The proposed Return Directive (recast)

Substitute Impact Assessment

STUDY

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Ex-Ante Impact Assessment Unit
PE 631.727 – February 2019

EN

The proposed Return Directive (recast)

Substitute impact assessment

On 12 September 2018, the European Commission published a proposal for a recasting of the 2008 Return Directive, which stipulates common standards and procedures in Member States for returning irregular migrants who are non-EU nationals. Effectively returning irregular migrants is one of the key objectives of the European Union's migration policy. However, Member States currently face challenges: national practices implementing the EU rules vary and the overall return rates remain below expectations. The proposal was not accompanied by a Commission impact assessment.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) therefore asked the European Parliamentary Research Service to provide a targeted substitute impact assessment of the proposed recast Return Directive. The assessment considers the main expected impacts of the key provisions of the Commission proposal, focusing on the social, human rights and financial impacts, as compared to the current situation (status quo).

The assessment concludes, inter alia, that: 1) there is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants; 2) the Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns; 3) the Commission proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights; 4) the Commission proposal would generate substantial costs for Member States and the EU; and 5) the Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in January 2019.

PE 631.727
ISBN: 978-92-846-3607-5
DOI:10.2861/187601
CAT: QA-02-19-058-EN-N

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Executive summary

Effectively returning irregular migrants is one of the key objectives of the EU's migration policy, as reflected in the 2015 European Agenda on Migration.[1] The focus of the EU and its Member States on return policy has become particularly evident since the rapid increase in the number of asylum seekers and irregular migrants arriving in the EU in 2015 (also referred to as the European 'migration crisis'). The political discourse across Europe changed. The EU received a relative increase in asylum applications in 2015, when 1.3 million applications were lodged across the Member States, but these figures decreased in the following years.

The European Commission argued that to address the key challenges to ensure the effective returns of irregular migrants, a targeted revision of the Return Directive was necessary, 'to notably reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding.' According to the Commission, the main challenges related to the effective return of irregular migrants included difficulties experienced by Member States to successfully enforce return decisions; varying national practices implementing the EU framework; inconsistent definitions and interpretations of the risk of absconding and of the use of detention; the lack of cooperation on the part of the third-country nationals; and the dependence on the cooperation of countries of origin in return and readmission, by means of EU readmission agreements and non-binding readmission arrangements.

Against this background, the European Commission published on 12 September 2018 a proposal for a recasting of the 2008 Return Directive, which stipulates common standards and procedures in Member States for returning irregular migrants who are non-EU nationals (COM(2018) 634). The proposal was not accompanied by a Commission impact assessment.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is currently considering the proposal. On 6 November 2018, it requested the European Parliamentary Research Service (EPRS) to provide a targeted substitute impact assessment of the proposed recast Return Directive, the rapporteur (Judith Sargentini, Greens/EFA, the Netherlands) and shadow rapporteurs being of the view that such an assessment is necessary. This targeted impact assessment assesses the main expected positive and negative impacts of the key provisions of the Commission proposal, with a focus on the social, human rights and financial impacts, as compared to the current situation (status quo). These key provisions include those on the risk of absconding (Article 6); the obligation to cooperate (Article 7); voluntary departure (Article 9); entry bans issued during border checks at the exit (Article 13); return management (Article14); remedies and appeals (Article 16); detention (Article 18); border procedure (Article 22).

This targeted substitute impact assessment is based on two separate external studies, which were outsourced by the Ex-Ante Impact Assessment Unit of EPRS: (1) a study covering the legal, social and fundamental rights aspects; and (2) a study covering the economic and budgetary aspects. These studies are reproduced in full in Annexes 1 and 2 respectively.

The study on the legal aspects is primarily based on desk research. It draws on international and EU law sources, case law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR), as well as relevant national case law, Commission reports and documents, relevant studies of consultations, reports and data, including from the Member States. In addition, a limited of number of interviews were conducted with stakeholders. The analysis of the economic aspects is based on desk research, together with a specific quantitative analysis of data gathered

[1] The European Commission considers the effectiveness of returns primarily in terms of the increasing return rates of irregularly staying third-country nationals, see European Commission, COM(2018) 634, explanatory memorandum, 12 September 2018, p. 2.

from four selected Member States: Belgium, Czech Republic, Germany and Italy. These were selected to ensure coverage of different key issues underlying the low effectiveness of returns, the availability of relevant information and geographical location.[2]

This targeted substitute impact assessment concludes, inter alia, that: 1) there is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants; 2) the Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns; 3) the Commission proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights; 4) the Commission proposal would generate substantial costs for Member States and the EU; 5) the Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending.

[2] More details on the respective methodologies may be found in the annexed studies.

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1. Background

On 16 December 2008, after three years of difficult negotiations, the European Parliament and the Council of the EU adopted Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals ('2008 Return Directive').[3]

The 2008 Return Directive aims to ensure that the return of third-country nationals (non-EU nationals) without legal grounds to stay in the EU[4] is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. This directive laid down, for the first time at EU level, mandatory return decisions, the preference for voluntary return, the mandatory issuance of entry bans together with return decisions, procedural safeguards in the return process, and grounds for pre-removal detention, for a maximum period of 18 months.[5]

The European Parliament has expressed its views on the need for a holistic EU approach to migration and on return policies of third-country nationals, who stay irregularly in the territory of an EU Member State. It has repeatedly called for return policies which involve sending migrants back to countries where they can be received safely and without being endangered, as in its resolution of 25 October 2016 on human rights and migration in third countries.[6] In April of the same year, the European Parliament called for a holistic EU approach to migration to tackle the situation in the Mediterranean Sea. It pointed out that the return of migrants should only be carried out safely, in full compliance with the fundamental and procedural rights of the migrants in question, and where the country to which they are being returned is safe for them. It also reiterated, in that regard, that voluntary return should be prioritised over forced returns.[7]

Many, including experts, scholars and various organisations, criticised the 2008 Return Directive.[8] The most controversial aspects concerned the maximum pre-removal detention period and re-entry bans.[9] More generally, the Return Directive was criticised for introducing common standards on the removal of irregular migrants in the absence of a comprehensive, common policy governing

[3] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; see also Lutz F., 'The negotiations of the Return Directive: comments and materials', Wolf Legal Publishers, 2010.

[4] Also referred to as 'irregular migrants'; irregular migrants are non-EU nationals, who are rejected asylum seekers and those who enter, stay or work in a country without the necessary authorisation or documents required under immigration regulations, see IOM key migration terms.

[5] See also Lutz, F. and Mananashvili, S., 'Return Directive 2008/115/EC' in Hailbronner, K. and Thym, D. (eds.), 'EU Immigration and Asylum Law. A Commentary', 2nd edition, Munich/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, 2016, p. 658.

[6] European Parliament resolution of 25 October 2016 on human rights and migration in third countries (2015/2316(INI)).

[7] European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 60.

[8] See targeted impact assessment study on the proposed recast Return Directive - legal aspects, in Annex 1, referring to Acosta D., 'The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, p. 19; Baldaccini A., 'The return and removal of irregular migrants under EU law: An analysis of the Returns Directive', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, p. 1.

[9] See Baldaccini A., 'The EU Directive on Return: Principles and protests', *Refugee Survey Quarterly*, Vol. 28(4), Oxford Academic, 2009, p. 114; see also Cornelisse G., 'Immigration detention and human rights: rethinking territorial sovereignty', Martinus Nijhoff Publishers, 2010, pp. 271-272; Provera, M., 'The Detention of Asylum Seekers in the European Union and in Australia – A Comparative Analysis', Wolf Legal Publishers, 2013.

admission and stay, despite a clear link between legal and irregular migration.[10] The interpretation of the Court of Justice of the EU (CJEU) clarified that the Return Directive itself was actually less restrictive than it initially appeared, in particular in light of the case law restricting the grounds for detention, limiting Member States' custodial penalities for irregular migration as a criminal offence, enhancing voluntary departure, prohibiting removal in non-refoulement cases, and widening the scope of the Directive, while clarifying that asylum seekers are not irregular migrants.[11] However, it has also been pointed out that 'some of the Court's rulings are fairly modest', for example, the right to a hearing has no effective content or remedies to enforce it.[12]

A 2013 Commission evaluation highlighted the overall positive effect of the 2008 Return Directive in terms of harmonisation of national practices.[13] The evaluation emphasised the streamlining of Member States' practices concerning the maximum length of detention; the promotion of voluntary departures and return monitoring; as well as a harmonisation concerning length and conditions of entry bans. However, the evaluation also found that the 2008 Return Directive did not seem to have much influence on the postponement of removal and on procedural safeguards, and it highlighted a lack of data availability at national level.[14] In 2014, the Commission reported on the implementation of the Return Directive in the Member States, emphasising the need for a 'proper and effective implementation'.[15]

Effectively returning irregular migrants is one of the key objectives of the EU's migration policy, as reflected in the 2015 European Agenda on Migration.[16] The Commission urged Member States to fully comply with the 2008 Return Directive and announced its monitoring efforts in this regard.[17]

The EU institutions' focus on return policy has become particularly evident since the rapid increase in the number of asylum seekers and irregular migrants arriving in the EU in 2015 (also referred to as the European 'migration crisis') and the political discourse across Europe changed. The EU saw a relative increase in asylum applications in 2015, when 1.3 million applications were lodged across the Member States, but these figures decreased in the following years.[18]

Subsequently, the Commission presented an 'EU action plan on return',[19] which again emphasised the need for a better implementation of the 2008 Return Directive at national level – and in this

[10] See Van Ballegooij, W. and Thirion, E., The Cost of non-Europe in the area of legal migration, EPRS, European Parliament, forthcoming; Baldaccini A., 'The EU Directive on Return: Principles and protests', *Refugee Survey Quarterly*, Vol. 28(4), Oxford Academic, 2009, p. 114.

[11] Peers S., 'EU Justice and Home Affairs Law', 4th edition, Oxford University Press, 2016, pp. 520-521 (502-521); see also Basilien-Gainche M.L., 'Immigration detention under the Return Directive: The CJEU shadowed lights', *European Journal of Migration and Law*, Vol. 17(1), Brill | Nijhoff, 2015, p. 104; Molnár T., 'The Place and Role of International Human Rights Law in the EU Return Directive and in the Related CJEU Case Law: Approaches Worlds Apart?', in: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, S. Carrera et al. (eds), Martinus Nijhoff Publishers 2018, p. 105.

[12] Peers S., 'EU Justice and Home Affairs Law', 4th edition, Oxford University Press, 2016, p. 521 (502-521).

[13] European Commission, Evaluation on the application of the Return Directive (2008/115/EC), Directorate-General for Migration and Home Affairs, 22 October 2013, based on a report prepared by Matrix.

[14] Ibid.

[15] European Commission, COM(2014) 199, 23 March 2014; on the implementation of the 2008 Return Directive in the Member States, see also Zwaan, K., 'The Returns Directive. Central themes, problem issues, and implementation in selected Member States', Wolf Legal Publishers, 2011.

[16] European Commission, COM(2015) 240, 13 May 2015.

[17] Ibid, p. 10.

[18] Van Ballegooij, W., with Navarra, C., The Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018, Annex produced by Milieu, p. 55.

[19] European Commission, COM(2015) 453, 9 September 2015; see 2015 Return Handbook, C(2015) 6250, 1 October 2015.

regard proposed a first Return Handbook, an enhanced role for Frontex, and better cooperation with third countries on re-admission.[20]

In 2017, the Commission published a 'renewed action plan' in view of the limited impact of EU initiatives on the return track record across the EU.[21] It indicated that in 2015, the number of irregular migrants ordered to leave the EU amounted to 533 395, compared to 470 080 in 2014. 'With around 2.6 million asylum applications in 2015/2016 alone, and considering that the first instance recognition rate stands at 57% in the first three quarters of 2016, Member States may have more than 1 million people to return once their asylum applications have been processed.'[22] According to the Commission, at the same time, return rates at EU level have not improved. 'While the total return rate from 2014 to 2015 increased from 41.8% to 42.5%, the rate of effective returns to third countries dropped from 36.6% to 36.4%.'[23] The Commission presented initatives aimed at increasing return rates, such as continuing the monitoring of the application of the Return Directive and identifying good practices on disincentives against irregular stay by third-country nationals. The renewed action plan also highlighted EU operational and financial support and it reiterated the need to implement better existing provisions. Guidance was provided to Member States in this regard in a recommendation and a second Return Handbook, however, the effects of these non-binding tools have not been assessed.[24]

1.1 The proposed Return Directive

On 12 September 2018, the Commission published a proposal for a recasting of the directive on common standards and procedures in Member States for returning illegally staying third-country nationals ('proposed Return Directive').[25] The Commission argued that to address the key challenges to ensure effective returns, a targeted revision of the Return Directive was necessary, 'to notably reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding.'[26] The Commission admits that despite efforts, there has been little progress in increasing the effectiveness of returns – in terms of increasing return rates. It notes that, in fact, a decrease in the return rate throughout the EU was observed from 45.8 % in 2016 to merely 36.6 % in 2017.[27]

The proposed Return Directive was presented as 'part of a package of measures adopted by the Commission as a follow-up to the European Council of 28 June 2018 that underlined the necessity to significantly step up the effective return of irregular migrants'. It was presented with the unusual

[20] See targeted impact assessment study on the recast Return Directive - legal aspects, in Annex 1.

[21] European Commission, COM(2017) 200, 2 March 2017, p. 2.

[22] Ibid.

[23] Ibid.

[24] Ibid., European Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council; European Commission, Return Handbook, Annex to Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks.

[25] European Commission, COM(2018) 634, 12 September 2018; the rules on the use of the recasting technique are stipulated in the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts. It lays down special procedures to enable the legislative authority to concentrate its attention on those parts of the legislative proposal which are new.

[26] European Commission, COM(2018) 634, explanatory memorandum, 12 September 2018, p. 2.

[27] Ibid.

addition that the proposal was 'A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018'.

The proposed directive should address some of the main challenges related to the effective return of irregular migrants, as identified by the Commission:[28]

- Difficulties and obstacles experienced by Member States' in return procedures to successfully enforce return decisions.
- National practices implementing the EU framework vary between Member States and are not as effective as they should be.
- Inconsistent definitions and interpretations of the risk of absconding and of the use of detention.
- Lack of cooperation on the part of the third-country nationals.
- Member States are not sufficiently well equipped to enable competent authorities to exchange necessary information promptly.
- Dependence on the cooperation of countries of origin in return and readmission, by means of EU readmission agreements and non-binding readmission arrangements.[29]
- The suggestion to use the EU's visa policy as a tool to achieve progress in cooperation on return and readmission with third countries. In the view of the Commission, once the newly proposed visa rules become law, this would 'significantly improve' the EU leverage in its relations to countries of origin.[30]

The main changes proposed by the Commission, as part of the 'targeted revision' of the Return Directive, concern the following nine articles:

- Risk of absconding (Article 6): introduction of a common, non-exhaustive list of criteria to determine the existence or not of a risk of absconding, including unauthorised secondary movements.
- Obligation to cooperate (Article 7): an explicit obligation for third-country nationals to cooperate with national authorities at all stages of the return procedures.
- Issuing of a return decision in connection with the termination of legal stay (Article 8): obligation for Member States to issue a return decision immediately after a decision rejecting or terminating the legal stay is taken.
- Voluntary departure (Article 9): change of the period for voluntary departure of up to thirty days (the minimum period of seven days was deleted) and introduction of several cases, in which it becomes mandatory not to grant a period for voluntary departure.
- Entry bans issued during border checks at exit (Article 13): possibility for Member States to impose an entry ban without issuing a return decision.
- Return management (Article 14): obligation for Member States to have national return management systems providing timely information on the identity and legal situation of the third-country nationals. These are to be linked to a central system established by the European Border and Coast Guard Agency. Obligation for Member States to establish voluntary return programmes that may also include reintegration support.
- Remedies and appeals (Article 16): introduction of a five-day time-limit for lodging appeals against return decisions issued in cases where the return decision is the consequence of a decision rejecting an application for international protection that became final.

  If the risk of a breach of the principle of non-refoulement has not already been assessed by a judicial authority in asylum procedures, an automatic suspensive effect of the appeal against a return decision must be granted. This is the only mandatory case where automatic suspensive effect shall be granted under this proposal, without prejudice to the obligation for Member States' competent national authorities or bodies to have the possibility to temporarily suspend the enforcement of a

[28] See European Commission, COM(2018) 634, explanatory memorandum, 12 September 2018, pp. 1-2.

[29] On EU readmission arrangements, see Carrera S., 'On Policy Ghosts: EU readmission arrangements as Intersecting Policy Universes', in: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, S. Carrera et al. (eds), Martinus Nijhoff Publishers 2018, p. 21.

[30] However, as the Commission admits in its impact assessment accompanying the proposal on the visa code, 'finally – apart from anecdotal experience in the EU with regard to one third country – there is no hard evidence on how visa leverage can translate into better cooperation of third countries on readmission', see SWD(2018) 77, p. 31.

return decision in individual cases where deemed necessary for other reasons. Such decision on temporary suspension shall be made quickly, within 48 hours as a rule.

The proposal also establishes that only one level of judicial remedy should be available to appeal against a return decision that is the result of a prior negative decision on an application for international protection, which was already subject to judicial remedy.

Finally, it further harmonises the rules to provide, on request, free legal assistance and/or representation, in accordance with the conditions set under the asylum *acquis*.

- Detention (Article 18): introduction of a new ground for detention for third-country nationals in an irregular situation, who pose a threat to public order or national security. In addition, national legislation shall provide for not less than three months as an initial minimum period of detention.
- Border procedure (Article 22): introduction of specific rules applicable to third-country nationals who were subject to asylum border procedures:[31] issuance of a decision in a simplified form, no period for voluntary return granted as a rule (except if the third-country national holds a valid travel document and cooperates with the national authorities), shorter time-limit for lodging an appeal, dedicated ground for detention. In order to facilitate return, it is proposed to ensure that a third-country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be maintained in detention for a maximum period of four months under the border procedure for return. If the return decision is not enforced during that period, the third country national may be further detained if one of the conditions set out in the provisions relating to the general rules on detention is fulfilled and for the period of detention set in accordance with Article 18.

1.2 The LIBE Committee's request for a targeted impact assessment

The proposed Return Directive is not accompanied by a Commission impact assessment. This was criticised by the LIBE Committee, which, at the request of the LIBE rapporteur (Judith Sargentini, Greens/EFA, the Netherlands) and shadow rapporteurs, asked the European Parliamentary Research Service (EPRS) to conduct this targeted substitute impact assessment. Others have also highlighted the need for an impact assessment.[32]

It is not the first time recently that major proposals in the field of migration and asylum have not been accompanied by a Commission impact assessment – one such example is the proposal for a recasting of the Eurodac Regulation.[33] The European Parliament has criticised the lack of impact assessments for major legislative proposals in its report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (IIA), of 15 May 2018, recalling that

[31] In accordance with Article 41 of Regulation (EU) .../.... [Asylum Procedure Regulation].

