations under the Pact and its implementing instruments. This is particularly relevant with regard to the Commission's duty to take into account the findings of the IMM when assessing the effective application and implementation of the Charter in the allocation and use of EU funds (article 10(2)¹⁴⁹), as this is one of the forms that the IMM can promote accountability and thus be deemed effective. It is equally pertinent in relation to the responsibilities of the FRA under article 10 of the Screening Regulation, especially if the guidance or support provided by the Agency proves insufficient. By extending scrutiny to the conduct of EU institutions themselves, the EO's involvement would reinforce the IMM's functions, contributing to greater coherence in the Union's accountability system.

2.3.2 Self-Created Financial Dependence

The Screening Regulation, pursuant to article 10(2), explicitly links the IMM's findings to the EU funds conditionality system, stating the Commission's assessment of compliance with the Charter within the EU funding framework shall consider the IMM findings. At the same time, under the Common Provisions Regulation¹⁵⁰, MS are required to manage EU funds through a «comprehensive partnership» that includes bodies responsible for promoting fundamental rights, notably through their participation in monitoring committees. This creates a situation in which an Ombudsman, NHRI, or equality body may be called upon both to contribute to monitoring the compliance of EU funding programmes with fundamental rights and to act as an independent monitor of respect for fundamental rights in border controls and border procedures. Even where formal independence exists, the accumulation of functions may dilute the perception of independence¹⁵¹.

¹⁴⁹ [Regulation \(EU\) 2024/1356](#), article 10(2).

¹⁵⁰ [Regulation \(EU\) 2021/1060](#).

¹⁵¹ FRA, *EU Funds: Ensuring Compliance with Fundamental Rights*, *op. cit.* In one hand, FRA's 2023 report on EU funds encourages MS to invite «independent fundamental rights bodies» (NHRI, equality bodies, ombudsman,

Moreover, Union funds are envisaged as a means of ensuring that key elements of the Pact, including the IMM, are sufficiently resourced¹⁵². However, where the IMM depends materially on the same EU funding whose fundamental rights conditionalities it helps to monitor, a conflict of interest emerges. Financing the monitor through the very system it scrutinises generates an institutional dependency paradox that raises serious concerns regarding independence and institutional legitimacy, in clear tension with the Paris Principles.

Additionally, funding may even constitute a structural weakness due to lack of stability, as neither the Pact nor its implementing instruments contain any explicit provision guaranteeing sustainable and long-term financial support. While EU institutions responsible for implementation indicate that national ministries may apply for EU funding (under the Asylum, Migration and Integration Fund, the Border Management and Visa Instrument or the Technical Support Instrument¹⁵³) to establish or support monitoring mechanisms, such funding remains predominantly project-based and therefore does not ensure continuity or long-term sustainability.

Furthermore, where monitoring mechanisms depend on funds channelled through national ministries, concerns arise regarding their financial independence. Reliance on ministry-controlled funding may give rise to perceptions of institutional dependence, particularly where the mechanism's mandate includes scrutinising the very authorities responsible for its financing. This dynamic may attract public and civil society criticism¹⁵⁴. Such financial dependence risks undermining the mechanism's perceived autonomy¹⁵⁵, credibility, and authority, thereby weakening both its legitimacy and its practical willingness to hold

etc) to participate in monitoring committees routinely while fully respecting their mandate and independence. On the other hand, in FRA, *Monitoring Fundamental Rights during Screening and the Asylum Border Procedure*, *op. cit.*, the Agency stresses that Member States must equip the IMM with appropriate financial resources structured in accordance with the principle of independence. The guidance recommends that monitoring mechanisms have their own dedicated budget lines, modelled on the funding frameworks of other independent statutory bodies such as ombudsmen and human rights institutions.

¹⁵² European Commission, *Second State of Play on the Implementation of the Pact on Migration and Asylum*, *op. cit.*, pp. 2-4.

¹⁵³ *Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration*, *op. cit.*, p. 9.

¹⁵⁴ *Summary Report of the Thematic Session of the Council of Europe's Network of Focal Points on Migration*, *op. cit.*, apparently it is already subject to criticism on a claimed to be functioning IMM: «(...) (Croatian IMM) echoed persistent concerns about independence when mechanisms are funded through state channels, noting that although Croatia's IMM is a coalition of five independent CSOs with full operational autonomy and no formal ties to the Ministry of Interior, reliance on ministry-controlled funding has attracted public and civil society criticism».

¹⁵⁵ *Ibidem*: «(...) while formal autonomy is necessary, funding sources and resource allocation also determine an IMM's actual and perceived independence».

governments and ministries accountable, particularly where there is a risk of financial retaliation.

2.3.3 Operational Fragility: Learning by Trial and Error

According to article 10(2)(b) of the SR, the IMM must «ensure that substantiated allegations of failure to respect fundamental rights in all relevant activities in relation to the screening are dealt with effectively and without undue delay, trigger, where necessary, investigations into such allegations and monitor the progress of such investigations».

As noted above, the screening procedure involves identification and security checks of the TCN subject to it, including fingerprinting and registration in the Eurodac database¹⁵⁶. Effective monitoring of border procedures increasingly requires specialised and interdisciplinary expertise that extends beyond traditional legal analysis. Contemporary border governance relies heavily on advanced technological tools, including biometric systems, automated risk assessment instruments and Artificial Intelligence-driven security. Assessing the compatibility of such technologies with human rights standards demands expertise at the intersection of artificial intelligence¹⁵⁷, data protection and human rights law. Without professionals trained in large-scale IT systems, artificial intelligence and human rights, monitoring bodies may lack, even if granted access to the relevant systems, the technical capacity to meaningfully scrutinise¹⁵⁸ algorithmic decision-making, automated

¹⁵⁶ [Regulation \(EU\) 2024/1356](#), articles 14–16 and recital 55. See also [COM\(2020\) 609 final](#), p. 4: «This screening will include identification, health and security checks, fingerprinting and registration in the Eurodac database».

¹⁵⁷ Council of Europe, *CDDH Handbook on Human Rights and Artificial Intelligence* (2026), p. 40: «The use of AI systems in immigration and border control may raise important issues, in particular under Article 3 (Prohibition of torture), Article 8 (Right to respect for private and family life), Article 14 (Prohibition of discrimination), Article 13 (Right to an effective remedy), as well as, where applicable, Article 1 Protocol no. 7 (Procedural safeguards relating to the expulsion of aliens) and Article 4 Protocol no. 4 (Prohibition of collective expulsion of aliens) to the ECHR. Nevertheless, if appropriately implemented, it also offers chances for a better protection of human rights of persons in need thanks to a more effective migration management and time-efficient conduct of the proceedings». See also Council of Europe, *European Policy Guidelines on AI and Algorithm-Driven Discrimination for Equality Bodies and Other National Human Rights Structures*, p. 92: «One characteristic of the AI Act is that it grants AI systems used in law enforcement, migration, asylum and border control a wide range of exemptions. For instance, certain AI systems prohibited for certain uses are only considered high-risk in the context of law enforcement, such as the prohibition on biometric categorisation. In addition, they are subjected to lesser registration and publicity obligations than other high-risk AI systems (see Article 49), leading to ongoing concerns regarding transparency».