[32] See, for example, European Economic and Social Committee (EESC), Opinion on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), rapporteur: José Antonio Moreno Díaz, co-rapporteur: Vladimíra Drbalová, adopted in plenary on 23 January 2019, para. 1.5 thereof; EU Agency for Fundamental Rights (FRA), Opinion 1/2019 on the proposed recast Return Directive and its fundamental rights implications, 10 January 2019; EDPS, Formal comments of the EDPS on the Commission proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 10 January 2019; Meijers Committee – standing committee of experts on international immigration, refugee and criminal law, CM1816 Comments on the proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, 27 November 2018; European Council on Refugees and Exiles (ECRE), Comments on the Commission proposal for a recasting of the Return Directive – COM(2018) 634, 30 November 2018.

[33] European Commission, COM(2016) 272, 4 May 2016.

initatives which are expected to have significant social, economic or environmental impacts should be accompanied by impact assessments.[34]

What is an impact assessment? The 2016 Interinstitutional Agreement on Better Law-Making explains that:

> 'Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses. The principles of subsidiarity and proportionality should be fully respected, as should fundamental rights.'[35]

According to the Commission's 2017 Better Regulation Guidelines, the impact assessment process is about gathering and analysing evidence to support policymaking.[36]

> 'Impact assessment promotes more informed decision-making and contributes to better regulation which delivers the full benefits of policies at minimum cost while respecting the principles of subsidiarity and proportionality. However, impact assessment is only an aid to policy-making/decision-making and not a substitute for it.'[37]

Moreover, stakeholders must be able to provide feedback on all key impact assessment questions, including through a 12 week internet-based public consultation.[38]

When is an impact assessment necessary? An impact assessment is required for Commission initiatives that are likely to have significant economic, environmental or social impacts.[39] Tool #9 of the Commission's Better Regulation Toolbox further specifies that the benchmark criterion of 'significant impacts' applies both to the macro- and the micro-level. However, it is emphasised that an impact assessment should be carried out only when it is useful. As a general rule, no impact assessment is needed when there is little or no choice available for the Commission; when impacts cannot be clearly identified ex ante; or when impacts are small. Tool #9 does not contain any rules about urgency.

As far as the proposed Return Directive is concerned, the Commission considered that an impact assessment was not required in the present case:

> 'Taking into account that an in-depth assessment of the key issues in the field of return has been accomplished, the urgency in which legislative proposals need to be tabled and also acknowledging that the revision of the existing Directive is the most appropriate option both in terms of substance and timing, an Impact Assessment on this proposal is not deemed necessary.'[40]

However, the Commission's argumentation lacks persuasiveness and raises questions. It is not clear which 'in-depth assessment' it refers to. Reference is only made to the 2017 Return Handbook,[41] and the 2018 European Migration Network (EMN) study on the effectiveness of return in EU Member

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[34] European Parliament, 'Report on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making (2016/2018(INI))', rapporteurs Pavel Svoboda and Richard Corbett (15 May 2018), para. 22; see also Hiller W., European Parliament work in the fields of Impact Assessment and European Added Value - Activity Report for 2017, EPRS, European Parliament, May 2018, p. 24.

[35] 2016 Interinstitutional Agreement on Better Law-Making, OJ L 123/1, 12.5.2016, para. 12.

[36] European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017, Chapter III on impact assessment, p. 15.

[37] Ibid; see also European Commission, Regulatory Scrutiny Board Annual Report 2017.

[38] Ibid, Chapter III on impact assessment and Chapter VII on stakeholder consultation.

[39] European Commission, 2017 Better Regulation Guidelines, SWD(2017)350, 7 July 2017, p. 15.

[40] European Commission, COM(2018) 634, explanatory memorandum, 12 September 2018, p. 6.

[41] European Commission, Commission Recommendation (EU) 2017/2338, 16 November 2017.

States.[42] It is striking that the Commission mentions neither its 2013 evaluation on the Return Directive,[43] nor its implementation report of 28 March 2014.[44] The question arises as to how the results of the 2013 evaluation were taken into account in the proposal for a recast directive in light of the 'evaluate first' principle. Evaluations aim to inform policy-making by assessing existing interventions regularly and ensuring that relevant evidence is available to support the preparation of new initiatives.[45]

While the Member States and the EMN were consulted on this initiative, it is not clear which civil society stakeholders were consulted and how they were consulted. Providing information on the specific stakeholders consulted, their input and the use of their input in the policy process is, however, an integral part of better regulation.[46]

The Commission also invokes urgency to justify why an impact assessment was not considered necessary. However, it seems that the Commission was already ready to revise the Return Directive in early 2017, as is apparent from the Renewed Action Plan on Return of 2 March 2017.[47] The question arises, therefore, as to why an impact assessment process was not initiated at that time.

Finally, the Commission could have explained why it considered that the revision of the existing directive is the most appropriate option 'both in terms of substance and timing'. It came forward with this proposed recast Return Directive, acting on demand of the European Council, at a time when the reforms of other key related EU asylum and migration legislation was, and is, pending.

It is against this background that, on 6 November 2018, the LIBE Committee requested the Ex-Ante Impact Assessment Unit of EPRS to conduct a targeted substitute impact assessment of the proposed recast Directive. The objective of this targeted substitute impact assessment is to assess the main expected positive and negative impacts of the key provisions of the Commission proposal, with a focus on the social, human rights and financial impacts, as compared to the current situation (status quo). These key provisions include those on the risk of absconding (Article 6); the obligation to cooperate (Article 7); voluntary departure (Article 9); entry bans issued during border checks at the exit (Article 13); return management (Article14); remedies and appeals (Article 16); detention (Article 18); border procedure (Article 22).

In light of the 2019 European Parliament elections and the time frame given by the LIBE Committee, it was not possible to conduct a fully-fledged impact assessment (of the whole proposal), which would have also considered different policy options and included an open public stakeholder consultation.[48] Instead, this is a targeted substitute impact assessment focusing on the main changes in the Commission proposal, as compared to the current situation (status quo).

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[42] European Commission, European Migration Network (EMN) study on the effectiveness of return in EU Member States, 23 February 2018.

[43] European Commission, Evaluation on the application of the Return Directive (2008/115/EC), Directorate-General for Migration and Home Affairs, 22 October 2013, based on a report prepared by Matrix.

[44] European Commission, COM(2014) 199, 28 March 2014.

[45] European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017, Chapter VI on evaluation, p. 50.

[46] European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017, Chapter VII on stakeholder consultation.

[47] European Commission, COM(2017) 200, 2 March 2017, p. 4.

[48] See European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017, Chapter III on impact assessment and Chapter VII on stakeholder consultation.

This targeted impact assessment addressed the following research questions:	
1)	What should be achieved? • Would the proposal address the challenges identified by the Commission and achieve its objective of an effective and fair return policy? • How will the proposed measures affect the number of returns of third-country nationals, who stay irregularly in the EU?
2)	Why should the EU act? • Does the Commission proposal respect the principles of subsidiarity and proportionality?
3)	What are the social, fundamental rights and economic impacts? • What are the expected social and human rights impacts of the proposal on irregular migrants, including as compared to the current *acquis*? More particularly, are international public law, human rights and fundamental rights under the EU Charter of Fundamental Rights, and the principle of non-refoulement (including the case law of the CJEU and the ECtHR), and in particular the rights of vulnerable persons such as children and unaccompanied minors, safeguarded under the proposal? • What are the expected costs and benefits of the changes that the Commission proposal would bring, notably taking into account the proposed rules on detention and border procedure?
4)	Is the proposal coherent with other EU policies? • Are the proposed changes in coherence with EU asylum law and policy and other related EU legislation?

This targeted substitute impact assessment is based on two separate external studies, which were outsourced by the Ex-Ante Impact Assessment Unit of EPRS: (1) a study covering the legal, social and fundamental rights aspects; and (2) a study covering the economic and budgetary aspects. These studies are reproduced in full in Annexes 1 and 2 respectively.

The targeted substitute impact assessment took into account the impact assessment methodology as described in the European Commission's 2017 Better Regulation Guidelines and the corresponding relevant parts of the Better Regulation Toolbox, when conducting the analysis.

The study on the legal aspects is primarily based on desk research. It draws on international and EU law sources, case law of the CJEU and of the ECtHR, as well as relevant national case law, Commission reports and documents, relevant studies of consultations, reports and data, including from the Member States. In addition, a limited number of interviews were conducted with stakeholders. The analysis of the economic aspects is based on desk research, together with a specific quantitative analysis of data gathered from four selected Member States: Belgium, Czech Republic, Germany and Italy. These were selected to ensure coverage of different key issues underlying the low effectiveness of returns, the availability of relevant information and geographical location.[49]

[49] Details on the respective methodologies may be found in the annexed studies.

2. Key findings

The key findings presented in this section are based on the two external studies conducted, one covering the legal, social and fundamental rights aspects ('legal study'), and the other one covering the economic and budgetary aspects ('economic study'). These studies are reproduced in full in Annexes 1 and 2.

2.1 Objective of an effective return policy

Key finding 1: there is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants.

The Commission considers the objective of **effectiveness primarily in terms of the increasing return rates of irregularly staying third-country nationals**. Alternative approaches to the effectiveness of the EU return policy do exist. It is often suggested that the emphasis could be placed on the sustainability of returns instead of on return rates. This would imply, for instance, a greater focus on the cooperation of third countries, as well as on voluntary return with assistance for appropriate reintegration.[50]

Official Commission documents on the 2008 Return Directive[51] **do not clearly establish the need for a revision of the legislative framework to enhance its effectiveness**. The focus has primarily been on the adoption of non-binding tools. The time elapsed between the adoption of the non-binding tools (e.g. the 2017 Recommendations and Return Handbook) for the better implementation of the 2008 Return Directive and the proposed Return Directive has been very short. There is only limited data or studies publicly available on the impact of these soft law tools.[52]

When comparing the proposal to previous Commission documents, it is noticeable that the overall focus of the **Commission's approach has moved away from its previous emphasis on voluntary departure and towards enabling more recourse to detention.** While the proposed Return Directive reiterates the preference for voluntary return over forced return,[53] the proposal hardly includes any provisions supporting voluntary returns, other than Article 14 on programmes for logistical, financial and other assistance to support the return of illegal migrants. Instead, several of the proposed changes would lead to significantly increasing detention, which may not lead to more effective returns.[54]

The evidence suggests that detention periods of longer than one month do not increase the return of irregular migrants. Four articles (Articles 6, 7, 18 and 22) in the proposed Return Directive may

[50] See legal study, p. 14.

[51] For example, the 2014 Commission implementation report, European Commission, COM(2014) 199, 28 March 2014 or 2017 Recommendation and the Return Handbook, European Commisison, Return Handbook, Annex to Commission Recommendation (EU) 2017/2338; the only exception is the 2017 Renewed Action Plan on Return, European Commission, COM(2017) 200, 2 March 2017.

[52] See legal study, pp. 16-17.

[53] Recital (13) of the proposed Return Directive.

[54] See legal study, pp. 17 and 42 et seqq; see economic study, pp. 21-23.

increase the likelihood or duration of detention. In the status quo, the rate of pre-removal detention ranged from 3 % in Germany to 18 % in Belgium. The new Articles 6 and 7 would greatly increase the likelihood of detention, in particular the broad criteria in Article 6 related to the risk of absconding.[55]

The revisions would increase opportunities for forced return while decreasing the likelihood of voluntary return. The potential impact on the rate of return cannot be forecast. The economic study identified revisions that promote forced returns and restrict voluntary return in four articles (Articles 9, 13, 16 and 22). For example, Article 22 would clearly elevate the level of forced returns as the proposal foresees no period of voluntary return in this case.[56] The shift in focus towards forced return runs contrary to practitioners' experiences with regards to effective, sustainable returns.[57]

The Commission's approach to the list of criteria related to the risk of absconding (Article 6), as well as to the grounds for detention, is not in line with earlier Commission statements, in particular with regard to Article 18(1)(c) of the proposed Return Directive. With regard to the circumstances leading to detention (Article 18), the Commission proposes to include, among the criteria that can lead to detention, situations in which the third-country national poses a 'risk to public policy, public security or national security' (Article 18(1)(c)). The Commission also proposes to include, in the list of criteria to be considered when assessing the risk of absconding for the purpose, inter alia, of imposing detention and denying voluntary departure, any criminal conviction or criminal investigation/ proceedings (Article 6(1), (k) and (l)). However, in the 2017 Return Handbook, the Commission notes that: '[i]t is not the purpose of Article 15 [of the 2008 Return Directive] to protect society from persons which constitute a threat to public policy or security. The legitimate aim to 'protect society' should rather be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for [reasons of] public order'.[58]

2.2 Compliance with principles of subsidiarity and proportionality

Key finding 2: the Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns.

The management of irregular migration has Union-wide relevance and has proved challenging for Member States. The Union's action is reasonably likely to provide added value in overcoming some of the obstacles encountered at the national level. **Taken as a whole, the proposal is not disproportionate. Nevertheless, the formulation of several provisions is a source of concern.**[59]

The following proposed changes are not supported by sufficient data or information to enable a full assessment of their proportionality: (i) list of criteria that might indicate a risk of absconding (Article 6); (ii) limitation of the possibilities for voluntary returns (Article 9); (iii) entry bans on exit in the

[55] See economic study, pp. 21-23.

[56] See economic study, pp. 23-26.

[57] Ibid., p. 23, referring to UNHCR, Return arrangements for non-refugees and alternative migration options, Chapter 9, 2010.

[58] See legal study, p. 17, referring to the Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 69.

[59] See legal study, pp. 21 et seqq.

absence of return decisions (Article 13); (iv) new ground of detention based on 'public policy, public security or national security' and (v) maximum period of detention of at least three months (Article 18(1) and (5)); proposed border procedure (Article 22).[60]

The following changes breach, or are likely to beach, the principle of proportionality: (i) legislative prohibition to grant a period of voluntary departure in a given set of circumstances (Article 9(4)); (ii) limitation of appeals against return decisions to one single level of jurisdiction, for rejected applicants for international protection (Article 16(1)§2); and (iii) limitation of the time limits of appeals to, respectively, five days and 48 hours in the context of Articles 16(4)§2 and 22(5).[61]

Regarding, for example, Article 9: the proposal significantly limits the possibilities for voluntary returns. In the absence of further data, it cannot be confirmed that such limitations are suitable to enhance effectiveness. In any case**, it is questionable that the EU legislature can automatically prevent the granting of a period of voluntary departure** – as is proposed in Article 9(4) – **without violating the general principle of proportionality**.[62]

The suitability of Article 13 (entry bans issued during border checks at exit) to reach its aim is difficult to assess in the absence of an evaluation of the deterrent effect that it may have for irregular migrants willing to exit the Union. **The objective of issuing entry bans without delaying departure of the third country national is unlikely to be achieved**.[63]

Article 16(1)§2 and 16(4)§2 harmonise rules on remedies, obliging all Member States to conform to the minimum common denominator allowed under EU law. **They limit both the scope for national decisions to be made and fundamental rights more than necessary in achieving the objective of enabling speedier return procedures. The suitability of Article 16(3)§3 in achieving the stated aim might be compromised by its unclear formulation.** The interpretation to be given to the expression 'new elements or findings have arisen or have been presented by the third-country national concerned which significantly modify the specific circumstances of the individual case' is unclear. The norm would go beyond what is necessary to achieve its aim, if interpreted as excluding the automatic suspensory effect of appeals even when a risk of refoulement exists. The necessity of the norm might also be questioned with respect to cases where no risk of refoulement exists. Specifying that in these situations suspension should not be automatic, but should always follow an individual assessment might be sufficient in achieving the relevant aim, while being less intrusive in Member States' procedural norms, and also less restrictive of the right to an effective remedy.[64]

With regard to Article 22 (border procedure): due to its novelty and its close correlation with the asylum border procedure as set out in the proposed Asylum Procedure Regulation (not yet adopted), **the norm is difficult to assess as to its suitability in achieving the aim of ensuring coordination between asylum and return, and ensuring the speedy enforcement of return decisions.** Several norms enshrined in Article 22 are very far reaching in limiting the applicant's rights, thereby raising concern as to their necessity in achieving the desired objectives.[65]

[60] Ibid.

[61] Ibid.

[62] See legal study, pp. 26-28.

[63] See legal study, pp. 28-29.

[64] See legal study, pp. 30-31.

[65] See legal study, pp. 33-34.

2.3 Social and human rights impacts on irregular migrants

Key finding 3: the Commission proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights, as safeguarded under international and EU law, in particular the EU Charter of Fundamental Rights.

The formulation of several provisions of the proposal may lead to unjustified or disproportionate breaches of the fundamental rights examined.[66]

The principle of non-refoulement is likely to be affected by the wording of Article 16(3)§3, and would be breached by the adoption of the current formulation of Article 22(6), each concerned with limitations of the suspensory effects of appeals against return decisions.[67]

With respect to Article 16(3)§3, there is a danger that the expression 'new elements or findings' will be transposed and interpreted in national law as only referring to elements that relate to the procedure introduced under the Qualification Directive, but which were not raised in the context of the said procedure, for instance because they were not in existence at the time. This interpretation would not allow for the automatic suspension of deportation if certain elements – such as the serious health condition of the third-country national and the absence of appropriate treatment in the country of origin – were raised and considered in the asylum procedure, but would not be sufficient to grant subsidiary protection to the applicant. Such an interpretation of Article 16(3)§3 would conflict with the principle of non-refoulement, as well as with the right to health if applied to seriously ill rejected applicants for international protection.[68]

The right to asylum, and the principle of non-refoulement, would be breached by the adoption of Article 7(1)(d), imposing on third-country nationals the 'duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document'. **The right to asylum encompasses a right to confidentiality** and the obligation for the State not to request the asylum seeker to contact his or her home country. Therefore, to ensure fundamental rights compliance, it must necessarily be discarded or confined to migrants whose asylum application has already been rejected with a final decision, and which is no longer subject to appeals.[69]

The fundamental right to liberty is likely to be affected by the long list of criteria indicating a risk of absconding, coupled with the broad nature of some of them and recourse to rebuttable presumptions (Article 6), as well as the related increase in the grounds for detention (Article 18).[70]

The increase of grounds of detention enshrined in Article 18, also read in light of Article 6, **are likely to increase the risk of arbitrary detention**. The increased possibilities for detention of third-country nationals might lead to far reaching limitations of the rights to health care, private, and family life of detained returnees, in light of the practical difficulties that Member States have already encountered – under the 2008 Return Directive - in ensuring dignified detention conditions to third-country nationals in return procedures, especially for vulnerable groups. Increasing the grounds for detention in Article 18, in some cases through rebuttable presumptions**, increases the risk of**

[66] See legal study, pp. 37-62.