¹⁵⁸ Niovi Vavoula, argued before the Pact's approval, on *Focus on Eurodac: Disentangled from the 'Package Approach', but Is It Fit to Fly?*, ECRE Working Paper (2023), p.7: «[t]he lack of reference to the screening process is attributed to Eurodac's separation from the other more controversial dossiers on screening. (...) [T]here is significant divergence between the co-legislators (...) Importantly, a key cause of divergence is the scope of the fundamental rights border monitoring mechanism».

profiling, or the proportionality and necessity of digital surveillance technologies deployed at borders.

In accordance with article 10(2), first subparagraph of the SR and the FRA Guidance on IMM, monitoring bodies should have access to relevant digital infrastructures. The latter document states that monitors should have access to «all electronic systems and records relevant to the mandate of the mechanism»¹⁵⁹. However, the guidance further indicates that monitors should possess «a reasonable level of knowledge of the relevant IT systems and how they support the screening and asylum border procedures»¹⁶⁰. For that purpose, the FRA has developed an online information platform explaining the functioning of large-scale EU IT systems¹⁶¹, related to borders, visas, asylum and migration, including Eurodac. The platform aims to familiarise monitors with the operation, legal bases and fundamental rights implications of EU databases, as well as with the remedies available to individuals whose data protection rights may be infringed. At the same time, the FRA is still developing more specific methodological tools intended to support the work of future monitoring bodies.

While these initiatives constitute an important first step, a merely «reasonable level of knowledge» may not be sufficient in light of the complexity and legal significance of these systems¹⁶². The use of large-scale EU databases may directly affect a wide range of human rights, the right to respect for private life, including the right to data protection, the right to asylum, the rights of the child, the right to good administration and the right to an effective judicial remedy. Furthermore, at the time of writing, IMM arrangements have not yet been fully established in all MS. Consequently, future IMM staff are unlikely to have received systematic and specialised training in the fields most relevant to the mechanism's mandate. This situation may make it difficult to ensure that substantiated allegations of human rights violations in screening activities are addressed effectively and without undue delay, as required under article 10(2)(b) of the SR. In the absence of already trained monitors and fully

¹⁵⁹ FRA, *Monitoring Fundamental Rights during Screening and the Asylum Border Procedure*, *op. cit.*, p. 8.

¹⁶⁰ *Ibidem*, p. 19.

¹⁶¹ *Ibidem*, p. 25. online platform on EU IT systems for migration and policing, available at: <https://e-learning.fra.europa.eu> (last accessed 12 March 2026).

¹⁶² On the limits of complaint mechanisms in this context, see Maria Clara Pina, «AI in the Context of Border Management, Migration and Asylum in the EU», *Official Blog of UNIO*, 15 February 2025: «complaint mechanisms will be insufficient to protect individual rights, since those who do not have complete access to the underlying data and logic of the system will be unable to contest it».

operationalised guidance, the mechanism's immediate effectiveness may therefore be limited, particularly in technically complex areas.

Similarly, the identification and protection of vulnerable individuals, which constitutes a core component of border procedures, requires medical and psychosocial expertise. Mental health vulnerabilities are often invisible, complex and easily overlooked in accelerated border contexts. The same applies to trafficking in human beings, a phenomenon that frequently intersects with migration flows and border crossings. Detecting indicators of trafficking requires specialised knowledge as subtle forms of coercion or dependency may not manifest as immediately visible abuse.

These considerations raise doubt regarding the institutional capacity of the bodies likely to be designated as IMM. Even if entrusted to already existing institutions such as Ombudsmen, NHRI or NPM, which possess relevant experience in human rights oversight, it is unlikely that they already have sufficient specialised staff in all the fields required by the IMM mandate. Even where such expertise exists, these institutions may have personnel allocated primarily to their pre-existing mandates or may already be operating under significant resource constraints, making it difficult to accommodate an additional monitoring mandate without corresponding increases in adequately trained staff.

Moreover, considering the current stage of implementation of the IMM across MS at the time of writing, the support currently provided at EU level risks amounting, in practice, to a form of «on-the-job training»¹⁶³. Monitoring bodies may therefore be expected to progressively develop the necessary methodologies and expertise by relying on the pre-existing experience of institutions such as ombudsman offices, NHRI, NPM and other independent oversight actors. However, if monitoring systems must build their operational capacity through trial and error, the burden of institutional learning may fall on those whose rights the mechanism is designed to protect.

¹⁶³ FRA, *op. cit.*, emphasises the importance of continuous training for monitoring staff. Monitoring mechanisms are encouraged to provide dedicated training programmes, including on-the-job training, and MS are invited to request FRA assistance in the development of monitoring methodologies and training activities. In addition, the mechanism should seek to pool knowledge and expertise from other human rights monitoring bodies, non-governmental organisations, academic institutions, and other qualified experts working in the field of human rights and migration, while safeguarding the mechanism's institutional independence. Nonetheless, it cannot be assumed that the mechanism's staff will possess the necessary level of preparedness to effectively assume their role from the outset.

In such circumstances, there is a risk that, during the initial phases of implementation, shortcomings in expertise may result in protection gaps. A monitoring system that must learn by experimentation cannot, in its early stages, guarantee a fully effective safeguard of human rights. This raises concerns that the IMM may operate below the level of protection required by its mandate, thereby compromising its capacity to provide genuine and immediate human rights oversight in border contexts.

Taken together, these structural vulnerabilities may affect the IMM's ability to operate with the level of effectiveness required for credible human rights oversight. Nevertheless, as previously established, the legal framework of the IMM under the Pact is not in itself incompatible with the requirements for effective and independent monitoring, nor do its structural limitations necessarily predetermine its ineffectiveness.

As such, this analysis moves to a further stage. The question that arises is whether certain national institutional configurations may nonetheless create conditions capable of ensuring effective monitoring, or whether the limitations identified above instead point to the risk of the mechanism operating as an empty mandate. To explore this question, the following chapter examines the institutional design of the Portuguese Ombudsman, which, according to the latest available information on the Pact state of implementation¹⁶⁴, is expected to be attributed the IMM mandate. The objective of this analysis is neither to predict nor to contribute to the design of the future Portuguese monitoring mechanism. Rather, the aim is to assess the adequacy and relevance of embedding the IMM mandate within an existing constitutional and statutory framework and to evaluate whether it is capable of meeting the requirements for effective human rights monitoring identified in this study, even under the Pact.

3. The Portuguese Ombudsman as a Potential Monitoring Body under the Pact

In light of institutional characteristics and existing mandates, assigning the IMM to already established institutions may present certain advantages. Given its constitutional status and the mandates it already exercises in the field of human rights protection, in my view, the Portuguese Ombudsman is particularly well placed to assume the role of IMM. The following section, therefore, examines whether the Portuguese Ombudsman possesses the institutional

¹⁶⁴ European Commission, *Second State of Play on the Implementation of the Pact on Migration and Asylum*, *op. cit.*, p. 13, fn. 60.

characteristics necessary to meet the requirements of effectiveness despite the constraints previously identified.

3.1 Constitutional and Statutory Basis of the Ombudsman

Following the end of the dictatorship in Portugal, the rule of law and the figure of the *Provedor de Justiça*¹⁶⁵ – the Portuguese Ombudsman (hereinafter, the Ombudsman) – were enshrined in the 1976 Portuguese Constitution¹⁶⁶ as a non-judicial guarantee of fundamental rights, encompassing civil and political rights as well as social, economic and cultural rights.

The systemic placement of the Ombudsman at the very heart of the Constitution (Title I, Part I, devoted to fundamental rights¹⁶⁷) reveals the constitutional relevance of the institution. article 23 of the Constitution establishes the Ombudsman as an independent and singular body, elected by Parliament, empowered to receive complaints concerning acts or omissions in the exercise of public powers¹⁶⁸.

Furthermore, the Constitution grants the Ombudsman the power to initiate abstract subsequent review of the constitutionality and legality of norms and review of unconstitutional omissions before the Portuguese Constitutional Court, in accordance with article 281(1) and (2)(d)¹⁶⁹ and 283(1)¹⁷⁰ of the Constitution. In this respect, the Ombudsman functions, to a certain extent, as a constitutional safeguard comparable, though not equivalent, to *amparo* proceedings¹⁷¹, which enables it to address structural or normative deficiencies capable of undermining the effective protection of fundamental rights.

The Ombudsman's scope of action thus extends well beyond the boundaries of classic administrative oversight, confined to a strict review of legality. Pursuant to article 23(1), in fine, of the Constitution, the Ombudsman is entitled to make broader considerations of

¹⁶⁵ That literally translated to Provider of Justice.

¹⁶⁶ Catarina Sampaio Ventura, *Direitos Humanos e Ombudsman: Paradigma para uma Instituição Secular* (Lisbon: Provedoria de Justiça, 2007), p. 81, about its legal establishment dates from 1975 (Decree-Law No 212/75 of 21 April), and its constitutionalisation from 1976.

¹⁶⁷ Jorge Miranda, «Sobre o âmbito de intervenção do Provedor de Justiça», in *O Provedor de Justiça: Estudos, Volume Comemorativo do 30.º Aniversário da Instituição* (Lisbon, 2006), p. 111.

¹⁶⁸ This notion extends beyond traditional public administration and includes privatised public services and entities providing services of general interest. Moreover, as clarified by Article 2(2) of the [Ombudsman's Statute](#), the Ombudsman's mandate may also cover relations between private parties involving a special relationship of dominance, insofar as such relations affect the protection of rights, freedoms and guarantees.

¹⁶⁹ [Statute of the Ombudsman](#), article 20(3).

¹⁷⁰ [Statute of the Ombudsman](#), article 20(4).

¹⁷¹ Miranda, *op. cit.*, p. 111. On *amparo* proceedings, see Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America*.

justice, which may include the assessment that a particular legal framework produces unfair or disproportionate outcomes. While the Ombudsman does not possess decision-making or annulment powers¹⁷², it may act through recommendations addressed to the competent authorities, exercising public powers with a view to preventing and remedying injustices.

The Ombudsman is also empowered to act on its own initiative¹⁷³, particularly when the protection of vulnerable persons' rights is at stake. This assumes particular relevance in this research as asylum seekers, refugees¹⁷⁴ and migrants' rights protection against public powers, mainly due to their vulnerability (also caused by the language barrier they tend to face¹⁷⁵), increases the difficulties they face in becoming aware of and effectively accessing their rights in a foreign country¹⁷⁶. Furthermore, public administration bodies are constitutionally required to cooperate with the Ombudsman in the fulfilment of its mandate. Article 23(4) of the Constitution expressly establishes a duty of cooperation¹⁷⁷.

In addition, the Ombudsman's has investigative and supervisory powers¹⁷⁸ that include the authority to carry out inspection visits, with or without prior notice, to any sector of activity of the central, regional, and local administration, including public services, prisons, and providers of services of general interest, regardless of their legal status, as well as to any other entities subject to his control. In the exercise of these powers, the Ombudsman may hear the competent bodies and officials and request any information or documentation deemed relevant. The Ombudsman is also empowered to conduct such investigations and inquiries as he considers necessary or appropriate, using all reasonable means of evidence-gathering, provided that such means do not infringe upon the rights and legitimate interests of citizens. Finally, the Statute grants the Ombudsman power¹⁷⁹ to cooperate with the competent bodies and services in identifying solutions that best protect citizens' legitimate interests and contribute to the improvement of administrative activity.

¹⁷² [Statute of the Ombudsman](#), article 22(1).

¹⁷³ [Statute of the Ombudsman](#), articles 4(1) and 24(1).

¹⁷⁴ As they may at least be subject to police identification to ascertain whether they should be or not subject to on the territory screening.

¹⁷⁵ On the language barrier in contacts with the Portuguese public administration, see the Portuguese Ombudsman, [Relatório à Assembleia da República 2021](#), p.57, and [Relatório sobre o Atendimento ao Cidadão 2023](#), p. 91 and ff.

¹⁷⁶ Further developing on the meaning of the Ombudsman's own initiative, see *op. cit.* [Relatório à Assembleia da República 2021](#), p. 11.

¹⁷⁷ [Portuguese Constitution](#) article 23(4); [Statute of the Ombudsman](#), articles 19 and 29(6): «[u]njustified non-compliance with the duty to cooperate established (...) shall constitute a crime of disobedience»

¹⁷⁸ [Statute of the Ombudsman](#), article 21.

¹⁷⁹ [Statute of the Ombudsman](#), article 20.

Considering these provisions, it must be concluded that the Ombudsman is already constitutionally and statutorily mandated to monitor the actions of Portuguese public authorities in matters of asylum and migration, regardless of the provisions of the Pact.

In addition, the Ombudsman may perform the functions of a national independent institution responsible for monitoring the implementation of international human rights treaties and conventions, where designated for that purpose¹⁸⁰. The Ombudsman further ensures cooperation with counterpart institutions, as well as with EU¹⁸¹ and international organisations, in the field of protection and promotion of citizens' rights, freedoms, and guarantees.

3.2 NHRI and NPM Mandates: Functional Overlaps and Potential under the Pact

The Ombudsman is characterised by a multifunctional nature¹⁸², while its primary constitutional function lies in the defence and promotion of citizens' rights, as well as in overseeing the exercise of public powers and addressing maladministration, the flexibility and adaptability¹⁸³ of its constitutional and statutory design have allowed the institution to evolve into a multifaceted guardian of human rights. This inherent elasticity has enabled the successful integration of international monitoring mandates – notably the roles of NHRI and NPM – and provides a solid structural basis for accommodating future IMM functions under the EU Pact. It has operated as Portugal's only NHRI since 1999, consistently holding A-status accreditation in recognition of its full compliance with the Paris Principles.

The mandate of NPM under the OPCAT was formally assigned to the Ombudsman in 2013¹⁸⁴. Currently the Decree-Law approving the organisational structure of the Ombudsman¹⁸⁵, reinforces that NPM operates as a separate department within the Office of the Ombudsman, headed by a departmental coordinator and supported by dedicated staff. It benefits from an autonomous budget considered adequate to ensure full operational

¹⁸⁰ [Statute of the Ombudsman](#), article 1(2).

¹⁸¹ [Statute of the Ombudsman](#), article 1(3).

¹⁸² JJ. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I (artigos 1–107), 4^a ed. (Coimbra: Coimbra Editora, 2007), p.442.

¹⁸³ Ventura, *op. cit.*, p. 10.

¹⁸⁴ Council of Ministers Resolution No. 32/2013 of 20 May.

¹⁸⁵ Decree-Law No. 80/2021 of 6 October

independence and effective engagement with relevant stakeholders. The structure and functioning of the NPM are regulated by its own internal regulation.