[67] See legal study, pp. 40-42.

[68] See legal study, p. 41.

[69] See legal study, p. 38.

[70] See legal study, pp. 42-49.

arbitrary detention and might result in more persons being detained, including children with their parents.[71]

The right to liberty is also likely to be breached by the unjustified possibility to cumulate two periods of detention with the same purpose, namely (i) detention up to four months for the purpose of removal in the context of the border procedure (Aricle 22(7)) and (ii) detention up to 18 months for the purpose of removal in the context of the ordinary procedure (Article 18).[72]

The fundamental rights to education, health, private and family life are likely to be affected by the increased possibilities of detention (Articles 6 and 18), as well as by the limitation of the right to be heard that follows from proposed Article 9(4).[73]

Article 9(4) prevents Member States from granting a period of voluntary departure in specific cases. Based on the case law of the CJEU, this provision seems likely to be in breach of both the right to be heard and the principle of proportionality. As it prevents migrants falling within its scope from making circumstances about their private and family life known to the authorities before they adopt the decision to deny a period of voluntary departure, the provision is also likely to lead to breaches of the third-country national's right to private and family life.[74]

The right to be heard is likely to be breached by the adoption of Article 9(4), obliging Member States to refrain automatically from granting a voluntary period of departure in specific cases. The right to an effective remedy is likely to be breached by (i) the time limits set for appeals, for rejected applicants for international protection, in the context of Articles 16(4)§2 and 22(5); and (ii) the strong limitation of suspensory effects of appeals under Articles 16(3)§3 and 22(6).[75]

The lack of clarity as to the procedural guarantees that will be available under the proposed Asylum Procedure Regulation **makes it difficult to foresee the potential impact of the proposed border procedure (Article 22) on fundamental rights**, although some of the relevant provisions, are *prima facie* problematic.[76] The time limits of, respectively, five days and 48 hours established by the proposed Return Directive (Article 16(4) and 22(5)) have not been examined in their specific context by either the CJEU or the ECtHR. Nevertheless, in light of the CJEU's reasoning in *Diouf* and of the ECtHR's judgment in *I.M.*, it appears unlikely that either of these two time limits would fulfil the requirement of being sufficient in practical terms to enable the applicant to prepare and bring an effective action.[77] In addition, according to the ECtHR case law, an effective remedy against an arguable claim to non-refoulement must always have automatic suspensory effect.[78]

Reducing the time limit for launching an appeal could possibly reduce the quantity and quality of appeal applications. However, the effects on the overall appeal rates are difficult to forecast, and reducing the time limit might imply that lawyers would not have the time to properly assess the case, leading to low-quality appeals.[79] Furthermore, it would not address an underlying driver of appeals which is the lack of harmonisation in qualification for asylum

[71] Ibid.

[72] See legal study, p. 47.

[73] See legal study, pp. 49-53.

[74] Ibid.

[75] See legal study, pp. 53-55.

[76] See legal study, pp. 55-60.

[77] See legal study, pp. 58-60.

[78] See legal study, p. 60.

[79] See economic study, p. 26.

decisions.[80] The recognition rate varies for asylum seekers of the same nationalities who present their applications in different Member States.[81] The quality of return and asylum decisions has also been questioned in a number of Member States, and may be a driver of the rate of appeals. Reducing the time limit for appeals would not address this root problem nor would it discriminate between persons with a valid claim for appeal and those without any such claim.[82]

2.4 Economic impacts on Member States and the EU

Key finding 4: the Commission proposal would generate substantial costs for Member States and the EU.

The proposal would generate substantial costs for Member States and the EU. Four of the articles (Articles 9, 14, 18, and 22) would require substantial new investments, primarily in terms of staffing but also in terms of infrastructure (e.g. judicial bodies to hear asylum appeals and building new detention facilities). The additional costs for the EU would chiefly stem from monitoring and coordination across agencies.

The main costs and benefits of the proposal are summarised in the table below.[83] Many of the revisions imply substantial new costs for Member States, as well as additional costs for EU bodies. **In terms of the impacts, the likelihood of pre-removal detention would increase due to the wide range of criteria that can put a person at risk of being detained (Articles 6 and 7).** New detention facilities would need to be constructed given existing overcrowded conditions leading to higher costs. For example, in the case of Italy, the government budgeted €13 million to build new facilities and an additional €35.5 million to manage them during the 2017-2019 period.[84]

In terms of the benefits, financial savings may be generated from the estimated reduction in reception costs due to shortened time limit for appeal. These costs, however, may be offset to a large extent by costs connected to the failure to respect the right to appeal. These costs may stem from the lower quality of appeal applications, which may be expected from the reduction in the time limit and an increased number of claims before courts regarding violations of procedural rights.

[80] See economic study, p. 28, referrring to Van Ballegooij, W., with Navarra, C., The Cost of Non-Europe in Asylum Policy, EPRS, European Parliament, 2018. This study has suggested that an underlying reason for the high rate of appeals is the lack of harmonisation in the qualification of asylum decisions.

[81] See economic study, Figure 6: Recognition rate for three nationalities – Germany and Belgium (Annex, p. 4)

[82] See economic study, p. 28.

[83] See economic study, p. II.

[84] See economic study, p. I, referring to Global Detention Project, Country Report on Italy.

Table 1: Summary of economic assessment & direct costs

		Articles	BE	CZ	DE	IT
Costs	Operating and staffing changes to return procedures		All eight articles imply new costs for Member States and the EU, while four articles imply substantial costs for Member States (see Chapter 3).			
	Pre-removal detention	6	Substantial increase (***) to build new detention facilities and manage them (e.g. facility staff, food for detainees).			
	Forced returns	6, 7, 18, 22	Expected to increase due to higher utilisation of detention.			
	Voluntary returns	9	Voluntary returns are expected to decline due to the introduction of the border procedure and the reduction in the time limit for voluntary departure, which is below current time limits in all countries.			
	Costs connected to the failure to respect the right to appeal	16	The cost per handling an appeal is expected to increase due to the lower expected quality of appeal application files. Other costs may include compensation costs awarded by courts for failure to respect right to appeal.			
Benefits	Estimated reduction in reception need for appeals	16	Moderate decrease (**)	Minor decrease (*)	Moderate decrease (**)	Minor decrease (*)
	Irregular migrants leaving the EU...	Increased opportunities for returns, in particular forced returns. However, the extent to which they can be implemented depends on the existence and/or use of readmission agreements and arrangements.				
	... subsequent lower risk of them falling into the shadow economy	No robust evidence linking irregular migrants and the shadow economy (which is also driven by EU nationals). The extent to which the shadow economy would reduce is uncertain.				

Note: * < €10 million, ** €10-100 million, *** > €100 million, **** > €500 million. These findings assume that Member States comply with the proposed changes to the Directive. Source: see economic study, p. II.

The table below provides an overview of the cost of pre-removal detention in four Member States.[85] An investigation of the potential costs was carried out using a conservative assumption that about 60 % of persons with orders to return may be considered 'at risk of absconding', uncooperative or unable to comply with the time limits of voluntary departure. This figure is conservative in light of other research that has noted that more that 90 % of asylum seekers enter the EU irregularly.[86]

The analysis found that the costs of pre-removal detention would increase compared to the status quo. For example, in Belgium, the costs of accomodating detainees would increase by €139 million, while in Germany it would increase by €46 million (see scenario in the table below).[87]

Table 2: Cost of pre-removal detention in the four Member States

	BE	CZ	DE	IT
Orders to return, 2016[88]	33 020	3 760	70 005	32 365
Number of persons in pre-removal detention [89]	6 106	444	2 151[90]	1 968
Share of persons with a return order who are in pre-removal detention – status quo	18 %	12 %	3 %	6 %
Scenario – consider an increase in pre-removal detention to 60%				
Estimated number of persons in pre-removal detention	19 812	2 256	42 003	19 419
Additional cost (EUR)	138 636 190	1 108 944	46 029 060	61 253 010

Note: In the case of the Czech Republic and Germany, detainees must pay for their detention, but the extent to which they do could not be determined from the desk research. The calculation assumes that the extent of their contribution is limited. Source: see economic study, p. 22.

[85] See economic study, p. 22.

[86] See economic study, p. 21, referring to Van Ballegooij, W., with Navarra, C., Humanitarian Visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiatve report, EPRS, European Parliament, 2018.

[87] See economic study, p. 21 (and Annex 2 thereof).

[88] 2016 figures (Eurostat variable: migr_eiord) were used to increase comparability with pre-removal detention figures.

[89] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017. Figures for pre-removal detention are 2016 figures from EMN national reports.

[90] Ibid.

2.5 Coherence with other EU law and policies

Key finding 5: the Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending.

The creation of national return monitoring systems which are compatible with a central system managed by the European Border and Coast Guard (EBCG), is **likely to increase the alignment of standards with the EBCG Regulation**, as it enables better compliance by the EBCG with its tasks under the latter instrument.[91]

Procedural standards contained in Articles 16 and 22 acting as both the minimum and maximum levels of protection of fundamental rights **significantly depart from an earlier regulatory approach**. The latter only sets minimum levels of protection, thereby always enabling Member States to develop higher standards.[92]

The limitation of the procedural safeguards for third-country nationals having claimed international protection under EU asylum law – even for persons who may have an arguable claim of non-refoulement – seems to be based on the consideration that such non-refoulement claims must have undergone thorough examination in the context of the asylum procedure. However, **Article 15 of the Qualification Directive**, indicating the grounds for the granting of subsidiary protection, **does not encompass all of the circumstances that might give rise to non-refoulement.** This constitutes **an element of inconsistency in the EU migration and asylum legal framework**.[93]

As Article 22 refers specifically to **Article 41 of the proposed Asylum Procedure Regulation**, the content of which appears to be far from settled and is completely new, **analysing the effects that it might have in terms of coherence between return and asylum legislation is extremely difficult**.[94]

[91] See legal study, p. 75.

[92] See legal study, pp. 64-65.

[93] See legal study, pp. 71-72.

[94] See legal study, p. 69.

3. Conclusions

On the basis of the legal and economic studies carried out, it appears that the Commission proposal for a recast Return Directive has significant legal, social, human rights and economic implications, which in principle would have deserved consideration in the context of a proper impact assessment process conducted ex-ante by the Commission, in line with the Better Regulation Guidelines and the IIA on Better Law-Making.[95]

This targeted substitute impact assessment analysed the expected main positive and negative impacts of the key provisions of the Commission proposal, with a focus on the social, human rights and financial impacts. It concludes as follows:

1) There is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants.

- Official Commission documents on the 2008 Return Directive do not clearly establish the need for a revision of the legislative framework to enhance its effectiveness.
- The Commission's approach has moved away from its previous emphasis on voluntary departure and towards enabling more recourse to detention.
- The proposal would likely increase the use of detention, which may not lead to more effective returns.
- The revisions would increase opportunities for forced return while decreasing the likelihood of voluntary return. The potential impact on the rate of return cannot be forecast.
- The Commission's approach to the list of criteria related to the risk of absconding (Article 6), as well as to the grounds for detention, is not in line with earlier Commission statements.

2) The Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns.

- The following proposed changes are not supported by sufficient data or information to enable a full assessment of their proportionality: (i) list of criteria that might indicate a risk of absconding (Article 6); (ii) limitation of the possibilities for voluntary returns (Article 9); (iii) entry bans on exit in the absence of return decisions (Article 13); (iv) new ground of detention based on 'public policy, public security or national security' and (v) maximum period of detention of at least three months (Article 18(1) and (5)); proposed border procedure (Article 22).
- The following changes breach or are likely to beach the principle of proportionality: (i) legislative prohibition to grant a period of voluntary departure in a given set of circumstances (Article 9(4)); (ii) limitation of appeals against return decisions to one single level of jurisdiction, for rejected applicants for international protection (Article 16(1)§2); and (iii) limitation of the time limits of appeals to, respectively, five days and 48 hours in the context of Articles 16(4)§2 and 22(5).

[95] European Commission, 2017 Better Regulation Guidelines, SWD(2017) 350, 7 July 2017; 2016 Interinstitutional Agreement on Better Law-Making, OJ L 123/1, 12.5.2016, para. 13.

3) The Commission proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights, as safeguarded under international and EU law, in particular the EU Charter of Fundamental Rights.

- The formulation of several provisions of the proposal may lead to unjustified or disproportionate breaches of fundamental rights.
- The main social and human rights impacts of the proposal on irregular migrants would be: a higher risk of arbitrary detention of persons, including children with their parents; likely breaches of the right to asylum, the right to private and family life, the right to health care, the right to education and procedural rights, such as the right to be heard and the right to an effective remedy; likely breaches of the principle of non-refoulement.

4) The Commission proposal would generate substantial costs for Member States and the EU.

- Four of the articles (Articles 9, 14, 18, and 22) would require substantial new investments, primarily in terms of staffing but also in terms of infrastructure (e.g. judicial bodies to hear asylum appeals and building new detention facilities). The additional costs for the EU would chiefly stem from monitoring and coordination across agencies.
- In terms of the impacts, the likelihood of pre-removal detention would increase due to the wide range of criteria that can put a person at risk of being detained (Articles 6 and 7). New detention facilities would need to be constructed given existing overcrowded conditions leading to higher costs.

5) The Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending.

- Procedural standards contained in Articles 16 and 22 acting as both the minimum and maximum levels of protection of fundamental rights significantly depart from an earlier regulatory approach. The latter only sets minimum levels of protection, thereby always enabling Member States to develop higher standards. The limitation of the procedural safeguards for persons having been refused international protection under the Qualification Directive – even when they may have an arguable claim of non-refoulement – constitutes an element of inconsistency within the EU migration and asylum legal framework.
- As Article 22 refers specifically to Article 41 of the proposed Asylum Procedure Regulation, the content of which appears to be far from settled and is completely new, analysing the effects that it might have in terms of coherence between return and asylum legislation is extremely difficult.

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Annex 1

Targeted impact assessment study on the proposed Return Directive (recast)

Legal Aspects

In September 2018, the European Commission presented a proposal for a recast of the 'Return Directive'. This impact assessment study evaluates the proposed amendments from a legal perspective. It assesses whether the proposed amendments (i) address the challenges identified by the Commission and achieve the objective of an effective and fair return policy; (ii) respect the principles of subsidiarity and proportionality; (iii) safeguard selected social rights and human rights guaranteed by EU and international public law; and (iv) are consistent with a limited number of other legislative instruments. Each of these points is tackled as follows: the relevant legal benchmarks (status quo) are defined, based on legislative and non-legislative documents of the EU institutions, case law, and international public law sources when applicable; then, the proposed Return Directive is assessed against that benchmark, taking into account relevant reports, studies and doctrine, as well as the opinions of the stakeholders interviewed.

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in January 2019.

PE 631.727
ISBN: 978-92-846-3607-5
DOI:10.2861/187601
CAT: QA-02-19-058-EN-N

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List of abbreviations

Asylum Procedures Directive: Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection

AFSJ: Area of Freedom Security and Justice

CEAS: Common European Asylum System

Charter: Charter of Fundamental Rights of the European Union

CJEU: Court of Justice of the European Union

CRC: UN Convention on the Rights of the Child

EBCG Regulation: Regulation (EU) 2016/1624 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC

EBCG: European Border and Coast Guard

ECHR: European Convention on Human Rights

ECRE: European Council on Refugees and Exiles

ECtHR: European Court of Human Rights

EMN: European Migration Network

Entry ban: administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision[1]

EPRS: European Parliamentary Research Service

EU/Union: European Union

EUI: European University Institute

EUROSUR: European Border Surveillance System

FRA: European Union Fundamental Rights Agency

FRONTEX: European Border and Coast Guard Agency

Geneva Convention/Geneva Refugees Convention: UN Convention of 28 July 1951 Relating to the Status of Refugees

ICCPR: International Covenant on Civil and Political Rights

ICESC: International Covenant on Economic, Social and Cultural Rights

ICJ: International Commission of Jurists

International Protection: refugee status and subsidiary protection status[2]

[1] Art. 3(6) 2008 Return Directive and Proposed Return Directive.

[2] Art. 2(a) Qualification Directive.

IRMA: Integrated Return Management Application

LIBE Committee: European Parliament Committee on Civil Liberties, Justice and Home Affairs

MS: Member States

NGO: non-governmental organization

PICUM: Platform for International Cooperation on Undocumented Migrants

Proposed Asylum Procedure Regulation: Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467

Proposed EBCG Regulation: Proposal for a regulation on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, COM(2018) 631

Proposed Qualification Regulation/Qualification Regulation: Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466

Proposed Return Directive/Proposal: Proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Recast), COM(2018) 634

Qualification Directive: Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Proposed Reception Conditions Directive: Proposal for a directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465

Reception Conditions Directive: Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection

Return Handbook: Return Handbook, Annex to Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks.

SIS: Schengen Information System

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UN: United Nations

UNCHR: UN Refugee Agency

Visa Code Proposal: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), COM(2018) 252, European Commission, March 2018

Executive summary

In September 2018, the European Commission proposed a 'recast' of the Return Directive to increase the rate of return of irregular migrants. The Commission proposal was not accompanied by an impact assessment. It is against this background that the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested a targeted substitute impact assessment to assess the expected main positive and negative impacts of the key provisions of the Commission proposal, with a focus on the social, human rights and financial impacts, as compared to the current situation (status quo). This impact assessment study focuses on the legal aspects and complements a separately commissioned study on the economic and budgetary aspects. It draws on international and EU law sources, case law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) and studies of institutions related to return, plus the relevant legal literature. The study aims to address the following research questions:

1: Would the Proposal address the challenges identified by the Commission and achieve its objective of an effective return policy?

The Commission considers the objective of effectiveness primarily in terms of the increasing return rates of irregularly staying third-country nationals. Alternative approaches exist, which for example are centred on the sustainability of returns. This study focuses on the Commission's approach to effectiveness. The approach to the list of criteria related to the risk of absconding (Article 6) and to the grounds for detention (Article 18(1)(d)) is not in line with earlier Commission statements. The Proposal has moved away from the emphasis on voluntary departure which is evident in previous documents, towards a greater recourse to detention.

2: Does the Commission Proposal respect the principles of subsidiarity and proportionality?