The Pact establishes a framework in which EU monitoring requirements intersect with the UN torture prevention regime under OPCAT. This convergence generates both institutional challenges¹⁸⁶ and significant opportunities for national monitoring bodies. Functional overlap is primarily driven by article 10 of SR, which provides that NHRI and NPM shall participate in the operation of the new IMM. In practice, these mandates undoubtedly converge around oversight of places of deprivation of liberty affecting asylum seekers and migrants and the prevention of refoulement, as a perceived form of torture and ill-treatment. Existing NPM possess specialised expertise in monitoring detention environments¹⁸⁷, which is directly transferable to migrant detention facilities and reception centres during screening and border procedures.

At the same time, EU law requires that secondary legislation be interpreted in light of relevant international obligations, providing a basis for harmonious interpretation¹⁸⁸ aimed at ensuring that EU border monitoring complies with the high standards set by international human rights treaties. According to recent statements of a representative of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)¹⁸⁹, the IMM provided for in the Pact appears broadly aligned with Council of Europe standards for Ombudsman institutions, NHRIs and NPM under OPCAT.

¹⁸⁶ Isobel Renzulli, «Monitoring Migrants' Human Rights at the EU Borders: EU Law v the UN OPCAT?», *EJIL: Talk!*, 27 February 2025: «If existing NPMs operating as INM were to be tasked with carrying out visits in relation only to screening, the exclusion of other related and seamless practices would be difficult to reconcile with their OPCAT mandate. The exclusion would also be at odds with the torture preventive standards and practices developed by international human rights monitoring mechanisms (see e.g. CPT's 2022 report on push-back and forced removals and its latest report on visit to Italy) and national mechanisms (some of which already monitor forced returns under the EU 'return directive', see for example the Greek Ombudsman)».

¹⁸⁷ See the latest [annual report of the Portuguese NPM to Parliament](#) and its thematic publications on [detention conditions](#) and its published recommendations concerning [migrant children](#).

¹⁸⁸ Renzulli, *op. cit.*, p. 3.

¹⁸⁹ See the official Council of Europe and OHCHR websites on the distinction between the CPT (<https://www.coe.int/en/web/cpt/about-the-cpt>) and the SPT (<https://www.ohchr.org/en/treaty-bodies/spt>), and on their cooperation under art. 31 OPCAT (<https://www.coe.int/pt/web/cpt/-/united-nations-and-council-of-europe-torture-prevention-bodies-to-strengthen-cooperation>).

The implementation of these intersecting mandates may also serve as a catalyst for institutional modernisation. The Portuguese Ombudsman has already undergone a structural transformation from a traditional complaints-based body into a hybrid institution combining NHRI and NPM functions. This model enables the direct mobilisation of existing human rights monitoring expertise in the border context. In particular, the NPM's experience in supervising places of deprivation of liberty (including migrant detention centres and transit zones)¹⁹⁰ equips the institution with the technical and methodological capacity required to assess human rights compliance during EU screening and asylum procedures.

Importantly, even within an integrated institutional framework, distinct mandates may retain operational autonomy. In Portugal, the NPM functions as an autonomous structure within the Ombudsman's Office, maintaining its own organisational framework, specialised staff, and independent budgetary resources. As this model proves effective, it may reasonably be envisaged that the assumption of the IMM mandate could follow a similar structural approach, preserve internal autonomy while benefiting from institutional integration.

3.3 Compliance with the Paris Principles and the Venice Principles

Currently, the Portuguese Ombudsman is an institution with over 50 years of existence and more than a quarter of a century of accreditation since acquiring its role as an NHRI. It has enjoyed continuous recognition with A-status¹⁹¹. Originally accredited in 1999, this status has been maintained and renewed in every subsequent periodic re-accreditation process¹⁹².

The Ombudsman holds a broad mandate to protect and promote human rights in relation to acts and omissions of public authorities. Its principal powers include:

- Access to information and premises: unfettered access to all public institutions, including prisons and military facilities, and the power to summon individuals to provide testimony.
- Constitutional review: the ability to request the Constitutional Court to review the legality and constitutionality of legislation adopted by Parliament or the Government.

¹⁹⁰ See the NPM, *Relatório à Assembleia da República 2024 – Mecanismo Nacional de Prevenção*, p. 45 ff.

¹⁹¹ A-status is the highest accreditation granted under the Paris Principles, certifying full compliance.

¹⁹² GANHRI, *Chart of the Status of National Institutions Accredited by the GANHRI*, *op. cit.*, p. 11. According to which the Portuguese ombudsman was first accredited with A-status in 1999 and subsequently re-accredited in 2007, 2012, 2017, and 2024.

- Legislative influence: the power to identify legislative shortcomings and propose reforms.
- Duty of cooperation: public authorities are legally obliged to cooperate with the institution and provide reasoned and timely responses to its recommendations.

In 2025, the Portuguese Ombudsman remains highly compliant with the Paris Principles¹⁹³. Its most recent re-accreditation was carried out in May 2024, confirming that the institution continues to meet the international standards relating to independence, strong mandate, and effectiveness. This accreditation is supported by a strong constitutional foundation, a broad human rights mandate, robust investigative powers, and effective mechanisms of cooperation and follow-up with public authorities. The report further highlights solid guarantees of institutional independence and an enabling operational environment, thereby demonstrating substantial implementation of both the Paris Principles and the underlying standards reflected in the Venice Principles concerning the status, powers, and independence of an Ombudsman.

A particularly relevant element emphasised in the report concerns the institution's financial autonomy. The Ombudsman benefits from an independent budgetary framework, with a specific and separate budget line in the Parliament's budget for the Ombudsman, and an additional autonomous allocation for its NPM mandate. This funding is considered adequate to allow the institution to engage with all relevant stakeholders in a fully independent manner and to freely determine its priorities and activities within its current mandates.

A recent report further confirms that the Ombudsman enjoys strong statutory independence, being legally protected from receiving instructions from any external bodies¹⁹⁴. Both its leadership and staff benefit from functional immunity, and no systematic patterns of harassment or intimidation have been identified in practice.

In light of the foregoing analysis, it becomes clear that the effectiveness of the Ombudsman lies not only in the scope of its mandates but in the careful preservation of the institutional principles that underpin its independence, legitimacy, and operational autonomy. Ensuring

¹⁹³ ENNHRI, *Portugal Country Report – CoE Recommendation Implementation* (2025).

¹⁹⁴ *Ibidem*.

respect for these foundational guarantees has allowed the institution to absorb new international monitoring functions without compromising its core nature¹⁹⁵. This experience offers valuable insights for the design and implementation of the IMM under the Pact.

Accordingly, the following section draws on the Portuguese institutional framework to identify practical tools capable of addressing the structural weaknesses previously highlighted within the EU monitoring framework. In doing so, it explores how elements of existing national institutional designs and practices could, if combined with the IMM provisions, contribute to strengthening the effectiveness of monitoring mechanisms.

3.4 Potential of the Ombudsman Institutional Design to Address the Weaknesses Identified

The Portuguese institutional configuration offers significant potential as a national implementation model of the IMM under the Pact. A first key potentiality lies in the exceptionally high degree of institutional legitimacy embedded within the Portuguese model. The constitutional entrenchment of the Ombudsman situates the institution at the core of the national system of fundamental rights protection, ensuring both symbolic authority and structural independence from the executive branch. This positioning is particularly relevant for the IMM, whose effectiveness depends heavily on the perceived credibility and authority of the monitoring body.