The management of irregular migration has Union-wide relevance and has proved challenging for Member States. The Union's action is reasonably likely to have added value.

Article 6

The absence of publicly available data supporting the introduction of specific criteria indicating a risk of absconding makes it difficult to assess their suitability of achieving that aim.

Article 9

The Proposal significantly limits the possibilities for voluntary returns. In the absence of further data, it is uncertain that such limitations are suitable to enhance the effectiveness of the policy. In any case, it is questionable that the EU legislature can automatically prevent the granting of a period of voluntary departure - as in Article 9(4) - without violating the general principle of proportionality.

Article 13

The suitability of the provision on entry bans on exit of achieving its aim is difficult to assess in the absence of an evaluation of the deterrent effect that it may have for irregular migrants willing to leave the Union. The objective of not delaying the departure of the person is unlikely to be attained.

Article 16

Articles 16(1)§2 and 16(4)§2 on procedural standards for judicial remedies affect national procedural law and fundamental rights more than is necessary in achieving their objective of increasing speed.

Article 18

It is difficult to assess the suitability of detention based on 'public policy, public security or national security' in achieving return policy aims. Addressing criminal law concerns through migration law

has fundamental rights consequences, which are to be considered when assessing the necessity of the measure. The suitability of Article 18(5) - on a maximum period of detention of at least three months - in achieving higher return rates is not sufficiently supported by available data.

Article 22

Due to its novelty and its close correlation with the border procedure foreseen in the Proposed Asylum Procedure Regulation, it is difficult to assess the suitability of the norm of achieving the aim of ensuring coordination between asylum and return and the quick enforcement of return decisions. Several norms enshrined in Article 22 are very far-reaching in limiting the applicant's rights, thereby raising concerns as to their necessity in achieving the desired objectives.

3: What are the expected social and human rights impacts of the Proposal on irregular migrants?

Article 6

The long list of criteria contained in Article 6, coupled with the broad nature of some of them, is likely to increase the risk of arbitrary detention.

Article 7

Article 7(1)(d), imposing on third-country nationals the 'duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document' would breach the right to asylum.

Article 9

A provision such as Article 9(4), obliging Member States to refrain automatically from granting a voluntary period of departure in specific cases, is likely to be in breach of the right to be heard.

Article 16

With respect to Article 16(3)§3, there is a danger that the phrase 'new elements or findings' be transposed and interpreted in national law as only referring to elements that relate to an application for international protection pursuant to the Qualification Directive, but which were not raised in the context of the said procedure, for instance because they were not in existence at the time. Such an interpretation would conflict with the principle of non-refoulement and shall be clearly excluded.

Article 18

Increasing the grounds for detention, in some cases through rebuttable presumptions, increases the risk of arbitrary detention and might result in more children being detained with their parents.

Article 22

The lack of clarity as to the procedural guarantees that will be available under the Proposed Asylum Procedure Regulation makes it difficult to foresee the potential impact of Article 22 on fundamental rights. In any event, the suspension of enforcement of a return decision pending an appeal against that decision in case of a risk of refoulement cannot be made subject to conditions. Moreover, as detention for up to 4 months at the border is intended to ensure return, these 4 months should be counted towards the absolute maximum of 18 months under Article 18 of the Proposal.

Articles 16 and 22

Because of the difference in scope between international protection under the Qualification Directive and non-refoulement, a thorough evaluation concerning the risk of non-refoulement must remain possible in the context of return procedures, even for rejected applicants for international protection.

It appears unlikely that neither the time limit of 5 days set for appeals by Article 16(4)§2, or the time

limit of 48 hours set for appeals by Article 22(5), would fulfil the requirement of being sufficient in practical terms in enabling the applicant to benefit from an effective judicial remedy.

4: Are the proposed changes in coherence with EU asylum law and policy and other related EU legislation?

Article 16 and 22

Procedural standards acting as both the minimum and maximum levels of protection of fundamental rights significantly depart from an earlier regulatory approach. The latter only sets minimum levels of protection, thereby always enabling Member States to develop higher standards. The limitation of the procedural safeguards for persons having been refused international protection under the Qualification Directive - even when they may have an arguable claim of non-refoulement - constitutes an element of inconsistency within the EU migration and asylum legal framework.

Article 22

As specific reference is made to Article 41 of the Proposed Asylum Procedure Regulation, the content of which is completely new and appears to be far from settled, analysing the effects that it might have in terms of coherence between both return and asylum legislation is extremely difficult.

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1. Introduction

1.1. Objective and scope of the study

The objective of this targeted impact assessment study is to assess the expected main positive and negative impacts, of the most important provisions of the Commission proposal, with a focus on the social and human rights impacts of the European Commission proposal for a recast Return Directive (the 'Proposed Return Directive' or 'Proposal').[3] In particular, this study aims to evaluate whether the Proposal:

- addresses the challenges identified by the Commission and achieves its objective of an effective and fair return policy;
- respects the principles of subsidiarity and proportionality;
- safeguards social rights and human rights guaranteed by international public law and EU law;
- is consistent with EU asylum law and policy and other related EU legislation.

The basis of comparison (status quo) is the current regulatory framework. The targeted nature of the study translates into a focus on the main changes that the Proposal introduces with respect to the Directive currently in force, concerning the risk of absconding (Article 6); the obligation to cooperate (Article 7); voluntary departure (Article 9); entry bans (Article 13); return management (Article 14); remedies and appeals (Article 16); detention (Article 18); and border procedure (Article 22). This impact assessment study complements a separately commissioned study on the economic and budgetary aspects.

1.2. Overview of the legal and policy context

1.2.1. The 2008 Return Directive

Directive 2008/115/EC (the '2008 Return Directive')[4] was adopted following a call from the European Council, to establish a common repatriation policy which is effective and respectful of the fundamental rights of migrants.[5] It provides the 'common standards and procedures [...] for returning illegally staying third-country nationals'. The adoption of the 2008 Return Directive was preceded by three years of difficult negotiations between the EU institutions.[6]

The personal scope of application of the 2008 Return Directive covers any third-country national who is illegally present in the territory of a Member State. However, Member States are free to not apply the Directive's provisions to migrants 'subject to a refusal of entry [...] or who are apprehended or intercepted [...] in connection with the irregular crossing [...] of the external border of a Member State', as well as to migrants returned in connection with a criminal sanction in accordance with the details of Article 2(2)(a) and (b) of the 2008 Return Directive.

[3] Proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Recast), COM(2018) 634, European Commission, September 2018 ('Proposed Return Directive').

[4] Directive 2008/115/EC of 24 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ('2008 Return Directive').

[5] Presidency Conclusions following the European Council meeting on 4 and 5 November 2004, Council document 14292/04.

[6] Please note that the 2008 Return Directive was the first instrument adopted in the field of AFSJ after the expiry of the transitional period for the application of the ordinary legislative procedure.

The salient traits of the 2008 Return Directive can be identified in the mandatory nature of return decisions;[7] the preference accorded to voluntary return as emphasised by the CJEU;[8] the mandatory issuance of entry bans together with return decisions;[9] the provision of procedural safeguards in the context of the return process;[10] and the provision of grounds for pre-removal detention, for an absolute maximum period of 18 months.[11]

The Directive was widely criticised by different experts in the field, NGOs, third countries, and academics.[12] It came to be known as the 'Directive of Shame'.[13] The greatest concern related to the considerable length of detention allowed in view of removal and the mandatory link between entry bans and return decisions.[14] More generally, this Directive was criticised for attempting to set common standards on the removal of irregular migrants in the absence of corresponding harmonised standards on entry and residence, despite the existence of a clear link between legal and irregular migration.[15]

The controversy surrounding the adoption of the 2008 Return Directive partially faded in the course of its implementation, also as a result of the clarifications brought by the case law of the Court of Justice of the European Union (the 'CJEU').[16] In 2013, the Commission presented an evaluation on the application of the Directive to the European Parliament and the Council,[17] which highlighted the overall positive effect of the Directive in terms of the harmonisation of national practices. The evaluation noted a streamlining of practice of Member States concerning the maximum length of detention, especially with respect to the introduction of ceilings where there were none; the overall benefits of the promotion of voluntary departures and returns monitoring; as well as a harmonisation concerning the length and conditions of entry bans.[18]

However, the Commission raised some concerns about the lack of impact of the 2008 Return Directive, in relation to the practice of postponement of removal, and to the improvement of procedural safeguards.[19] On a broader level, it lamented on a generalised 'lack of data availability' in the Member States.[20] One of the shortcomings on returns which was identified and which attracted the most attention in later institutional documents - also arguably in light of the 'migration crisis' -

[7] Art. 6(1) of the 2008 Return Directive.

[8] Art. 7 of the 2008 Return Directive. Judgment in Case C-61/11 PPU - *El Dridi*, European Court of Justice, April 2011.

[9] Art. 11(1) of the 2008 Return Directive.

[10] Arts. 12-14 of the 2008 Return Directive.

[11] Art. 15(5) and (6) of the 2008 Return Directive.

[12] See inter alia: Diego Acosta, 'The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law,* Vol. 11(1), Brill | Nijhoff, 2009, p. 19.

[13] See Fabian Lutz, *The negotiations of the Return Directive: comments and materials*, Wolf Legal Publishers, 2010, pp. 73-80.

[14] See inter alia: Anneliese Baldaccini, 'The EU Directive on Return: Principles and protests', *Refugee Survey Quarterly,* Vol. 28(4), Oxford Academic, 2009, p. 114. See also Anneliese Baldaccini, 'The return and removal of irregular migrants under EU law: An analysis of the Returns Directive', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, p. 1; and Marie-Laure Basilien-Gainche, 'Immigration detention under the Return Directive: The Cjeu shadowed lights', *European Journal of Migration and Law*, Vol. 17(1), Brill | Nijhoff, 2015, p. 104.

[15] Baldaccini, 'The EU Directive on Return'.

[16] Steve Peers, 'Lock 'em up: the proposal to amend the EU's Returns Directive', *EU Law Analysis*, September 2018.

[17] Evaluation on the application of the Return Directive (2008/115/EC), Directorate-General for Migration and Home Affairs, European Commission, 2013.

[18] Ibid. p. 9.

[19] In particular, the Commission notices the following: 'some issues regarding the practical application of safeguards were found in relation to the form of the return decision (lack of detail and motivation; translation and interpretation), effective legal remedy, the period of time between adopting a forced return decision and the carrying out of the actual return as well as means tests applied before granting legal assistance free of charge' (Ibid. p. 9)

[20] Ibid. pp. 9-10.

was the lack of impact on the practice of postponement of removals and, more specifically, on the return rates.[21] In fact, the Commission supported the need to revise the 2008 Return Directive by identifying a return rate of 36.6% in 2017.[22] This constituted a drop of more than 9 percentage points compared to the previous year.[23]

1.2.2. The Commission's framing of the EU's return policy

The migration law and policy of the European Union (the 'EU' or the 'Union') are complex. They encompass areas with different and potentially competing objectives that risk undermining each other in the absence of a clear, overarching framework. In 2015, in response to calls by the European Parliament and the Council for a consistent and consistent migration policy, and in the wake of the 'migration crisis', the Commission presented a European Agenda on Migration.[24] This was for the coordination and harmonious development of all of the relevant policy areas. The European Agenda on Migration is based on four pillars: (i) the reduction of incentives for irregular migration; (ii) better border management; (iii) a strong common asylum policy; and (iv) a new policy on legal migration.

In its 2015 European Agenda on Migration, the Commission announced its intention to launch various initiatives and undertake fitness checks and evaluations of several legislative instruments in force at the time. With respect to the EU's return policy, the Commission referred to the need for Member States to comply fully with the 2008 Return Directive, announcing its intention to set up a strict monitoring system on its implementation. It also revealed its plan to publish a Return Handbook containing guidelines and best practices to the benefit of Member States, as well as to amend Regulation 2007/2004[25] to enhance the role of EBCG in return operations.

A few months later, upon a request of the European Council, the Commission presented an action plan specifically dedicated to the subject of return.[26] This was prompted by the need to ensure effectiveness, while remaining compliant with international human rights standards. The action plan presented a series of actions to be undertaken, focusing on the need for a better implementation of the 2008 Return Directive at a national level, as well as on the enhancement of the role of EBCG and improvement of the cooperation with third countries on the subject of readmission.

This first action plan on return was followed by a renewed action plan, presented in 2017 in view of the limited 'impact [of EU initiatives] on the return track record across the European Union'.[27] The Commission presented points of action to increase the return rate. The 2017 renewed action plan focused on operational and financial support from the Union, as well as on the need to better implement existing provisions. The Commission provided more detailed guidance to Member States

[21] Peers, 'Lock 'em up' . See also Communication on a more effective return policy in the European Union - A Renewed Action Plan, COM(2017) 200, European Commission, March 2017; Commission recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council; Return Handbook, Annex to Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks.

[22] Proposed Return Directive, Explanatory Memorandum, p. 2.

[23] Ibid. This percentage is even lower than that registered in 2013, equal to 39.2% (Communication on a European agenda on migration, COM(2015) 240, European Commission, 2015).

[24] COM(2015) 240.

[25] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[26] Communication on EU Action Plan on Return, COM(2015) 453, European Commission, 2015.

[27] COM(2017) 200, p. 2.

on how to implement specific provisions of the 2008 Return Directive with a Recommendation[28] and a Return Handbook[29] later in 2017.

In the 2017 renewed action plan, the Commission also foreshadowed the possibility of proposing a revision of the 2008 Return Directive[30] to further strengthen the EU legal framework on return, depending on the evolution of the track record on return in light of the 2017 initiatives. This perspective was not reiterated in the possible 'next steps' on return listed in the 2018 Progress Report on the Implementation of the European Agenda on Migration.[31] Nonetheless, taking into account the European Council's conclusions of 28 June 2018,[32] in September 2018 the Commission presented the Proposed Return Directive to the European Parliament and the Council.

1.2.3. The broader policy context: the European Agenda on Migration and the UN Global Compact on Migration

As explained, the Proposed Return Directive forms part of a larger EU law and policy framework for migration, which includes the European Agenda on Migration. Ensuring consistency among the four pillars of the European Migration Agenda is of vital importance, as they evolve in parallel and currently form the object of several legislative proposals.

The Proposed Return Directive was presented on 12 September 2018 as one of several Commission contributions to the Leaders' meeting in Salzburg of 19-20 September 2018. The Commission also issued an amended proposal for a Regulation on the European Union Agency for Asylum[33]; a proposal for a Regulation on the European Border and Coast Guard ('Proposed EBCG Regulation')[34]; a report on the evaluation of the European Border Surveillance System (EUROSUR)[35]; and a Communication on legal migration.[36]

The text of the Explanatory Memorandum accompanying the Proposed Return Directive refers to the need for a consistent approach to migration, asserting the mutually reinforcing nature of the Proposal, the Common European Asylum System (the 'CEAS'), and the European Border and Coast Guard Regulation.[37]

The interplay between various legal instruments composing the CEAS, on the one hand, and the Proposed Return Directive, on the other, will be analysed in sections 2.4.2, 2.4.3, and 2.4.4, while the links of the Proposal with the current and proposed Regulations on a European Border and Coast Guards will be discussed in section 2.4.5.

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[28] Commission recommendation (EU) 2017/432.

[29] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338.

[30] COM(2017) 200, p. 4.

[31] Communication on Progress report on the Implementation of the European Agenda on Migration, COM(2018) 250, European Commission, March 2018, p. 17.

[32] European Council conclusions of 28 June 2018.

[33] Amended proposal for a regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2018) 633, European Commission, September 2018.

[34] Proposal for a regulation on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, COM(2018) 631, European Commission, September 2018.

[35] Report on the evaluation of the European Border Surveillance System (EUROSUR), COM(2018) 632, European Commission, September 2018.

[36] Communication on Enhancing legal pathways to Europe: an indispensable part of a balanced and comprehensive migration policy, COM(2018) 635, European Commission, September 2018.

[37] Regulation (EU) 2016/1624 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC ('EBCG Regulation').

It should be added that EU migration policy is not developed in a vacuum, but rather interacts with the broader international law framework as well as with the work of international organisations in which the EU or its Member States participate.

In recent years, migration management has constituted the focus of several United Nations ('UN') initiatives. In September 2016, the UN General Assembly adopted the New York Declaration for Refugees and Migrants, launching the negotiations for the conclusion of two Global Compacts on refugees[38] and migrants[39], respectively. The UN Global Compact for Safe, Orderly and Regular Migration was adopted at an intergovernmental conference on 10-11 December 2018 in Marrakech, and was presented as a 'non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants'.[40] It lists a series of 23 agreed objectives, inspired by a 'people-centred' approach to the phenomenon, the commitments to 'human rights', 'rule of law and due process'; and a special consideration for the rights of children. For the purposes of the present study, objective 13 - concerning migration detention - and objective 21 - on the safe and dignified return and readmission of migrants - are especially relevant.

In 2017, the Union's institutions declared their intention to 'support [together with the Member States] the elaboration of the Global Compact' and engaged in the negotiation process with 27 of the 28 Member States.[41] In March 2018, the Commission presented a proposal for a Council decision authorising it to approve the Global Compact on Migration on behalf of the Union.[42]

Notwithstanding the involvement of the EU and almost all Member States in the negotiations and the continued support of the Commission for their outcome,[43] the perspective of a common position on the Global Compact was called into question. Several Member States decided to withdraw their endorsement due to the purportedly excessively protective stance taken on irregular migrants, as well as alleged state sovereignty concerns.[44]

1.3. Problem definition

Effectively returning irregular migrants is one of the key objectives of the EU migration policy, as is also reflected in the European Agenda on Migration. The focus of EU institutional actors on return has become particularly evident since the swift increase of the number of migrants who arrived in the EU in 2015 (a phenomenon which was also referred to as the European 'migration crisis'). These developments affected the political discourse across Europe.

The Commission observed that despite its efforts to tackle irregular migration, little progress was made to increase the return rates.[45] In fact, the return rate even decreased in 2017 compared to 2016,

[38] Global Compact on Refugees.

[39] Global Compact on Safe, Orderly and Regular Migration.

[40] General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants, GA/12113, 19 December 2018.

[41] Speech by High Representative/Vice-President Federica Mogherini at the European Parliament plenary session on the progress on the UN Global Compact for Safe, Regular and Orderly Migration and UN Global Compact on Refugees, HR/VP Speech, 180313_20, European Union External Action, 13 March 2018. Hungary was not participating in the negotiations.

[42] Proposal for a Council decision authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the area of immigration policy, COM(2018) 168, European Commission, March 2018.

[43] Speech Delivered by Commissioner Stylianides on Behalf of HR/VP Mogherini, during the EP Debate on the Global Compact on Migration, 13 November 2018, HR/VP Speech, 181114_7, European Union External Action, 13 November 2018.

[44] Georgi Gotev, 'Six EU countries - and counting - back out from the Global Migration Pact', *euractiv.com*, November 2018.

[45] Proposed Return Directive, Explanatory Memorandum, p. 2.

which has raised concern in the Member States. These concerns were expressed in European Council Conclusions,[46] as well in political declarations demonstrating the intention to take a strict stance on irregular migration, such as the decision of six EU Member States to withdraw their support for the Global Compact on Migration.

The Commission identified the difficulties that Member States were facing regarding the enforcement of return decisions and the cooperation with countries of origin or transit, and also the migrants themselves.[47] In order to solve such issues, the Commission initially published recommendations on the implementation of existing legislation. It finally decided to put forward a proposal for targeted amendments of the 2008 Return Directive to 'reduce the length of return procedures, secure a better link between asylum and return procedures, and ensure [the] more effective use of measures to prevent absconding.'[48]

The Commission did not conduct an impact assessment of the Proposed Return Directive. However, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) considers that a targeted impact assessment is necessary to assess the main expected positive and negative impacts, of the most important provisions of the Commission proposal, with a focus on the social, human rights and financial impacts (on the latter, see the impact assessment study covering the economic aspects of the Proposal[49]). The present study examines the impact of Proposed Return Directive on a number of legal principles.

1.4. Methodological approach

In light of the legal nature, the targeted scope and the limited timeframe of the present study, the methodology used is primarily based on desk research.

The relevant sources include:

- EU primary and secondary law on asylum, migration and fundamental rights;
- case law of the CJEU and of the European Court of Human Rights (ECtHR);
- the Commission report of 28 March 2014 on the implementation of the Return Directive presented to Parliament;
- the 2018 European Migration Network (EMN) study on "the effectiveness of return in EU Member States", to which the Commission refers in the Explanatory Memorandum of the Proposal on page 5;
- further EMN studies on return and detention published between 2014 and 2016 (see full references in the 2018 EMN study on page 10), as well as any other EMN studies of relevance to this assessment;
- studies on return and detention conducted by the Odysseus network under the REDIAL project, MADE REAL project, and any other relevant work of the Odysseus network;
- the 2018 EPRS cost of non-Europe study on asylum policy, in particular pages 95, 111-132 and 161-162;
- the 2018 EPRS European added value assessment on humanitarian visas;
- the 2015 evaluation of the Dublin III regulation conducted by ICF for the European Commission;
- the public recommendations to Member States based on data about return gathered through the Schengen evaluation mechanism;

[46] European Council conclusions of 28 June 2018; European Council conclusions 18 October 2018.

[47] Ibid. p.1.

[48] Ibid. p. 2.

[49] Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

- studies and other reports from Member States, national authorities, and so on;
- relevant academic research;

- other relevant consultations, reports, data and official statistics from the field.

In order to ensure that the views of stakeholders be taken into account, to the extent possible, semi-structured interviews were organised with:

- two experts from the Commission;
- an expert from EBCG;
- two experts from FRA;
- experts from four national administrations of different Member States;
- an expert from PICUM;
- an expert from ECRE;
- an expert from the ICJ;
- an expert from the EUI.

Each of the four research questions outlined in the introduction will be approached as follows: the relevant legal benchmark (status quo) will be defined, based on legislative and non-legislative documents of the institutions, case law, and international public law sources when applicable; then, the Proposed Return Directive will be assessed against that benchmark, taking into account relevant reports, studies and doctrine, as well as the opinions of the experts interviewed.

More particularly, Question 1 asks whether the proposal addresses the challenges identified by the Commission and achieves its objective of an effective and fair return policy. As the concepts of effectiveness and fairness have no clear legal definition, the assessment starts by defining them, using the proposal itself and other documents of the EU institutions as guidance. As the concept of fairness is defined in relation with proportionality and human rights compliance of each of the proposed changes, the relevant analysis is developed when answering questions 2 and 3 which relate to these aspects. As to 'effectiveness', the targeted nature of this legal study compelled the author to adopt a definition that corresponds to that proposed by the author of the Proposal itself, which is essentially focused on return rates. Thus, the analysis which has been developed assesses the consistency of the narrative of the Commission on which measures are likely to achieve the objective of an effective return policy in terms of an increase in return rates. This does not exclude the existence of alternative approaches to the definition of effectiveness, being for instance more focused on the sustainability of return or other parameters, on which the legislative institutions may wish to place emphasis.

Question 2 asks whether the proposal respects the principles of subsidiarity and proportionality. The European Commission Better Regulation Guidelines on the assessment of subsidiarity and proportionality of impact assessments are used in the relevant sections. With respect to subsidiarity, the assessment seeks to establish whether the problem has EU relevance and whether the Proposal brings any added value. Documents from the EU institutions, studies on the EU return policy, interviews and literature are used to draw conclusions on this point. With respect to proportionality, for each of the amendments examined, the assessment analyses whether they can achieve their stated aims and, whenever possible based on the data available, whether they go beyond the necessary to achieve the aim. The proportionality of the measure, in terms of the need for limitations to be imposed by the proposed amendments on the social and fundamental rights of migrants, is examined in the sections dealing with the impact of the Proposal on such rights.

Question 3 asks what the expected social and human rights impacts of the Proposal on irregular migrants are, including the situation as compared to the current acquis. Considering the targeted nature of this legal impact assessment study, a choice had to be made as to the benchmarks against which the Proposed Return Directive would be analysed. For this reason, a certain number of fundamental rights, *prima facie* particularly likely to be affected by the Proposal, were identified. The choice has been made to focus on the principle of non-refoulement, the right to asylum, the right to liberty, the rights to education, health, private and family life, the right to be heard, and the right to an effective remedy. The right to data protection was left out of the scope of the study, because the European Data Protection Supervisor submitted its formal comments on the Proposal.[50] The lack of examination of other fundamental rights does not mean that there is a possibility they will not be affected by this Proposal. In this respect, readers are invited to consult the Opinion of the EU Fundamental Rights Agency (FRA) on the Proposal.[51] For each of the rights selected, the relevant legal framework is briefly outlined, and the potential limitations deriving from the Proposal are analysed.

Question 4 asks whether the proposed changes are consistent with EU asylum law and policy and other pieces of related EU legislation. In this context, a choice had to be made as to the legislative instruments against which the Proposed Return Directive would be examined. Those instruments are the Asylum Procedures Directive,[52] the Qualification Directive,[53] the Reception Conditions Directive,[54] and the European Border and Coast Guard Regulation. The legal consistency of the Proposal is only assessed with respect to these instruments, as currently in force.

This targeted substitute impact assessment study took into account the impact assessment methodology as described in the European Commission's 2017 Better Regulation Guidelines and the corresponding relevant parts of the Better Regulation Toolbox.[55]

Finally, the targeted nature of the study and the time available excluded the possibility of interviewing more stakeholders as well as of conducting in-depth case studies of the potential impact of the Proposed Return Directive on the national legal order of specific Member States. However, several of the studies and reports examined provide clear and focused information about national perspectives. Furthermore, experts from four national authorities of different Member States were interviewed to take their views on the research questions into account to the extent possible. The experts interviewed asked to remain anonymous due to the ongoing legislative procedure on this file. These national administrations were chosen to ensure coverage of different key issues related to the low level of effectiveness of returns, the availability of relevant information and geographical location.

[50] European Data Protection Supervisor, Formal comments of the EDPS on the Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 10 January 2019.

[51] FRA, Opinion 1/2019 [Return] - The recast Return Directive and its fundamental rights implications, 10 January 2019.

[52] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection ('Asylum Procedures Directive').

[53] Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ('Qualification Directive').

[54] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection ('Reception Conditions Directive').

[55] European Commission, 2017 Better Regulation Guidelines, SWD(2017)350, 7 July 2017.

2. Analysis

2.1. The objective of a fair and effective return policy

The Proposed Return Directive aims to achieve the objective of a fair and effective return policy.[56] This section evaluates whether the Proposal addresses the challenges identified by the Commission and whether it can reasonably be considered likely to achieve its objective of an effective and fair return policy. Such an analysis requires a preliminary definition of the concepts of effectiveness and fairness, to be translated into more specific parameters against which the Commission's Proposal will be evaluated. We will provide for such definitions in sections 2.1.1 and 2.1.3, whilst the analysis of the Proposed Return Directive in light of the objectives of fairness and effectiveness will be dealt with in sections 2.1.2 and 2.1.4, respectively.

2.1.1. Definition of fairness

The term *fairness* is seldom used in documents related to the EU return policy[57] and has no clear legal definition. However, the context of the Proposed Return Directive suggests that fairness can be defined in legal terms as compliance with fundamental rights, including procedural rights, in the context of return proceedings. This interpretation is confirmed by Commission documents on return, that consistently associate the aim of effectiveness with the need to safeguard fundamental rights.[58] A fair return policy must therefore be a return policy, which does not disproportionally limit the fundamental rights of migrants, including their procedural rights, when pursuing the objective of effectiveness.

2.1.2. The Proposed Return Directive and fairness: renvoi

As fairness has to be understood in terms of fundamental rights compliance, the relevant analysis is conducted under section 2.3.

2.1.3. Definition of effectiveness

The term *effectiveness* is used in several institutional documents referring to the EU's return policy. Yet, the notion of effectiveness of a given EU policy has no clear legal definition; it depends on what a given policy is intended to achieve with reference to the intention of the authors of the said policy.

The CJEU itself analyses the effectiveness of EU legislative instruments with reference to their stated aims.[59] The Court understands the objective of the 2008 Return Directive to be the 'establishment of an effective policy of removal and repatriation of illegally staying third-country nationals'.[60] In its case law on the 2008 Return Directive, the CJEU noted that national measures that provide for the detention of third-country nationals under criminal law on the sole ground that the person continues to stay illegally after an order to leave and after the expiry of the period granted hinder

[56] See Recital (2) of the Proposed Return Directive.

[57] Only the Communication on EU return policy, COM(2014) 199, European Commission, 2014, (p. 3) and Recital (6) of the 2008 Return Directive mention the need for 'fair and transparent' procedures on return. See also the reference to 'fair and efficient' procedures at p. 30 COM(2014) 199 and to 'fair rules' in Recital (4) 2008 Return Directive. However, it should be noted that Article 67(2) TFEU envisages a 'common policy on asylum, immigration and external border control, based on solidarity between Member States, which is *fair* towards third-country nationals' (*emphasis added*), whilst both Article 79(1) TFEU and the Tampere Conclusions of the European Council require 'fair treatment of third country nationals' residing legally in the territory of an EU Member State (Presidency Conclusions of the Tampere European Council 15 and 16 October 1999).

[58] See, for instance, COM(2015) 453; COM (2017) 200; C(2017) 1600.

[59] *El Dridi*, paras 56-57.

[60] Ibid. para 59.

the effectiveness of the Directive. Indeed, such measures frustrate efforts towards the enforcement of the return decision, effectively delaying it.[61] In order to ensure the effectiveness of return procedures, all necessary measures must be taken to carry out the removal of a person who has not complied with an obligation to return.[62] Furthermore, the concern for effectiveness requires removal to happen as soon as possible.[63]

By mirroring the approach of the CJEU, the notion of effectiveness of EU return policy will be assessed in reference to the Commission's own approach to the policy. **The Commission considers the objective of effectiveness primarily in terms of increasing the return rates of irregularly staying third-country nationals**.[64] In order to tackle the 'key challenges to ensure effective returns', the Commission stresses the need 'to notably reduce the length of return procedures, secure a better link between asylum and return procedures, and ensure a more effective use of measures to prevent absconding'.[65]

There are alternative approaches to the effectiveness of the EU return policy.[66] In particular, **it is often suggested that emphasis could be placed on the sustainability of returns instead of the rate of returns.** This would imply, for instance, a greater focus on the cooperation of third countries, as well as on voluntary return with assistance for appropriate reintegration.[67] However, an exhaustive analysis of the literature on the effectiveness of EU return policy, as well as the development of an alternative analytical framework for assessing the effectiveness of EU return policy,[68] are beyond the scope of this targeted and legal impact assessment.

The present study examines if the Commission, as the author of the Proposed Return Directive, approaches the notion of effectiveness of EU return policy in the Proposed Return Directive in a way that is consistent with its own narrative on the effectiveness of EU Return Policy since the entry into force of the 2008 Return Directive. To that effect, we will identify which measures the Commission indicates to be the best tools to achieve effectiveness in the field of return in its policy documents after the adoption of the 2008 Return Directive. These measures will be compared to those included in the Proposed Return Directive.

2.1.4. The Proposed Return Directive and effectiveness

In its first Communication on EU return policy after the entry into force of the 2008 Return Directive ('2014 Communication'), the Commission highlighted 'faster procedures and higher rates of - voluntary - return' as effective measures.[69] It regretted the scarce impact that the 2008 Return Directive appeared to have had on the speed of procedures and rates of returns. Based on available data from six comparative studies,[70] the 2014 Communication concluded that the low return rates were caused by practical difficulties, namely the lack of cooperation of both migrants in the

[61] *El Dridi*, paras 58-59. See further judgment in Case C-329/11 - *Achughbabian*, European Court of Justice, December 2011, paras 39 and 45.

[62] Judgment in Case C-38/14 - *Zaizoune*, European Court of Justice, April 2015, para 33.

[63] Ibid. para 34; see also paras 39-40.

[64] Proposed Return Directive, Explanatory Memorandum, p. 2.

[65] Ibid.

[66] Interview with expert from a national authority.

[67] Interviews with experts from PICUM and ECRE.

[68] See for instance: Ruerd Ruben, Marieke van Houte, and Tine Davids, 'What Determines the Embeddedness of Forced-Return Migrants: Rethinking the Role of Pre- and Post-Return Assistance', *Int'l Migration Rev.*, Vol. 43(4), SAGE Publications,2009, pp. 908-937; Marta Latek, 'Reintegration of returning migrants', Briefing, EPRS, October 2017; Katie Kushminder, 'Interrogating the Relationship between Remigration and Sustainable Return' *International Migration*, Vol. 55(6), Wiley-Blackwell, 2017; Jean-Pierre Cassarino (ed.), Reintegration and Development, *Return Migration and Development Platform (RDP)*; CRIS; Analytical Study; 2014.

[69] COM(2014) 199, p. 30.

[70] Ibid. p. 12.

identification process and third countries in the return process.[71] These challenges were not considered to be caused by the 2008 Return Directive. In order to improve the effectiveness whilst safeguarding human rights, the suggestion was to implement better existing return rules, rather than modifying such rules. Measures proposed to that effect included: (i) the strengthened monitoring of the implementation of the 2008 Return Directive; (ii) the promotion of consistent and fundamental rights compliant practices through the adoption of guidelines; (iii) enhanced cooperation with third countries; (iv) improved cooperation between Member States, especially in the field of voluntary return, the return of unaccompanied minors, the sharing of statistics and personal information; (v) the enhanced role of EBCG.[72]

Similarly, the 2015 European Agenda on Migration traced the lack of effectiveness of the common return policy back to the state of the Directive's implementation, rather than to its text. More particularly, the main challenges were due to a lack of 'effective operational cooperation' and the difficulty of obtaining the necessary collaboration by third countries.[73] The suggested actions, aside from improving cooperation with third countries, encompassed an increased monitoring of the implementation of the 2008 Return Directive, the identification of guidelines and best practices, as well as the reinforcement of the role of EBCG in the area of return.[74] The 2015 Agenda on Migration also introduced for the first time the idea of a link between the visa code and the EU return policy,[75] that underpins the choice, made by the Commission in the 2018 Visa Code Proposal[76] to use the visa code as a leverage to obtain readmission cooperation from third country.[77]

The 2017 Renewed Action Plan referred to 'the need for Member States to use to the full extent the flexibility provided for in the Return Directive to enhance their capacity to return the increasing number of irregular migrants present in the European Union', and encouraged the 'use all the possibilities provided by the existing asylum legislation in order to address the abuses of the asylum system',[78] in particular through the recourse to accelerated procedures.[79] Similar wording, invoking both the use of flexibility[80] and the importance of setting up accelerated procedures for the examination of international protection claims,[81] can be found in the 2017 Commission Recommendation to make returns more effective. This Recommendation states that 'swift return procedures and a substantial increase of the rate of return' should be ensured.[82] It not only underlines the need to ensure compliance with the obligation to issue systematic return decisions[83], but also affirms that their effective enforcement should be achieved, for example, through the use of 'the shortest possible deadlines for lodging appeals' and the limitation of automatically suspensory remedies.[84] The Recommendation also encouraged the issuance of return decisions,

[71] Ibid. p. 3.

[72] Ibid. pp. 7-11.

[73] COM(2015) 240, pp. 9-10.

[74] Ibid.

[75] COM(2015) 240.

[76] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), COM(2018) 252, European Commission, March 2018 ('Visa Code Proposal').

[77] Article 251 and 36a of the Visa Code Proposal, See also Revision of the visa code, Initial Appraisal of a European Commission Impact Assessment, Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament, April 2018.

[78] COM(2017) 200, p. 4.

[79] Ibid pp. 4 and 5.

[80] Point 6 of Commission recommendation (EU) 2017/432.

[81] Point 9(a) of Commission recommendation (EU) 2017/432.

[82] Point 2(a) of Commission recommendation (EU) 2017/432.

[83] Recital (11) of Commission recommendation (EU) 2017/432.

[84] Point 12(b) and (c) of Commission recommendation (EU) 2017/432.

together with entry bans, against migrants exiting the Union, when proportionate and necessary, to avoid future illegal stays based on an individual assessment.[85] In addition, the Commission reiterated that 'voluntary departure is preferred at an EU level'[86], and that voluntary return should be encouraged[87] with the 'shortest possible period for voluntary return'.[88] Moreover, the Commission recommended the use of rebuttable presumptions concerning the risk of absconding in several instances.[89] This has to be seen in connection with the Commission's previous calls for an individual and evidence-based assessment of the risk of absconding, based on a combination of different criteria.[90]

The 2017 version of the Commission's Return Handbook recalled the need to improve cooperation between Member States and to increase the support of EBCG.[91] The Commission further noted that 'voluntary departure in compliance with an obligation to return is preferable to removal for the threefold reason that it is a more dignified, safer and frequently more cost-effective return option'.[92] When discussing the circumstances justifying detention, the Commission noted that '[a] complete absence of deterrents may lead to insufficient removal rates. At the same time an overly repressive system with systematic detention may also be inefficient, since the returnee has little incentive or encouragement to co-operate in the return procedure. Member States should develop and use a wide range of alternatives to address the situation of different categories of third-country nationals'.[93] The Handbook also emphasised that Member States should make full use of the flexibility provided for by the 2008 Return Directive.[94] For example, one recommendation was to make use of the derogation provided for in Article 2(2)(a),[95] in case of 'high migratory pressure'.[96]

It is relevant to note that the 2017 Recommendations and Return Handbook aimed themselves at addressing the above challenges through soft law (i.e. recommendations and collection of good practices). The short time elapsed since the adoption of these soft law instruments implies that their impact on the challenges encountered at national level has not yet been assessed.[97] Thus, it is

[85] Point 2(a) of Commission recommendation (EU) 2017/432.