This domestic legitimacy is further reinforced by the Ombudsman's continuous reaccreditation as Portugal's NHRI under the Paris Principles, as a result, findings issued within the IMM framework would benefit from a strong normative «pull towards compliance»¹⁹⁶, reducing the risk of dismissal by national authorities.

As such, for other MS, the Portuguese institutional configuration may illustrate the potential advantages of entrusting IMM functions to institutions that are constitutionally or strongly legislatively anchored and internationally accredited, rather than to newly created or administratively dependent bodies. Another potentiality concerns the capacity of the

¹⁹⁵ On its latest annual report to the Portuguese Parliament, the Ombudsman institution publicly reiterated the importance of ensuring that any future national IMM is grounded in a robust legal framework, since only in this way can its legitimacy, independence and authority be guaranteed. See Portuguese Ombudsman, *Relatório à Assembleia da República 2024*, pp. 137–138.

¹⁹⁶ Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990), *apud* Jasper Krommendijk, *op. cit.*, p. 493.

Portuguese institutional design to convert monitoring outputs into multi-level accountability mechanisms, by implementing Paris Principle according to which NHRI are to «[m]aintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions)¹⁹⁷».

Furthermore, at the international level, the Ombudsman's role as NHRI enables systematic engagement with UN treaty bodies and participation in international monitoring networks. This positioning allows domestic findings related to asylum and migration practices to be elevated to international scrutiny, whereby international validation amplifies domestic reform pressure and strengthens compliance constituencies.

A recent illustration of such interaction is the alternative evaluation report on Portugal's human rights situation under the Universal Periodic Review, presented by the Ombudsman in 2024¹⁹⁸. These types of reports, where the institutions maintain a distinct and independent voice¹⁹⁹, providing an expert assessment of the government's human rights performance, contribute to preserving its impartiality, credibility and thus legitimacy. Its selected, among others, issues that reflected concerns including areas related to the Pact framework, such as human trafficking and asylum seekers and migrants' detention. In this regard, the Ombudsman noted the absence of a renewed National Action Plan for the Prevention and Combating of Human Trafficking since 2022²⁰⁰, a gap that was subsequently addressed through the publication a new National Action Plan by the end of 2024. This sequence may suggest a form of international-to-national mobilisation effect, whereby international scrutiny contributes to renewed domestic policy action. The report also addressed the detention of migrant and asylum-seeking children, reiterating that detention of children should never occur and recommending consideration of abolishing the possibility of detaining children. Furthermore, it expressed concern, in the context of the NPM's mandate, about delays in establishing effective alternatives to detention for asylum seekers and migrants²⁰¹.

¹⁹⁷ Paris Principles, *op. cit.*

¹⁹⁸ Portuguese Ombudsman, [written submission to the UPR on Portugal](#).

¹⁹⁹ Lacatus and Carraro, *op. cit.*

²⁰⁰ Portuguese Ombudsman, UPR submission, p. 5. See also Council of Ministers Resolution No. 194/2024, which approves the plan to combat human trafficking 2025-2027.

²⁰¹ It was not possible to identify the outcome of these recommendations.

3.4.1 The Portuguese Ombudsman and the European Ombudsman

At the regional/European level, accountability can be strengthened via participation in networks such as the European Network of Ombudsmen²⁰² channel through which concerns related to EU institutions and agencies may be flagged to the EO²⁰³. This is particularly relevant in light of the limited independence of the EU's monitoring of human rights, as mentioned under the pact. Through this networked accountability structure, potential rights violations linked to EU-level actors may be subjected to independent oversight by the EO.

Moreover, the EO could play a complementary role in relation to EU actors' compliance with their own obligations under the Pact. As it is under its capacity to, for example, recommend in the interest of human rights safeguard that, where monitoring capacity is demonstrably insufficient at the date of application of the SR and APR for reasons not attributable to the MS, consideration be given to the temporary postponement or phased activation of particularly restrictive procedural components until adequate supervisory capacity is effectively in place. For instance, a sequenced implementation model, which is no novelty to the EU²⁰⁴, linking the activation of restrictive measures to verified monitoring readiness, would more closely align the Pact's operational rollout with the principle of effective human rights protection and the requirement that safeguards be practical and effective rather than merely formal.

There is also the possibility used in the past by the Portuguese Ombudsman of a «query procedure»²⁰⁵ that is a non-Treaty-based mechanism developed within the framework of the European Network of Ombudsman to promote the uniform application of EU law, allowing national Ombudsmen to submit questions to the EO concerning the interpretation or

²⁰² On the European Network of Ombudsmen, see the official website (<https://eno.ombudsman.europa.eu/home.html>) and the Portuguese Ombudsman on the interaction with the network see: <https://www.provedor-jus.pt/relacoes-internacionais/rede-europeia-de-provedores-de-justica-eno/>.

²⁰³ Gil, *op. cit.*, p. 13, on the division of competences between the EO and national ombudsmen.

²⁰⁴ Despite Commission experience in progressive start (see <https://travel-europe.europa.eu/ees/faq#what-progressive-start-EES-mean> and <https://travel-europe.europa.eu/etias/how-to-apply/what-you-need-to-apply>) from instruments such as European Travel Information and Authorisation System and Entry Exit System, the difference lies in the circumstance that the operational start date is determined by a later Commission decision once technical readiness is confirmed, which we believed should have been done with the Pact given, especially given its unassessed human right impact.

²⁰⁵ Further on this matter: Natassa Athanasiadou and Nikos Vogiatzis, «The EU Queries: A Form of Extra-Judicial Preliminary Reference in the Field of Maladministration?», *German Law Journal* 22, no. 3 (2021): 441–465.

application of EU law, who would, when necessary, forward them to the competent institution. In practice, as pointed out by Ana Rita Gil²⁰⁶, the European Commission was considered competent to provide interpretative guidance, which, under EU law, raises concerns, as the institution entrusted with providing authoritative and final interpretation of EU law is the CJEU, not the Commission. Thus, we support the view that, from a rule of law perspective, greater alignment with EU principles would be achieved if the EO had direct access to the CJEU and the ability to submit interpretative questions. In the absence of this possibility, the following subsections explore alternative pathways for enhancing the effectiveness of the IMM, namely by fostering judicial dialogue or by enabling the monitoring bodies themselves to engage directly with courts.

3.4.2 Triggering Judicial Dialogue through the Preliminary Reference Procedure: The Role of the Portuguese Ombudsman

From an accountability perspective, judicial dialogue constitutes a crucial mechanism through which monitoring findings may ultimately be transformed into binding legal consequences. The independent monitoring architecture established under the Pact does not replace judicial scrutiny. Rather, it presupposes that monitoring findings may be channelled into existing accountability pathways, including judicial proceedings where appropriate²⁰⁷.

In this context, this study argues that an admissible and desirable judicial mechanism within the EU legal order is the preliminary ruling procedure²⁰⁸ under article 267 of the TFEU and article 19(3)(b) of the Treaty on European Union (TEU). In this context, this procedure serves to ensure that the interpretation and implementation of the Pact comply with EU primary law, in which human rights standards are enshrined, and to determine whether the implementation of EU legislation may give rise to breaches of EU law for which either national authorities or Union actors may ultimately be held accountable.