[86] COM(2017) 200, p. 7.

[87] COM(2014) 199, especially pp. 7, 9, 10, 21 and 30; COM(2015) 453, p. 3; COM(2017) 200, p. 7.

[88] Point 18 of Commission recommendation (EU) 2017/432.

[89] Namely when the migrants (a) refuse to cooperate in the identification process, use false or forged identity documents, destroy or otherwise dispose of existing documents, refuse to provide fingerprints; (b) oppose violently or fraudulently the operation of return; (c) do not comply with a measure aimed at preventing absconding imposed in application of Article 7(3) of Directive 2008/115/EC, (d) do not complying with an existing entry ban; or (e) move to another Member State without authorisation. Point 15 of Commission Recommendation (EU) 2017/432.

[90] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 11.

[91] Ibid. p. 5. On the need to step up cooperation between member states and increase the role of EBCG, see also COM(2017) 200, pp. 8-11 and COM(2015) 453, pp. 6-10.

[92] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 31.

[93] Ibid. p. 70.

[94] Ibid. p. 5.

[95] Allowing Member States not to apply the 2008 Return Directive to 'third country nationals who are subject to a refusal of entry […] or apprehended or intercepted [...] in connection with the irregular crossing […] of the external border of a Member States'.

[96] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 14, according to which 'The use of [Article 2(2)(a)] can be useful, for instance, in the case of frontline Member States experiencing significant migratory pressure, when this can provide for more effective procedures; in such cases, the Commission recommends making use of such derogation'.

[97] The 2017 EMN study, issued only a few months after the adoption of the 2017 Recommendation, aimed at assessing the impact on Member States of pre-existing EU rules on return, and did not constitute an evaluation 'of the implementation of the [2017] Recommendation by Member States' (European Migration Network, The effectiveness of return in EU Member States (2017), February 2018, pp. 9-10.

difficult to judge whether the Proposal has an added value, in terms of effectiveness, when compared to the 2017 Recommendation and Return Handbook'.

Taking into account the Commission's policy approach on return (as outlined in the documents above), we can make the following two general observations on the consistency of the targeted measures contained in the Proposed Return Directive.

Firstly, the Commission seems to exclude the need for a revision of the legal framework on return, and focussed mainly on improvements of its implementation. The only exception to this approach was the 2017 Renewed Action Plan on Return, which envisaged a possible revision of the Return Directive taking national practices into account after having implemented the 2017 Commission Recommendations.[98] The focus has primarily been on the adoption of non-binding tools. The time elapsed between the adoption of the non-binding tools for the better implementation of the 2008 Return Directive and the Proposed Return Directive has been very short. Furthermore, there is only limited data or studies publicly available on the impact of these soft law tools.[99] **Therefore, the Commission's official documents on the 2008 Return Directive do not clearly establish the need for a revision of the legislative framework to enhance its effectiveness.**

Secondly, in the 2017 Return Handbook, the Commission places important emphasis on voluntary returns and warns against overly repressive systems with systematic detention that could hinder the effectiveness of EU return policy. While the Proposed Return Directive maintains the preference for voluntary return over forced return,[100] the proposal hardly includes any provisions supporting voluntary returns, other than Article 14 on programmes for logistical, financial and other assistance to support the return of illegal migrants. Instead, as is further discussed in section 2.3.2 examining the limitations to the fundamental right to liberty, several of the proposed changes would lead to significantly increasing the detention. **The overall focus of the Commission's approach has therefore moved away from its previous emphasis on voluntary departure and towards greater recourse to detention.**

It is furthermore possible to make a set of remarks on more specific provisions of the Proposed Return Directive. To start with, **the creation of national return management systems linked to a central system managed by the European Border and Coast Guard Agency ('EBCG') (Article 14); the imposition of the obligation to cooperate on third-country nationals (Article 7); and the attempt to limit the length of return proceedings intervening on remedies (Article 16), while ensuring coordination between accelerated asylum proceedings and returns (Article 22) are *prima facie* consistent with the Commission's consistent findings that a lack of cooperation, monitoring and coordination, as well as arduous and repetitive procedures, might impair effectiveness**.

As to the risk of illegally staying third-country nationals absconding (Article 6), it is noticeable that the list of criteria provided in the Proposed Return Directive is much longer than the lists previously indicated by the Commission.[101] The list in the Proposed Return Directive includes the criterion of 'illegal entry' (Article 6(1)(d)) upon which the Commission had commented in the 2017 Return Handbook as follows: 'it is not possible to exclude in general all illegal entrants from the

[98] COM(2017) 200, p. 4.

[99] The study on the effectiveness of return in EU Member States performed by the European Migration Network in 2017 will be discussed below. It was performed in the same year as the non-binding tools were adopted. It could therefore only assess or reflect their effectiveness to a very limited extent.

[100] Recital (13) of the Proposed Return Directive.

[101] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, pp. 10-11; point 15 of Commission Recommendation (EU) 2017/432; see also COM(2014) 199, p. 15, listing criteria used by Member States to assess the risk of absconding.

possibility of obtaining a period for voluntary departure.'[102] Such generalising rule would be contrary to the definition of risk of absconding, the principle of proportionality and the obligation to carry out a case-by-case assessment, undermining the *effet utile* of Article 7 (promotion of voluntary departure)'.[103] The insertion of the criterion of 'illegal entry' as one that has to be taken into account in the context of the overall assessment of the circumstances of the case, to assess the risk of absconding is not, *per se*, in contradiction with the above excerpt from the Return Handbook. However, the interplay between the logic underpinning the two documents may warrant further reflections.

With regard to the circumstances leading to detention (Article 18), the Commission proposes to include, among the criteria that can lead to detention, situations in which the third-country national poses a 'risk to public policy, public security or national security' (Article 18(1)(c)). The Commission also proposes to include, in the list of criteria to be considered when assessing the risk of absconding for the purpose, *inter alia*, of imposing detention and denying voluntary departure, any criminal conviction or criminal investigation/ proceedings (Article 6(1), (k) and (l)). However, in the 2017 Return Handbook, the Commission notes that: '[i]t is not the purpose of Article 15 [of the 2008 Return Directive] to protect society from persons which constitute a threat to public policy or security. The legitimate aim to "protect society" should rather be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for [reasons of] public order'.[104] **The wording of Article 18, and Article 18 read in conjunction with Article 6(1)(k-l), therefore constitutes a clear change in the Commission's approach.**

Finally, **the possibility to issue entry bans without the obligation to adopt, at the same time, a return decision against irregular migrants detected at exit (Article 13) is neither supported nor contradicted by previous Commission documents**.

Besides the official documents shedding light on the Commission's approach to the effectiveness of EU return policy examined above, a study on the effectiveness of return in EU Member States was performed by the European Migration Network (EMN) in 2017. The EMN analysed the implementation of the Return Directive at a national level, also in light of the Commission's 2017 Recommendation.[105] In the disclaimer opening the EMN study, it is specified that 'this report should not be construed as reflecting, in any way, the views or legal opinion of the European Commission'.[106] Nevertheless, the study was compiled at the request of the European Commission and published by that institution. Furthermore, the Commission refers to the work of the EMN as forming part of the stakeholder consultations on which the Proposed Return Directive is based.[107] The points identified by the EMN study are therefore indicators of the effectiveness of EU return policy which had been specifically brought to the attention of the Commission as well as noted by that institution. The 2017 EMN study on the effectiveness of return in EU Member States, when compared to the wording of the Proposed Return Directive, helps shedding light on the Commission's own choices on how to address effectiveness. The following paragraphs therefore focus on differences of approach between the EMN study and the Commission Proposal.

Concerning the risk of an illegally staying third-country national absconding, the EMN study reported on the difficulty that Member States had in assessing this risk and motivating their decision, citing Finland's observation that 'often, the first definite sign of the risk of absconding [coincides

[102] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 34.

[103] Ibid.

[104] Ibid.pp. 69.

[105] European Migration Network, The effectiveness of return in EU Member States (2017), February 2018, p. 1.

[106] European Migration Network, The effectiveness of return in EU Member States (2017), Disclaimer.

[107] Proposed Return Directive, Explanatory Memorandum, p. 5.

with] the person's disappearance'.[108] The study also noted, citing the case of the Netherlands, that 'ticking' boxes of a number of objective criteria would not be enough to meet the motivation threshold' set out by national judicial authorities.[109] Moreover, with regard to the use of a rebuttable presumption on the risk of absconding, the study noticed that the latter might impose an excessively onerous - or even unrealistic - burden of proof on the migrant.[110] As will be discussed further in section 2.2.4, the concerns thereby expressed in the EMN study are reflected in doubts on the suitability of certain aspects of Article 6 of the Proposed Return Directive to achieve its objective.

Specific difficulties were identified in the context of voluntary returns: the period of voluntary return provided for under the 2008 Return Directive was judged to be too short by around half of the Member States, even in the case of full cooperation of the concerned migrant.[111] It was also noted that the possibility of being subject to entry bans even when departing voluntarily might have the effect of discouraging voluntary returns.[112] These remarks add to the observation made above and according to which, in the Proposed Return Directive, the Commission placed little emphasis on enhancing voluntary returns.

Finally, **other challenges to the effectiveness of EU return policy** identified in the EMN study **included the lack of cooperation by third countries**, including their non-acceptance of EU-issued travel documents for the purpose of return.[113] Concerns about the difficulties of maintaining high standards in detention facilities, especially in the presence of vulnerable migrants in need of assistance, were also raised by the participating Member States.[114] These are concerns that the Proposed Return Directive does not address as such. It shall be noted that **the lack of cooperation of third countries on readmission, in particular, belongs to the realm of the Union and the external action of its Member States. It therefore could not have been addressed in this Proposal.[115]**

[108] Ibid. p. 32.

[109] Ibid.

[110] Ibid.

[111] Ibid p. 73.

[112] Ibid p. 85.

[113] Ibid. pp. 35-37.

[114] Ibid p. 48. Observations on the cost of detention for Member States are developed in the Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

[115] As noticed, as an important limit to effectiveness, in the interview with the expert from EUI and in the interview with the experts from FRA.

Key Findings on Effectiveness

Question 1: Does the Proposal address the challenges identified by the Commission and achieve its objective of an effective return policy?

The Commission considers the objective of effectiveness primarily in terms of the increasing return rates of irregularly staying third-country nationals. Alternative approaches to the effectiveness of the EU return policy do exist. It is often suggested that the emphasis could be placed on the sustainability of returns instead of on return rates. This targeted study focuses on the Commission's approach to effectiveness.

Official documents of the Commission on the 2008 Return Directive do not clearly establish the need for a revision of the legislative framework to enhance its effectiveness.

When comparing the Proposal to previous Commission documents, we notice that the overall focus of the Commission's approach has moved away from its previous emphasis on voluntary departure and towards enabling more recourse to detention.

The creation of national return management systems linked to a central system managed by the European Border and Coast Guard Agency (EBCG, Article 14); the imposition on third-country nationals of the obligation to cooperate (Article 7); and the attempt to limit the length of return proceedings intervening on remedies (Article 16), while ensuring coordination between accelerated asylum proceedings and returns (Article 22) are *prima facie* coherent with the Commission's consistent findings that a lack of cooperation, monitoring and coordination, as well as arduous and repetitive procedures, might impair effectiveness.

The Commission's approach to the list of criteria related to the risk of absconding (Article 6), as well as to the grounds for detention, is not in line with earlier Commission statements, in particular with regards to Article 18(1)(c) of the Proposed Return Directive.

The possibility to issue entry bans without the obligation to adopt, at the same time, a return decision against irregular migrants detected at exit (Article 13) is neither supported nor contradicted by previous Commission documents.

The important role played by the cooperation of third countries in the effectiveness of EU return policy relates to the external policy of the EU and could not have been addressed in this Proposal.

2.2. Subsidiarity and proportionality of the Proposal

The legal basis of the Proposed Return Directive is Article 79(2)(c) Treaty on the Functioning of the European Union ('TFEU'), conferring upon the EU the competence to 'adopt measures in the [...] areas [of] illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation' for the purposes of the development of a common immigration policy. The latter is part of the shared competences of the EU, as asserted in Article 4(2)(j) TFEU. EU legislation in the field must therefore comply with both the principles of subsidiarity and proportionality (Article 5 Treaty on the European Union ('TEU')). As is clear from Article 67 (1) TFEU, the Union shall constitute an Area of Freedom Security and Justice (AFSJ) with respect to the different legal systems and traditions of the Member States. It is also clear from Article 72 TFEU that Title V TFEU on the AFSJ shall not affect the exercise of the responsibilities incumbent upon each Member State with regard to the maintenance of law and order and the safeguarding of internal security.

The compliance of the Proposed Return Directive with the principles of subsidiarity and proportionality will be assessed, to the extent possible, in the following sub-sections.

2.2.1. Definition of subsidiarity

The principle of subsidiarity entails, according to Article 5 TEU, that 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

As confirmed by the Better Regulation Toolbox,[116] the subsidiarity control of proposed EU legislation should proceed in two steps: first, it should entail an assessment of the insufficiency of Member State action, sometimes referred to as *Union relevance of the problem*. Second, it should move to an evaluation of the *added value of the Union's action*.

In the next section, we will follow these two steps to assess whether the Proposed Return Directive complies with the principle of subsidiarity. It should be added that a fundamental function of subsidiarity control is performed by national parliaments, according to Protocol 2 of the EU Treaties. No reasoned opinions were submitted by national parliaments by the deadline for submission of 12 December 2018.[117]

2.2.2. The subsidiarity of the Proposed Return Directive

Union relevance

The management of irregular migration has been a common challenge for the EU in the last years, as shown by the numerous initiatives taken by the different EU institutions.[118] In an area without internal frontiers, migration management becomes a common responsibility, to be fulfilled through the development of a common policy, as envisaged by Article 79(1) TFEU. With respect to the return of irregular migrants, difficulties in increasing return rates have been prevalent in most Member States, which are confronted with similar challenges and difficulties when applying the EU *acquis* in the field.[119]

[116] Better Regulation Toolbox, European Commission.

[117] See the scrutiny status on the IPEX website, consulted on 21 January 2019.

[118] COM(2015) 240; COM(2015) 453; COM(2017) 200; Commission Recommendation (EU) 2017/432.

[119] European Migration Network, The effectiveness of return in EU Member States (2017).

The difficulty to return migrants has clear cross-border implications, because of the risk that irregular migrants who are not returned and who receive no clear legal status abscond and move undetected within the Schengen area. The risk of secondary movement implies that the deficiencies in the return system of one Member State will have an impact on the control of irregular migration in other Member States as well.

According to percentages reported in institutional documents, notwithstanding the strong political pressure to increase return rates, the latter has not increased over the last few years.[120] This shows that **Member States are encountering difficulties in addressing this common challenge, which requires coordination between national authorities and the cooperation of third countries. In this context, the first prong of the subsidiarity test is complied with.**

Union added value

To verify whether further EU level action would bring clear benefits in the area of return, we need to identify the main difficulties encountered by Member States when implementing the current EU *acquis*, and assess whether they can be better addressed through a Union level intervention, capable of streamlining national approaches, or by establishing supranational coordination mechanisms.

The main challenges identified by Member States in the context of the EMN study (mentioned in section 2.1.4) included 'the risk that a third-country national absconds - including during the asylum procedure and the granted period for voluntary departure; the difficulty in arranging voluntary departures in the timeframe defined in EU rules and standards or equivalent; the application of rules and standards, including CJEU case law, on detention; the capacity and resources needed to detain third-country nationals in the context of return procedures; the length of the return procedure, in particular when the decision is appealed'.[121]

An EU level intervention has the potential to bring added value at least with respect to some of the challenges identified, especially the lack of coordination between Member States, the lack of automatic recognition of return decisions, as well as the difficulties created by existing EU rules defining time limits for voluntary departure and requiring detention in a series of circumstances.

To the extent that it intends to address such challenges, the Proposed Return Directive complies with the principle of subsidiarity. The suitability of each of the proposed measures, as drafted, to achieve the defined objectives will be examined in section 2.2.4, in the context of the proportionality analysis. On the difficulties to assess the added value of the Proposal when compared to the 2017 Recommendation and Return Handbook see above, section 2.1.4.

2.2.3. Definition of proportionality

The principle of proportionality entails, according to Article 5 TEU, that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.' As such, and as will be analysed in this section, the principle of proportionality relates to the relationship between EU and national competences and seeks to protect the domestic sphere against unwanted interferences from European Union law.[122]

The principle of proportionality is also commonly understood as one of the elements to be taken into account when analysing limitations to fundamental rights. This second dimension of the principle will be discussed in section 2.3, as an integral part of the analysis of each of the selected

[120] See COM(2015) 453, p. 9; COM(2017) 200, p. 2.

[121] Ibid. p. 1.

[122] See Koen Lenaerts and Pieter Van Nuffel, European Union Law,3rd edition, Sweet & Maxwell 2011, pp. 144-145; ; Takis Tridimas, *The General Principles of EU Law*,2nd edition, Oxford University Press,2006, p. 13. See also the set of questions provided in: Tool #5. Legal Basis, Subsidiarity and Proportionality, p. 30.

fundamental rights against which the Proposed Return Directive is tested in the context of this targeted impact assessment study.

The principle has been consistently interpreted as requiring double verification: firstly, a verification of the suitability or appropriateness of the measure for the purpose of achieving its stated aims, and, secondly, a verification of the necessity or indispensability of the measure for the same aim.[123]

With respect to the proportionality of the Proposed Return Directive, its Explanatory Memorandum affirms that the 'limited and targeted' changes proposed, with respect to the 2008 Return Directive, are meant to address the challenges faced by Member States when implementing the EU return *acquis* and do 'not go beyond what is necessary' to this aim. The absence of an impact assessment accompanying the Proposal makes it difficult to either confirm or contradict the Commission's claim. In the following sub-section, and as requested by the European Parliament, we will nonetheless seek to perform the double verification outlined above on each of the proposed amendments.[124] We will reach a conclusion on their proportionality with the aim of achieving a fair and effective EU return policy, to the extent that this is possible based on the data currently available.

The proportionality analysis will take the Better Regulation Toolbox into account. The latter provides guidance on proportionality assessment, listing a series of relevant questions[125] that have been taken into account and guide the analysis whenever relevant.

2.2.4. The proportionality of the Proposed Return Directive

The proportionality of Article 6

Article 3(7) of the Proposed Return Directive (left unchanged) defines the risk of absconding as 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'.

In light of difficulties expressed by national authorities in assessing the risk of absconding in the absence of further indications at EU level,[126] the Proposed Return Directive contains a new Article 6, intended to provide more guidance to national authorities when determining the risk of absconding.

Article 6(1) of the Proposal lists 16 criteria that national authorities are required to take into account when determining the existence of a risk of absconding. The list is non-exhaustive and national authorities remain free to provide for further criteria in their national legislation. According to Article 6(2), the risk of absconding should be determined on a case-by-case basis, taking into account the circumstances of each individual migrant. Four of the criteria listed in the first paragraph entail a rebuttable presumption that the migrant is at risk of absconding.

The *suitability* of the codification of objective criteria to determine the risk of absconding is supported by the argument that the list would provide much sought-after guidance for national authorities.[127] However, a series of observations can be made that might cast some doubts on the suitability of the measure *as currently drafted* to reach its stated aims.

Firstly, the main challenge encountered by national authorities when determining whether there is a risk of absconding concerns the difficulty of individual assessments in practice. The proposed

[123] Koen Lenaerts and Pieter Van Nuffel, *European Union Law*,3rd edition, Sweet & Maxwell, 2011, pp. 143-144; Takis Tridimas, *The General Principles of EU Law,*2nd edition, Oxford University Press,2006, p.139.

[124] Reflections on the overall regulatory approach chosen by the Commission in the Proposed Return Directive are developed in Section 2.4.1, where it is related to the regulatory approach chosen in other pieces of EU legislation in the field.

[125] Tool #5. Legal Basis, Subsidiarity and Proportionality, p. 30.

[126] See, for example, European Migration Network, The effectiveness of return in EU Member States (2017), p. 32.

[127] Interviews with expert from the EBCG, FRA EUI.

Article 6 contains a long list of non-exhaustive criteria that national authorities have to consider in their assessment. As the list is non-exhaustive[128] and does not encompass elements that might be used to exclude a risk of absconding - which form an essential part of the overall evaluation -[129], its suitability to render the assessment more objective is questionable. Interviewees have expressed the concern that the long list of criteria, as drafted, may lead to arbitrary detention decisions.[130] More than one interviewee noticed that the criteria indicating a risk of absconding might be used as a checklist by national authorities, *de facto* exempting them from the need for an individual assessment of all of the circumstances of the case, notwithstanding the safeguard contained in the first part of Article 6(2).[131]

Secondly, the list is much longer than that contained in the Commission's recommendation of 2017,[132] but no specific indication as to why the new criteria have been included can be found in the Explanatory Memorandum. The Commission has clarified that the new criteria have been included based on several exchanges with the Member States that took place between the adoption of the 2017 Recommendation and the Proposed Return Directive.[133] Nonetheless, **in the absence of an impact assessment and reliable data on the actual nexus between each of the criteria and the risk of absconding, it is difficult to assess their suitability in actually indicating the risk of absconding**.[134] Several interviewees noted that the provision lists all of the criteria currently taken into account at a national level, although some of them are only used in very few Member States.[135] **Several of the criteria are extremely broad. Some observers have noted that virtually all returnees would fall within the scope of at least one of them, which in and of itself might question their suitability in indicating the existence of a risk of absconding**.[136] There are some grounds which have been repeatedly signalled as casting particular doubt. For example, the nexus between a lack of financial resources and the risk of absconding may seem counterintuitive.[137] Similarly, it is unclear why the existence of a conviction for any criminal offence, of any type - be it even minimal in nature - might relate to the risk of absconding.[138] In the absence of publicly reliable data supporting the introduction in the list of each of the relevant criteria, assessing their suitability of actually indicating a risk of absconding is difficult.[139]

Finally, the rebuttable presumption attached to four of the 16 listed criteria responds to the willingness of simplifying the work of the authorities. However, experts[140] have argued that reversing

[128] Interview with expert from ICJ and with expert from ECRE.

[129] Interview with experts from FRA; Meijers Committee, CM1816 Comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, November 2018.

[130] Interview with expert from ECRE; interview with expert from PICUM.

[131] Article 6(2), first part, establishes that 'the existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria referred to in paragraph 1.'

[132] Point 15 of Commission recommendation (EU) 2017/432.

[133] Proposed Return Directive, Explanatory Memorandum; interviews with experts from the Commission.

[134] The broad nature of some of the criteria and the lack of clear link noticed by several interviewees (interview with experts from FRA, interview with expert from PICUM, interview with expert from ECRE, interview with expert from ICJ). Perplexities on some of the reasons for introducing some of the criteria were also expressed by national authorities.

[135] Interview with expert from EUI; interview with expert from PICUM.

[136] Interview with experts from FRA, interview with expert from EUI.

[137] Interviewees express reserves on link on many more criteria (interview with expert from EUI, interview with experts from FRA).

[138] Interview with expert from ICJ.

[139] Experts from a national authority and the EBCG have affirmed that the criteria seem all suitable to achieve their stated aims, while experts from three other national authorities have expressed concerns on the suitability of several of the criteria.

[140] Meijers Committee, CM1816 Comments; interview with experts from FRA.

the burden of proof might either be unsuitable in achieving this aim, as the authorities would remain obliged to consider all of the circumstances of the case and balance them. They could also go beyond what is necessary to achieve the aim of facilitating the national authorities' evaluation, if this is interpreted as placing the burden of proof entirely on the migrant. In the latter scenario, proving the absence of a risk of absconding might result in being excessively onerous,[141] compromising the norm's compliance with the fundamental rights of an illegally staying third-country national to an effective remedy, with implications on the legitimacy of detention (see section 2.3.2).

The proportionality of Article 7

The new Article 7 of the Proposed Return Directive imposes upon irregular migrants 'the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedure', by giving details on their identity and on the third country transited, as well as by remaining available throughout the procedure and requesting valid travel documents from third countries. This provision is linked to the difficulties that Member States share in identifying third-country nationals, partially due to their lack of cooperation.

The Commission and several observers have emphasised that Article 7 codifies an obligation that was already implicit in the current Return Directive.[142] In this respect, **Article 7 is *prima facie suitable for achieving the aim of bringing more clarity* as to what is expected from returnees.[143] It has been noticed that the suitability of the norm for achieving the objective of increasing return rates will crucially depend on the possibility to attach not only sanctions, but also incentives to encourage cooperative behaviour.[144]** Compliance with the requirements of suitability and necessity must, nonetheless, be excluded for Article 7(1)(d), because of its incompatibility with the right to asylum and, as a consequence, with the principle of non refoulement [145] (see section 2.3.1).

As for the *necessity* of the provision to achieve its stated aims, concerns may be expressed about the obligation to provide information on travel routes and the third countries through which the migrant transited, if the latter was interpreted as encompassing information deemed unnecessary for the purposes of the individual return procedure, but useful for the national authorities' broader migration management goals. The obligation to cooperate has important consequences in terms of determining the risk of absconding, the possibility to leave the Union voluntarily, and in detention and access to assistance. Imposing such consequences to achieve the aim of gathering data for the broader purpose of border control might be considered going beyond what is necessary with respect to the main objective of the norm, namely rendering the identification and the return of the individual migrant possible.[146] The drafters interpret this provision as limited to the information necessary for the return procedure related to the individual returnee.[147]

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[141] See European Migration Network, The effectiveness of return in EU Member States (2017), p. 32.

[142] Interview with the first expert from the Commission; interview with expert from EUI; interview with expert from the EBCG; interviews with national authorities. See for instance: Judgment in Case C-249/13 -*Boudjlida,* European Court of Justice, December 2014, para 50; judgment in Case C- 146/14 PPU - *Mahdi*, European Court of Justice, June 2014, paras 82-84*;* judgment in Case C-82/16 - *K.A. and Others* v *Belgische Staat*, European Court of Justice, May 2018, paras 103, 105-106.

[143] For further discussion on this point, see also Section 2.4.2.

[144] Interview with expert from a national authority. See, in this respect, obligation of cooperation under the Asylum Procedures Directive, section 2.4.2.

[145] Interview with expert from EUI.

[146] The interviews with experts from the Commission suggested that an interpretation of the provision as only encompassing information useful for the return of the individual third-country national would also be in conformity with the drafters' intentions.

[147] Interviews with experts from the Commission.

The proportionality of Article 8

The new Article 8(6) of the Proposed Return Directive requires Member States to issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status. The objective avoids situations where national administrative authorities end the legal stay of the third-country national but no return decision is adopted.[148]

The provision is *suitable* in addressing the challenge presented by the fact that some Member States do not systematically adopt return decisions when the legal stay of the third-country national is terminated. It does not go beyond what is *necessary* to achieve its aim.

Some observers and national authorities have specified that the *suitability* of the provision might be increased if it required the return decision to be adopted only at the end of the judicial procedure on status determination, rather than at the moment of the first administrative decision on the end of legal stay. The reasons adduced were two: (i) the need to clarify that asylum seekers are not considered as illegally present on the territory until their applications have been denied at the last instance;[149] and (ii) the administrative costs and complications derived from the need to coordinate the return procedure with a separate but ongoing judicial procedure concerning the person's status.[150]

On the other hand, other interviewees have expressed concerns that Article 8(6) might prevent Member States from maintaining a one-step procedure, namely from taking the decision at the end of a legal stay and return in one and the same act, rather than in sequence.[151] However, the Explanatory Memorandum accompanying the proposal seems to clarify the drafters did not intend to prevent the merging of the two acts, as it explicitly envisages the possibility of 'a return decision […] issued […] *in the same act* as a decision rejecting an application for international protection' (emphasis added).[152]

The proportionality of Article 9

According to the Commission, Article 9(1) of the Proposed Return Directive aims at eliminating a provision, namely the minimum period of seven days for voluntary departure. The Commission noted that this provision is not applied in practice, as the period granted by national authorities is always longer.[153] Some national authorities have observed that the change is useful, for example to return migrants who are apprehended shortly after entry from certain neighbouring countries, towards which voluntary returns can be organised in less than seven days.[154]

To the extent that it aims at ensuring further flexibility to Member States in this context, the provision seems *suitable* in achieving its aim.

However, it has also been noted[155] that the second part of Article 9(1) already provides for the possibility that third-country nationals leave before the expiry of the time period provided,[156] and that almost all Member States have already 'shortened the period for voluntary departure to less

[148] Interview with first expert from the Commission.

[149] Interview with expert from ECRE.

[150] These difficulties had led some countries to modify their national law to make the return procedure follow, rather than proceed in parallel with a status determination procedure (Interviews with ECRE and national authorities).

[151] Interview with expert from a national authority.

[152] Proposed Return Directive, Explanatory Memorandum, p. 7.

[153] Interview with the first expert from the Commission.

[154] Interviews with national authorities.

[155] Interview with expert from EUI.

[156] Interview with expert from EUI.

than seven days' in certain cases.[157] In this sense, the abolition of the minimum of 7 days might go beyond what is *necessary* to achieve the objective of flexibility, as the latter might be considered already sufficient in the context of the 2008 Return Directive.

Furthermore, interviewees noticed that the minimum of seven days had been inserted in the 2008 Return Directive with a view to prevent arbitrary practices by Member States, that might grant a period of voluntary return too short to be realistic, and then use the lack of compliance of the migrant as a basis for detention and the imposition of entry bans.[158] This is particularly relevant, if we consider that, in *Zh. and O.*, the CJEU observed that the period for voluntary departure 'seeks, *inter alia*, to ensure that the fundamental rights of [third-country] nationals are observed in the implementation of a return decision'.[159] In light of the amendments envisaged in the Proposal, which explicitly links non-compliance with voluntary return to the risk of absconding and, thus, the possibility of detention,[160] the elimination of the minimum period of seven days for voluntary departure may be considered as going beyond what is *necessary* to pursue the aim of flexibility.

The Proposed Return Directive also introduces a new Article 9(4), transforming the optional grounds for refraining from granting a period for voluntary departure into compulsory grounds. The rationale behind the provision, according to the Commission, is to oblige national authorities to take responsibility when determining whether or not to grant a voluntary departure, in order to contrast the practice according to which a period of voluntary departure is *de facto* granted automatically, even when it is clear that the migrant is not likely or willing to return on a voluntary basis.[161]

The provision appears *suitable* in reaching its stated aim, but it may be considered as going beyond what is *necessary*. In fact, the main objective could have been achieved by explicitly requiring an assessment of the 'specific circumstances of the individual case' not only when determining the length of the period of voluntary departure, as prescribed by the new second part of Article 9(1), but also when determining whether or not to grant a period for voluntary departure. This solution is also supported by the focus of the 2008 Return Directive (Recital 6, unchanged in the Proposed Return Directive) and the CJEU[162] on case-by-case decisions.[163] More specifically, in *Zh. and O.*, the CJEU ruled that the provisions of the 2008 Return Directive read in conjunction with the general principles of EU law, including the principle of proportionality, mean that 'decisions taken under that directive must be adopted on a case-by-case basis and properly take into account the fundamental rights of the person concerned'.[164] As a consequence, 'a Member State cannot refrain automatically, by legislative means or in practice, from granting a voluntary period for departure where the person concerned poses a risk to public policy'.[165] **It is therefore questionable that the EU legislature itself could automatically prevent the granting of a period of voluntary departure without violating the general principle of proportionality.**

Several observers and national authorities have also expressed concerns about Article 9(4). They reinstated that **voluntary returns should be allowed whenever realistic, due to their 'more dignified, safer and frequently more cost-effective return option' - as the Commission itself**

[157] European Migration Network, The effectiveness of return in EU Member States (2017), p. 5.

[158] Interview with expert from EUI and interview with experts from FRA.

[159] Judgment in Case C-554/13 - *Zh.* and *O.*, European Court of Justice, June 2015, para 47.

[160] Article 6(1)(h) of the Proposed Return Directive.

[161] Interview with expert from the Commission.

[162] Judgment in Case C-240/17 - *E.*, European Court of Justice, January 2018, para. 49; *Mahdi*, para 70; judgment in Case C-430/11 - *Sagor*, European Court of Justice, December 2012, para. 41; *Zh. and O.*, para. 49; *El Dridi*, para. 41.

[163] See observations developed by section 5 of Meijers Committee, CM1816 Comments, that propose to amend the relevant provision as follows: 'Member States may decide not to grant a period for voluntary departure in following cases:'.

[164] *Zh. and O.*, para 69.

[165] Ibid. para 70.

had observed in its 2017 Return Handbook[166] - as well as the diminished likelihood of re-entry.[167] Although the preference for voluntary departure is portrayed as one of the guiding principles of the Proposed Return Directive,[168] some interviewees expressed the concern that the amendments proposed might empty such principle of any actual relevance.

Furthermore, prohibiting the granting of a period of voluntary departure in case an application of legal stay is dismissed as manifestly unfounded (Article 9(4)(b)), is problematic. The situation in the country of origin of persons having applied for international protection might change during the relevant procedure, rendering an application that was legitimate and substantiated when presented manifestly unfounded. In this case the migrant would be prevented from having a period of voluntary departure, where he or she might want to do so.[169]

Experts from one national authority have underlined that the different origins and backgrounds of irregular migrants prevalently present in the different Member States have a significant impact on whether or not a policy which favours the granting of periods of voluntary departure is suitable for achieving the aim of an effective return policy.[170]

The proportionality of Article 13

Article 13 now explicitly allows the imposition of entry bans on migrants detected as they are leaving the Schengen area, based on an individual examination of the circumstances of the case. The Commission has explained that this provision was introduced to close a legal gap. In fact, border guards finding irregular migrants as they are leaving the Schengen area did not know how to act. They seemed to be required by law to put the migrant through the return procedure, instead of letting the migrant leave the territory, in order to allow for the imposition of an entry ban.[171]

According to the Explanatory Memorandum accompanying the Proposal, the imposition of entry bans in such circumstances may 'be appropriate … in order to prevent future re-entry and reduce the risks of illegal migration' and that this 'should not delay [the migrant's] departure, given that the person is already about to leave the territory of the Member States'.[172]

The *suitability* of the provision in achieving its aim as defined in the Explanatory Memorandum is difficult to assess in the absence of a thorough evaluation of the deterrent effect that such a provision may have for irregular migrants willing to exit the Union.[173]

Furthermore, the provision does not specify the relevant procedural safeguards, so that it is not clear how it could be implemented in practice in a way that could allow for the quasi-immediate departure of the migrant without violating his or her right to be heard and to an effective remedy (see sections 2.3.4 and 2.3.5). Procedures will have to be put in place to determine whether to impose entry bans, as well as effective judicial remedies against these bans, at the national level.

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[166] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338 p. 31.

[167] Interview with a national authority; interview with expert from EUI; interview with experts from FRA.

[168] See Recital (13) of the Proposed Return Directive.

[169] Interview with experts from FRA.

[170] Interview with a national authority.

[171] Interview with expert from the Commission.

[172] Proposed Return Directive, Explanatory Memorandum, p. 7.

[173] Interview with expert from PICUM; interview with expert from ECRE; interview with expert from ICJ; interview with expert from EUI. A similar deterrent effect was noted by IOM Netherlands, according to which 'an entry ban could have an opposite effect and obstruct voluntary return of third-country nationals. Indeed, prospects of voluntary return decrease in cases where a third-country national receives an entry ban or where s/he is aware that an entry ban can be imposed the moment s/he returned as s/he will not be able to re-enter the EU afterwards. Thus, an entry ban also increases the possibility for third-country nationals to leave through a different EU Member State' (European Migration Network, The effectiveness of return in EU Member States (2017), p. 85).

The necessary guarantees - including the migrant's right to be heard, to access his or her file, to seek legal advice, to have his or her case examined individually and to be given reasons for the relevant decision[174] - may significantly mitigate the advantage that the new norm seeks to achieve, namely allowing the immediate departure of the migrant while still retaining the possibility of issuing an entry ban against him or her.

Interviewees have noticed that considerations of *suitability* require a clearer delimitation of the possible scenarios in which imposing an entry ban in these circumstances would be appropriate. Stopping an irregular migrant who is voluntarily leaving the territory of a Member State would, as a general rule, impose an undue burden not only on the migrant's fundamental rights, but also on the state's administration itself.[175]

To the extent that it might require the setting-up of border offices capable of taking the decision on the proportionality of an entry ban and providing the migrant with information related to the remedies available, the provision might entail costs (see impact assessment study covering the economic aspects of the Proposal[176]).