²⁰⁶ As explained by the author, Gil, *op. cit.*, it is a non-Treaty based mechanism developed within the framework of the European Network of Ombudsmen to promote the uniform application of EU law. It allows national Ombudsmen submit questions to the EO concerning the interpretation or application of EU law. Although originally envisaged that such queries would be forwarded to the «competent institution», in practice an established arrangement has emerged whereby the European Commission is considered the competent institution.

²⁰⁷ [Regulation \(EU\) 2024/1356](#), article 10.

²⁰⁸ «(...) [T]he role of national courts, including their requests for preliminary rulings from the CJEU, may continue to be crucial as regards the interpretation and application of EU asylum law», Steve Peers, *op. cit.*, p.183.

The preliminary reference procedure becomes relevant where a national court is confronted with questions concerning the interpretation or validity of EU law and where a ruling from the Court of Justice is necessary to resolve the dispute before it. This is particularly the case where new questions of interpretation arise that are of general significance for the uniform application of Union law, or where existing case law does not provide sufficient guidance for emerging legal contexts²⁰⁹.

Under article 267(a) TFEU, the procedure covers the interpretation of the Treaties, including the Charter pursuant to article 6(1) TEU. Under article 267(b) TFEU, it also covers the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. This includes the regulations establishing the Screening and Asylum Procedures, as per article 288 TFEU. Their domestic implementation may give rise to constitutional questions concerning the compatibility of national measures with fundamental rights. Such issues can be conclusively resolved only through authoritative interpretation by the Court of Justice. This enables the Constitutional Court to interpret domestic legislation and to assess its validity in the light of EU law and national constitutional law.

Under EU law, courts against whose decisions there is no possibility of national appeal²¹⁰ are under an obligation to submit a preliminary reference to the Court of Justice whenever a question of interpretation or validity of EU law is raised and its resolution is indispensable to the matter at stake. The Portuguese Constitutional Court has already addressed the issue in practice by making its first reference to the CJEU²¹¹. Accordingly, where the Ombudsman frames a request for constitutional review in a manner that clearly raises questions concerning the interpretation or validity of EU law, and where the admissibility criteria established by

²⁰⁹ See the recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, in: <https://eur-lex.europa.eu/EN/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html>.

²¹⁰ João Mota de Campos, António Pinto Pereira and J. L. Mota de Campos, *Direito Processual da União Europeia – Contencioso Comunitário*, 2^a ed. (Lisbon: Fundação Calouste Gulbenkian, 2014), pp. 416 and ff.

²¹¹ Portuguese Constitutional Court, *Judgment No. 711/2020*. Although the preliminary reference in this case occurred in the context of concrete constitutional review, nothing in EU law appears to preclude interpretative questions from being referred in the context of abstract review proceedings or even in cases of unconstitutional omission, those within the competences of the Portuguese Ombudsman. On this, see also the observation concerning Italian Constitutional Court «its position has, however, changed significantly over time as it started to accept EU law as a standard for abstract constitutional review», Marek Pivoda, ‘Constitutional Courts Asking Questions: A Deliberative Potential of Preliminary Reference Mechanism’ (2023) 25 *Cambridge Yearbook of European Legal Studies* p. 148.

the Court of Justice are satisfied, the Constitutional Court would have strong grounds to engage with the preliminary reference procedure.

The CJUE has consistently held that preliminary references cannot be hypothetical²¹². However, this study argues that the fact that constitutional review proceedings are abstract does not necessarily imply that the issue raised is merely hypothetical. On the contrary, the need for abstract constitutional review may arise precisely because concrete situations have revealed structural legal tensions requiring clarification at the constitutional level. For example, the hypothesis where monitoring activities carried out by the Ombudsman in an eventual IMM capacity may lead to the identification of systemic issues in the implementation of national legislation related to the Pact and do not preclude the IMM from referring the concrete issue to ordinary national courts as predicted in the SR.

In such circumstances, abstract constitutional review may serve the purpose of preventing further harm to individuals subject to the same legal framework. Where doubts arise regarding the compatibility of national implementing measures (or the interpretation of the underlying EU regulations) with EU primary law, the Constitutional Court may be required to seek clarification from the CJEU regarding the compatibility of those measures with the EU Treaties, particularly the Charter.

Thus, in the context of the Pact's implementation, the Portuguese Ombudsman's power to initiate proceedings for abstract constitutional review before the Constitutional Court assumes particular significance. This competence extends beyond the protection of fundamental rights and encompasses the broader defence of the Constitution itself. In this sense, the IMM does not substitute judicial review but may operate as a catalyst for it.

The Portuguese Ombudsman's constitutional position may therefore function as a procedural bridge between monitoring findings and judicial review. Within the framework of abstract constitutional review, the constitutionality of legal provisions that prove incompatible with constitutional guarantees or with EU primary law may be challenged.

In practice, such situations may arise for example where national measures implementing the Pact interfere with the constitutional status of the Ombudsman under Article 23(3) of the Portuguese Constitution (due to insufficient funding, training, staffing, or other resources

²¹² CJEU, *Stichting Rookpreventie Jongd and Others* (C-160/20), judgment of 22 February 2022, paragraph 82.

necessary to ensure constitutionally safeguarded independence), which forms part of Portugal's constitutional identity protected under Article 4(2) TEU. Similar tensions may arise in relation to the constitutional guarantee of asylum, both under Article 33(8) of the Constitution and under Articles 18 of the Charter and 3 of the ECHR or concerning the right of access to justice under Article 20 of the Constitution and Articles 47 of the Charter 6 and 13 of the ECHR, as mentioned above (chapter 2, section 2.1). In such circumstances, the Constitutional Court may be required to engage with the preliminary reference procedure to safeguard both the Portuguese constitutional order and the coherence of the Union's legal system.

Against this background, the present study identifies the period following the Pact's implementation deadline and the adoption of national implementing acts as a particularly important opportunity for the Portuguese Ombudsman to trigger renewed judicial dialogue between the Portuguese Constitutional Court and the CJUE. This possibility exists irrespective of whether the Ombudsman is formally designated as the IMM, as its constitutional mandate already enables it to promote such judicial review.

This institutional configuration places the Ombudsman at the intersection of constitutional law and EU primary law as a guardian of human rights. In a legislative context in which both the Charter and the fundamental rights enshrined in the Portuguese Constitution must be carefully safeguarded, such an institutional arrangement may play a decisive role in ensuring both constitutional and supranational compliance.

3.4.3 The Potential Role of the Portuguese Ombudsman in Judicial Proceedings

At the national level, as noted by Ana Rita Gil²¹³, the Portuguese Ombudsman, as a rule²¹⁴, does not intervene in proceedings pending before ordinary national courts, neither as a party nor as *amicus curiae*. This reflects the traditional constitutional design of the Portuguese Ombudsman as a non-contentious and extra-judicial mechanism of oversight, operating

²¹³ Ana Rita Gil, *O Provedor de Justiça nos Países de Língua Portuguesa* (Lisbon: ICJP, 2021), p. 21.

²¹⁴ Portuguese procedural law across its different jurisdictions already accommodates mechanisms allowing the participation of third parties and specialised experts in judicial proceedings, as outlined in the Civil Procedure Code, articles 311, 316 and 467; Administrative Court Procedure Code, articles 10 and 31; Code of Criminal Procedure, articles 68, 151 and 152; Constitutional Court Act, articles 54 and 64.

primarily through recommendations, persuasion, and requests for constitutional review rather than through direct judicial participation.

Nevertheless, according to the author²¹⁵, this institutional model is not universal. In several European jurisdictions, Ombudsmen may intervene, even acting as *amicus curiae*, particularly where human rights are at stake. Under Portuguese law, the Ombudsman's Statute does not expressly limit judicial intervention²¹⁶, nor does it explicitly confer a specific power to act before ordinary courts. Article 35 of the statute provides that where sufficient evidence of criminal, disciplinary, or regulatory offences emerges during proceedings, the Ombudsman shall inform the competent authorities, including the Public Prosecutor.

At the EU level, the SR provides the primary normative anchor for the interaction between monitoring and judicial accountability. Article 10 of the Regulation establishes that findings of the IMM must be followed up where human rights violations are identified, including through referral to competent authorities and, where appropriate, to civil or criminal proceedings. While the provision does not expressly regulate judicial participation by the monitoring body itself, it clearly embeds the IMM within a broader accountability architecture that may ultimately involve judicial oversight.

The guidance issued by FRA concerning the establishment and functioning of the IMM supports that where substantiated allegations of human rights violations are identified, the monitoring mechanism should be entitled to communicate directly with competent investigative authorities and trigger prompt and effective investigations by internal disciplinary bodies and/or prosecutorial authorities. This possibility should also extend to substantiated reports of violations occurring outside the screening or asylum border procedure, particularly where criminally relevant conduct is involved. Furthermore, the mechanism should monitor and report on the progress of investigations it has triggered, drawing on information received from investigative authorities.

Taken together, these elements suggest that Portuguese Ombudsman practice on intervention in national judicial proceedings is not structurally immutable. On the contrary, the evolving EU framework surrounding the IMM, combined with existing statutory

²¹⁵ «“Query Procedures” in the European Union», Gil, *op. cit.*, p. 9: «However, many Ombudsmen have ex officio powers, being competent to autonomously start an investigation on matters deemed relevant. Some European Ombudsmen may also intervene before the Courts (activating a judicial procedure or even as *amicus curiae*)».

²¹⁶ [Statute of the Ombudsman](#), article 22.

competences and comparative European practice, opens the door to the possible formal recognition of a more structured form of judicial engagement in Portuguese law, at least insofar as the IMM mandate is concerned.

Allowing the Portuguese Ombudsman to intervene as *amicus curiae* in judicial proceedings could serve several important functions. First, it could contribute to a more effective protection of human rights by providing courts with specialised expertise derived from the monitoring activities. Second, it could assist national courts, particularly courts of last instance, in complex litigation concerning the implementation of the Pact by clarifying the human rights implications of the measures under scrutiny. In doing so, it could also facilitate the activation of the preliminary reference procedure, encouraging national courts to seek authoritative interpretation from the CJEU where questions of EU law arise.

At the regional level courts, Julia Laffranque²¹⁷ observes that closer cooperation between Ombudsmen and courts may enhance the protection of human rights and highlights the possibility of third-party interventions by Ombudsmen, particularly in their NHRI capacity. As previously noted, the Paris Principles expressly encourage interaction between NHRI and jurisdictional bodies responsible for the promotion and protection of human rights. For instance, in ECtHR this mechanism is well established, as under Article 36(2) ECHR, which is of the utmost in accordance as per the article 52(3) of the Charter, the rights enshrined in the charter must be interpreted in the same way as the equivalent rights in the ECHR and its protocols, which interpretation is of the ECtHR competence under 32 ECHR. The President of the court may invite written comments from any person concerned in the interest of the proper administration of justice. The ECtHR's practice demonstrates, according to the literature reviewed²¹⁸, a comparatively open and facilitative approach to third-party intervention, fostering dialogue between rights defenders and the court.

By contrast, intervention before the CJEU is claimed to remain significantly more restrictive. Article 40 of the Statute of the Court²¹⁹ limits intervention primarily to MS and EU institutions and requires other entities to demonstrate a direct and present interest in the resolution of the dispute. Nevertheless, doctrinal proposals have suggested possible avenues

²¹⁷ Julia Laffranque, «The Ombudsman in the Eyes of the European Court of Human Rights», *Juridica International* 29 (2020).

²¹⁸ Jasper Krommendijk and Kris van der Pas, «Third-Party Interventions before the Court of Justice in Migration Law Cases», *EU Migration Law Blog*, 29 November 2022.

²¹⁹ [Protocol \(No 3\) on the Statute of the Court of Justice of the European Union](#).

for expanding expert participation in proceedings, including article 70 of the Rules of Procedure of the CJUE²²⁰.

Within this framework, the possibility for the Portuguese Ombudsman to intervene as *amicus curiae*, including at the regional level, would represent a coherent development, particularly in cases involving systemic human rights concerns arising from the implementation of the Pact. This possibility becomes especially relevant considering the accountability gap identified above, where migration control operations involve both national authorities and EU agencies.

4. Conclusion

The previous chapters have demonstrated that the IMM, as designed under the Pact, is neither structurally doomed to failure nor guaranteed to succeed. Its legal framework provides certain safeguards, including references to independence standards, investigative powers, and integration within broader accountability structures. At the same time, the analysis has revealed a number of structural vulnerabilities, including the persistence of an accountability gap at the EU level, risks of financial dependence, and operational fragility during the early stages of implementation.

The analysis of the IMM's potential integration into the Portuguese legal order illustrates that national institutional configurations may mitigate some of these weaknesses. Where monitoring responsibilities are entrusted to a constitutionally entrenched and functionally autonomous institution, the structural preconditions for effective oversight may be significantly strengthened. However, this finding does not eliminate the systemic risks embedded in the Pact's architecture, nor does it ensure that comparable safeguards will exist across all MS.

The central question of this dissertation – whether human rights monitoring under the Pact functions as a genuine safeguard or risks operating as an empty promise – cannot ultimately be answered solely through textual analysis of the legal framework or through the examination of a single national institutional model. Rather, it depends on whether the structural conditions capable of transforming monitoring into effective accountability are secured in practice.

²²⁰ [Rules of Procedure of the Court of Justice](#), p. 21.

Building on the theoretical framework presented in Chapter 1 and the legal and institutional assessment conducted in Chapters 2 and 3, the following sections identify the main contributions of the study, summarise its principal findings, and outline possible avenues for future research.

4.1 Attainments

This research has sought to move beyond a purely critical diagnosis of the Pact's shortcomings and to identify concrete legal tools and institutional strategies capable of strengthening the effectiveness of the IMM without requiring a redesign of the Pact itself.

First, the study highlights the need to address the existing EU-level accountability gap by reinforcing the multi-level coherence of oversight. One possible avenue lies in structured cooperation mechanisms between the national Ombudsman and the EO. Such cooperation would not expand the IMM's mandate but would ensure that monitoring findings concerning EU-related maladministration are channelled to the appropriate level of independent oversight. This coordination could help prevent fragmentation of accountability and reinforce the credibility of the EU legal order.

Second, the study emphasises that financial independence must be secured in accordance with the standards reflected in the Paris Principles and the Venice Principles. Stable and predictable budgetary allocations are essential to avoid dependence on discretionary or project-based funding. MS may therefore consider integrating EU financial instruments into national budgets to ensure more durable institutional funding structures.

Third, operational capacity emerges as a key condition for effective monitoring. Border management increasingly involves technological tools and complex vulnerability assessments. Monitoring bodies must accordingly develop multidisciplinary expertise in areas such as artificial intelligence, data protection, medical vulnerability assessment, and trafficking indicators. Although assistance from the FRA and the Commission is envisaged under the Pact, additional institutional support mechanisms and implementation time may be required to ensure that monitoring bodies possess the technical capacity necessary to perform their tasks effectively.

Fourth, the study highlights the importance of activating stronger accountability pathways when soft-law engagement proves insufficient. Monitoring findings should not remain purely

descriptive but should be capable of generating legal consequences. In particular, judicial dialogue mechanisms, including preliminary references under article 267 TFEU before the CJEU, may transform systemic monitoring concerns into authoritative legal clarification.

Altogether these strategies demonstrate that the IMM's effectiveness depends not only on its formal legal design but also on the strategic use of existing institutional tools within national and EU legal orders. The distinction between a genuine safeguard and a merely symbolic mechanism ultimately lies in the seriousness with which monitoring findings are translated into behavioural change.

4.2 Summary of Findings

This dissertation examined how the legal design of the IMM under the EU Pact influences its potential to safeguard human rights. At the centre of the analysis lay a broader question: whether the institutionalisation of monitoring within the Pact constitutes a meaningful protective safeguard within an increasingly securitised migration governance framework.

The theoretical analysis established that effective human rights monitoring depends on three key structural conditions: legitimacy, independence and accountability. Monitoring becomes meaningful only when it is capable of influencing behaviour, whether through persuasion, reputational pressure, political mobilisation or judicial intervention.

The legal analysis of the Pact revealed that the IMM framework includes important safeguards, such as references to internationally recognised independence standards, investigative powers, and access to border areas. Nevertheless, the study identified several structural vulnerabilities. These include the persistence of an EU-level accountability gap, risks of financial dependence, and potential operational fragility during the early phases of implementation. While none of these weaknesses individually renders the mechanism ineffective, their combined effect may constrain the practical impact of monitoring.

An institutional assessment focused on the Portuguese Ombudsman as a possible national institutional host for the IMM intends to showcase how a constitutionally entrenched and internationally accredited institution may provide favourable structural conditions for effective monitoring. The integration of Ombudsman, NHRI and NPM mandates, combined with the power to initiate constitutional review and stimulate judicial dialogue, illustrates how monitoring may be embedded within broader accountability structures. At the

same time, it confirms that institutional robustness is strongly dependent on national constitutional traditions and political culture, as there may be different guarantees across MS.

Taken as a whole, the findings suggest that the IMM is structurally ambivalent. Its legal design creates the possibility of effective monitoring but does not guarantee it. Whether the mechanism ultimately operates as a genuine safeguard or as a merely performative institutional device will depend on how its structural guarantees are implemented and operationalised at both national and EU levels.

4.3 Avenues for Future Research

Despite the concerns raised both in the literature and in this study regarding the potential limitations to the independence and effectiveness of the monitoring mechanism established under the Pact, this dissertation has demonstrated that institutional performance cannot be ensured through legal design alone. The institutions entrusted with monitoring responsibilities must continually safeguard and strengthen their independence, actively drawing upon the legal and institutional instruments available within national and international accountability systems.

Future research could therefore examine how oversight bodies in different MS develop practical strategies to preserve their autonomy in increasingly complex political and institutional contexts. Comparative studies analysing different national institutional set-ups would be particularly useful in assessing whether certain models are better equipped to safeguard independence, credibility and operational effectiveness.

Future research should also focus on conducting *ex post* assessments of the Pact's impact on human rights. Such analyses would be particularly valuable, given that no human rights impact assessment was carried out prior to the adoption of the Pact. Assessing the concrete consequences of the new framework will thus be essential to determining whether the monitoring structure established by the Pact effectively contributes to the protection of human rights at the Union's external borders.

In this regard, the true significance of the IMM will only become clear once it has been implemented. Where monitoring bodies are able to carry out their mandate with independence and institutional resilience, the mechanism could still develop into a

meaningful tool capable of strengthening the protection of human rights at Europe's borders, rather than whitewashing their erosion.

It thus remains to be seen whether an empirical assessment of the achievements of IMM to be established in the MS will determine their success in protecting the human rights of asylum seekers and migrants, influencing the behaviour of States and deterring them from breaching international human rights law, despite the Pact's questionable provisions.

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Annex I

Date	Documents	Stated advances in IMM implementation
11-11-2025	European Annual Asylum and Migration Report (2025) and the Second State of play on the Implementation of the Pact annex to it	– Large majority of MS had already identified arrangements necessary to establish IMM. – Austria, Bulgaria, Cyprus, Czechia, Latvia, Lithuania, Estonia, Poland, Portugal, and Slovakia defined that the IMM is to be attributed to existing Ombudsmen. In Romania, the ombudsman had formally taken up the role. Other MS had chosen different structures, for example, Ireland, Croatia, and the Netherlands. – Denmark, Finland, Greece, Hungary, Malta, Slovenia, Spain, and Sweden had not defined their arrangements for the IMM. The European Commission states that outstanding arrangements need to be concluded. – FRA was developing specific methodological guidance to support the work of future designated monitors. – The following challenges to meet the June 2026 deadline were identified: splitting the IMM role among too many different actors and MS ensuring sufficient and stable funding, recruitment, and training to allow the monitoring bodies to issue annual recommendations and effectively investigate allegations of rights failure.
11-06-2025	State of play on the implementation of the Pact on Migration and Asylum	– Most MS – some out of the 25 that delivered their National Implementation Plans (NIP) – provided for the establishment of the IMM in their NIP: some MS were already making contacts to operationalize the monitoring and in other issues have already been flagged, including for Bulgaria, Italy and Malta. – Austria and Greece did not refer the IMM in their NIP.
19-09-2024	Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms	– FRA published guidance for EU countries on setting up IMM to ensure fundamental rights are respected during screening and asylum border procedures. – This updates the 2022 guidance.
12-06-2024	Operational Checklist and List of Commission Implementing and Delegated Acts to be adopted	Identified as required MS measure: – The establishment of a binding legal framework for IMM covering both screening and border procedures. – National legal provisions enabling the investigation of alleged fundamental rights violations, including appropriate referral to civil or criminal justice proceedings. – Operationally, the assurance of effective functioning of IMM by providing sufficient qualified personnel, adequate financial resources for maintenance, appropriate administrative arrangements, and cooperation links with international and non-governmental organisations.
12-06-2024	Common Implementation Plan for the Pact	– Organises Pact's legal obligations into ten interdependent building blocks to be developed in parallel, the establishment of the IMM is primarily addressed under Building Block 9: «New safeguards for applicants for international protection and vulnerable persons, and increased monitoring of fundamental rights». – Tasks FRA to provide guidance on the implementation of the IMM by the fourth quarter of 2024.
14-05-2024	Explanatory Memo on the Pact on Migration and Asylum	– Clarifies that all MS are required to establish IMM for fundamental rights oversight during screening and border asylum procedures to enhance transparency, accountability, and respect for fundamental rights.