The proportionality of Article 14

Article 14(1) and (2) of the Proposed Return Directive requires the setting-up, operation and maintenance of a return management system, which is technically compatible with that established under the Proposed EBCG Regulation.[177]

According to the Commission, return management systems which are already in place in some Member States have proved beneficial in the overall management of the return procedure and in its coordination with the status determination procedures. The setting-up of a national monitoring system (Article 14(1)) is, therefore, aimed at guaranteeing a more consistent and smooth running of the return process and seems *suitable* in achieving the targeted objective.

The aim of imposing the technical compatibility (Article 14(2)) of these national systems with a central return database managed by the EBCG and the Integrated Return Management Application ('IRMA'),[178] seems to be about addressing the lack of coordination between Member States when implementing the EU return *acquis*. This kind of lack of coordination is one of the main problems identified by Member States. The provision is therefore *suitable* in achieving its objective of a more effective return policy. However, **imposing the development and use of a new return management system compatible with the IRMA, on Member States that already have a functioning return management system, is considered by some as going beyond what is necessary to achieve the relevant aim and, in particular, as being excessively onerous for the concerned Member States[179] (see also impact assessment study covering the economic aspects of the Proposal[180]).**

Article 14(3) requires Member States to set up programmes for providing logistical, financial or other material or in-kind assistance to support return migrants coming from third countries listed in Annex I to Council Regulation 539/2001. The aim is to achieve the objective of helping migrants to return, avoiding irregular circular migration, and the measure is *suitable* in achieving it. Limiting the obligation to a specific list of countries is linked to the need to discourage abusive conducts, namely

[174] Judgment in Case C-383/13 PPU - *G&R*, European Court of Justice, September 2013; *Boudjlida*; Return Handbook, Annex to Commission Recommendation (EU) 2017/2338 p. 57.

[175] Interview with a national authority.

[176] Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

[177] COM(2018) 631.

[178] Interview with the first expert from the Commission.

[179] Interview with expert from a national authority.

[180] Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

irregular border crossings from neighbouring countries just to obtain reintegration assistance that would surpass the costs of the return ticket.[181] The elements of *suitability* and *necessity* of this choice do not seem to be particularly problematic.

The proportionality of Article 16

Article 16(1)§1 of the Proposed Return Directive eliminates the possibility of establishing administrative remedies against return decisions, imposing the intervention of a competent judicial authority. The provision aims at ensuring respect for the right to an effective remedy; it is *suitable* and not going beyond what is *necessary* to achieve its purpose. It might entail costs for Member States which will have to adapt their systems[182] (see impact assessment study covering the economic aspects of the Proposal[183]).

Article 16(1)§2 provides that only one level of judicial remedy shall be available against a return decision based on a prior rejection of an application for international protection pursuant to EU law which has already been subject to judicial review. The provision, read in light of the Explanatory Memorandum,[184] seems designed to preclude the possibility, for Member States, of guaranteeing more than one level of judicial remedy. In this context, the provision is clearly aimed at shortening the return procedure. Nevertheless, the compliance of the norm with the principle of *necessity* is questionable. This is also in light of the problems of constitutionality that it could raise in certain Member States which consider the right to more than one appeal as fundamental for their constitutional tradition. **In this case, reducing remedies to the minimum common denominator might create tensions between national constitutional traditions and primacy.[185] The lack of a higher court capable of harmonising the interpretation of lower courts as to how the various standards have to be applied at a national level could also be problematic**.[186] Instead, codifying the CJEU's case law in *Gnandi*[187] according to which Member States can limit judicial remedies to one appeal, but are free to have more, might be equally *suitable* in achieving the aim of encouraging swiftness of procedures, without going beyond what is *necessary*. For a discussion on the regulatory technique adopted in Article 16 see below section 2.4.1.

Article 16(3)§1 of the Proposed Return Directive provides for the automatic suspension of the enforcement of the return decision, during the period for bringing an appeal at first instance and during the examination of the appeal, when there is a risk of breach of the principle of non-refoulement. To the extent that it is meant to codify the CJEU's case law,[188] the norm seems *suitable* and does not go beyond what is *necessary* to achieve its aim.

Article 16(3)§1 also indicates that no automatic suspension should be granted to further levels of appeals. To the extent that it aims to speed up return proceedings as much as possible without preventing national courts from granting suspension whenever the individual circumstances of the case so require, the provision seems *suitable* to achieve its stated aim. A similar assessment can be made concerning the second part of Article 16(3), setting a time limit of 48 hours for examining suspension requests that can be extended when needed by the competent authority. Nevertheless, the *necessity* of those provisions is doubtful. It largely depends on the level of restriction they impose on the fundamental right to an effective remedy (see section 2.3.5).

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[181] Interview with expert from a national authority.

[182] Interview with expert from a national authority.

[183] Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

[184] Proposed Return Directive, Explanatory Memorandum, p. 7.

[185] Interview with expert from ICJ.

[186] Interviews with national authorities.

[187] Judgment in Case C-181/16 - *Gnandi,* European Court of Justice, June 2018.

[188] Ibid. para 54; judgement in Case C-562/13 - *Abdida*, European Court of Justice, December 2014, para 52; judgment in Case C-239/14 - *Tall*, European Court of Justice, December 2015, para 54.

Article 16(3)§3 provides that the norms contained in the other parts of Article 16(3) shall not apply in the absence of new elements or findings, when the reason for a temporary suspension was assessed in the context of a procedure for international protection under the Qualification Directive subject to an effective judicial review, or the return decision is the consequence of a decision ending the legal stay taken following such procedures. The norm seems aimed at avoiding a double assessment of the reasons for suspending return decisions.[189] **The *suitability* of the norm to achieving the stated aim might be compromised by its unclear formulation. In fact, the norm does not acknowledge the fundamental difference between the (narrower) grounds of international protection under the Qualification Directive and the (broader) scope of non-refoulement[190] (see below, section 2.3.1). The *necessity* of the norm might also be questioned with respect to cases where no risk of refoulement exists. Specifying that suspension should not be automatic in these situations, but rather always follow an individual assessment might be sufficient in achieving the relevant goal, while being less intrusive in the domestic procedural law of a Member State, and thus less restrictive of the right to an effective remedy.**

Article 16(4)§1 requires Member States to establish the necessary rules for migrants to exercise their right to an effective remedy in the context of return proceedings. It does not raise issues of proportionality.

Article 16(4)§2 harmonises the maximum period allowed to lodge an appeal against a return decision following a final decision which rejects an application for international protection under the Qualification Directive. The norm is directed at shortening procedures, but raises concerns as to its *suitability* and *necessity*. Firstly, the norm is unclear, as it does not specify whether the final decision rejecting an application for international protection corresponds to a judicial decision taken in accordance with the Asylum Procedures Directive (or the Proposed Asylum Procedure Regulation[191]) against which no more appeals are possible, or rather a first decision rejecting an application for international protection under EU law.[192] The lack of clarity raises concerns about suitability. It should be added that, even if the provision was suitable in achieving its stated aim, the time limit of five days to bring an appeal is so strict that it appears to compromise the fundamental right to an effective remedy (see section 2.3.5). [193]

More generally, it should be added that the detailed regulatory technique chosen in the drafting of Article 16 of the proposal is closer to that of a regulation than to that of a directive, as configured in the Treaties, which might raise proportionality concerns.[194] In fact, according to the Better Regulation Toolbox, 'Directives should, as far as possible, be general in nature and cover the objectives, periods of validity and essential requirements, while technicalities and details should be left to the Member States to decide.'[195]

Notwithstanding the detailed regulatory technique used, one interviewee noticed the choice to propose a directive, rather than a regulation, might be detrimental in terms of effectiveness, as it will necessarily leave a broad margin for Member States' transposition.[196]

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[189] Recital (20) of the Proposed Return Directive.

[190] FRA, Opinion 1/2019, p. 11: FRA Opinion 9.

[191] Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467, European Commission, July 2016 ('Proposed Asylum Procedure Regulation').

[192] The drafters intended to give the expression 'final decision' the same meaning it has under the Asylum Procedure Regulation (interview with the second Commission expert).

[193] See CJEU's reasoning in Judgment in Case C-69/10 - *Samba Diouf,* European Court of Justice, July 2011, paras 67-68.

[194] Interview with experts from FRA.

[195] Tool #18. The choice of policy instruments, European Commission.

[196] Interview with an expert from the EBCG.

The proportionality of Article 18

Article 18(1) removes the word 'only' from the text of the Proposal. This change does not modify the international and EU law principle according to which migration detention is justified only for the purpose of return, and as long as there is a realistic prospect of removal, as confirmed by the last part of Article 18(1) and by the first sentence of Article 18(5). However, if read in combination with the targeted change in Recital (27), erasing the indication that detention should be limited, it might seem to move away from the principle that detention should be a measure of last resort.[197] As such, this seems to go beyond what is necessary to achieve the aim - as identified by the Commission[198] - of simplifying the text of the article.[199]

The requirement that detention grounds be laid down in national law does not raise concerns about proportionality. This precision, contained in the last part of Article 18(1), brings legal clarity,[200] as it constitutes a welcome codification of the principle expressed in Article 9(1) of the International Covenant on Civil and Political Rights ('ICCPR'),[201] according to which '[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law',[202] as well as in the case law of the CJEU[203] and ECtHR.[204]

Article 18(1)(c) introduces a new ground for detention, namely a 'risk to public policy, public security or national security'. The Explanatory Memorandum refers only to 'new risks [that have]…emerged in recent years'[205] to justify its introduction. Therefore assessing the suitability of these grounds to achieve aims related to the return policy is difficult. Treating criminal law concerns in the context of migration law has important fundamental rights consequences that have to be taken into account when assessing the necessity of measures of this kind. More generally, it is unclear why it is necessary to address threats to public policy, public security and national security posed by irregular migrants through administrative law, instead of criminal law.[206]

Article 18(1)(a) specifies that the risk of absconding, which can justify detention, has to be determined according to the modified Article 6, listing 16 non-exhaustive criteria that national authorities have to take into account in their assessment. The difficulty of assessing the *suitability* of several of the criteria to indicate a risk of absconding has been mentioned. It should be recalled that the extremely broad nature of some of these grounds, especially 'illegal entry', sheds doubts on their proportionality and might lead to arbitrary detention (see section 2.3.2).

Article 18(5) requires Member States to provide for a maximum period of detention of at least three months. According to some interviewees, this is a suitable measure to achieve the objective of reducing secondary movements that might occur after release from Member States where the

[197] FRA Opinion 11.

[198] Interview with the first expert from the Commission.

[199] FRA, Opinion 1/2019, p. 11: FRA Opinion 11.

[200] Interview with expert from EUI.

[201] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 ('ICCPR').

[202] This provision applies also to migration detention (UN, Human Rights Committee, CCPR General Comment No. 8 (1982): Article 9 (Right to Liberty and Security of Persons), 30 June 1982, HRI/GEN/1/Rev.9 (Vol. I), para. 1). See also Article 52(1) of the Charter of Fundamental Rights of the European Union read in conjunction with article 6 of the Charter of Fundamental Rights of the European Union.

[203] See, for example, judgment in Case C-528/15 - *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* v *Salah Al Chodor and Others*, European Court of Justice, March 2017, para. 38.

[204] Judgment in App. No. 45508/99 - *H.L.* v *The UK*, European Court of Human Rights, October 2004, para. 114; judgment in App. No. 16483/12 - *Khlaifia and Others* v *Italy,* European Court of Human Rights, December 2016.

[205] Proposed Return Directive, Explanatory Memorandum, p. 8.

[206] FRA, Opinion 1/2019, p. 12: FRA Opinion 13.

periods of detention are too short to allow for the conclusion of return proceedings while the migrant is detained.[207] However, as noticed by FRA, **'[a]vailable data does not support that this [measure] would be necessary to stimulate effective returns, as there does not seem to be a clear correlation between the maximum period of detention established under national law and the effectiveness of return from individual Member States**.'[208]

The proportionality of Article 22

Article 22 provides for a special and accelerated border procedure applicable to third-country nationals whose application for international protection has been rejected by virtue of the Border Procedure provided for in the Asylum Procedure Regulation (not yet adopted).[209]

As the procedure is completely 'new' and is not supported by specific studies put forward by the Commission, its *suitability* in achieving its stated aim of accelerating return and guaranteeing the close coordination between accelerated asylum and return border procedures is difficult to assess.[210]

The uncertainty regarding the way that the norm will relate to the asylum border procedure, and the different ways to transpose and apply it at a national level, makes it difficult to determine whether provisions such as Article 22(3), imposing the issuance of return orders by means of standard forms, and Article 22(4), prohibiting Member States from granting a period for voluntary departure - except when the third-country national holds a valid travel document and fulfils the obligation to cooperate with the competent authorities - will render the procedure swifter or, rather, increase the likelihood of both litigation and fundamental rights violations.[211] More generally, **the link between the return border procedure and the asylum border procedure in the Proposed Asylum Procedure Regulation, itself still heavily negotiated, makes it impossible to assess fundamental rights compliance, and thus proportionality, of the norm**.[212]

Notwithstanding the difficulty of assessing the suitability of the norm as a whole, several interviewees consider Article 22(5) to be in any case unsuitable in achieving its stated aim or going beyond what is necessary. This paragraph provides for a deadline for appeals against return decisions of 48 hours. According to the Commission, the provision, aimed at ensuring the swiftness of the return procedure, is justified based on the circumstances that migrants subject to return decisions in this context are detained at the border and have never settled in the territory of the Member States. Their physical proximity to the authorities would ensure the prompt serving of the return decision which would, in turn, allow for the prompt reaction of the migrant.[213] Moreover, according to the Commission, third-country nationals subject to the border procedure in Article 22 have already been able to claim protection, with appropriate safeguards, in the context of the asylum border procedure under the Asylum Procedures Directive or Proposed Asylum Procedure Regulation (Art 22(1)).[214]

[207] Interview with a national authority.

[208] FRA, Opinion 1/2019, p. 13: FRA Opinion 14.

[209] Even though the text of proposed Article 22 refers to the Asylum Procedure Regulation, a special border procedure is already provided for in Article 43 of the Asylum Procedures Directive.

[210] Interview with expert from the EBCG.

[211] Interview with expert from ICJ.

[212] FRA, Opinion 1/2019, p. 14: FRA Opinion 17.

[213] Interview the first expert from the Commission.

[214] Ibid.

Several interviewees have judged the provision unsuitable in achieving its stated aim.[215] Even if the availability of legal assistance was guaranteed in the context of the border procedure, lawyers, in such a context, might be forced to appeal systematically, without having time to form an opinion on the chances of success of the appeal and to thus advise their client in this context. In this case, the provision might lead to an inflation of litigation. The quality of the appeals would also be compromised by the deadline, rendering the work of judges more difficult, and compromising the right to an effective judicial remedy of the migrant.

In case of difficult access to legal assistance in the context of the border procedure, the provision would seriously undermine the right to an effective remedy, rendering appeals *de facto* impossible and going beyond what is necessary to achieve the aim of swiftly enforcing return decisions (see below under section 2.3.5).

Article 22(6)§1 of the Proposed Return Directive aims at avoiding repeated assessments of the risk of non-refoulement. However, the provision as currently formulated might be considered as going beyond what is necessary to the aim, to the extent that its formulation seems to be in breach of the absolute nature of the principle of non-refoulement (see below under section 2.3.1).

Finally, Article 22(7) of the Proposed Return Directive allows national authorities to continue detaining applicants that have already been detained in the context of the asylum border procedure, according to the Proposed Asylum Procedure Regulation (not yet adopted), read in conjunction with the Recast Reception Condition Directive[216] (not yet adopted). If the first period of detention, under the Asylum Procedures Directive[217] read in conjunction with the Reception Condition Directive (or the proposed amendments, in due time), might be justified in order to determine the right of entry of the migrant in the Member State's territory, the purpose of this second period of detention, under the Proposed Return Directive, is to ensure the person's removal, once the right to enter the territory has been denied. Assessing the suitability of the proposal of achieving its stated objective in the absence of a clear legal framework concerning the asylum border procedure is impossible; however, the proposal is likely to go beyond what is *necessary*, both in terms of costs imposed on the Member States (see impact assessment study covering the economic aspects of the Proposal[218]), and in terms of the limitation of the fundamental rights of the third-country nationals (see below section 2.3.2).

[215] Interview with expert from ICJ; interview with expert from PICUM; interview with expert from ECRE; interview with expert from EUI.

[216] Proposal for a Directive laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, European Commission, July 2016.

[217] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[218] Targeted impact assessment study on the Recast Return Directive - economic aspects (as included in Annex 2).

Key Findings on Subsidiarity and Proportionality

Question 2: Does the Commission Proposal respect the principles of subsidiarity and proportionality?

In general: The Proposal complies with the principle of subsidiarity. The management of irregular migration has Union-wide relevance and has proved challenging for Member States that are encountering difficulties in conducting an effective return policy. Moreover, the Union's action is reasonably likely to provide added value in overcoming some of the obstacles encountered at the national level.

Article 6: The absence of publicly available data that support the introduction of specific criteria indicating a risk of absconding makes it difficult to assess the suitability of the list of criteria. It appears that virtually all returnees would fall within the scope of at least one of them.

Article 7: Article 7 codifies an obligation that was already implicit in the current Return Directive. In this respect, it is *prima* facie suitable for achieving the aim of bringing more clarity as to what is expected from returnees. However, the suitability of the norm for achieving the objective of increasing return rates will depend on the possibility to attach not only sanctions, but also incentives to encourage cooperative behaviour.

Article 8: The provision is suitable in addressing the challenge presented by the fact that some Member States do not systematically adopt return decisions when the legal stay of the third-country national is terminated. It does not go beyond what is necessary to achieve its aim.

Article 9: The proposed amendments significantly limit the possibilities for voluntary returns, which goes against the stated aim of the Proposed Return Directive to prioritise voluntary returns over forced returns. In the absence of further data, there is uncertainty as to whether such limitations, intended to prevent absconding, are suitable for the overall objective of enhancing the effectiveness of the EU return policy.

Based on the CJEU's case law, it is questionable that the EU legislature itself could automatically prevent the granting of a period of voluntary departure - as it does in Article 9(4) - without violating the general principle of proportionality.

Article 13: The *suitability* of the provision to reach its aim as defined in the Explanatory Memorandum is difficult to assess in the absence of a thorough evaluation of the deterrent effect that such a provision may have for irregular migrants willing to exit the Schengen area.

Procedures will have to be put in place to ensure respect for the migrant's right to be heard and for the right to an effective remedy subject to an entry ban issued upon exit. Hence, the suitability of the norm to avoid delaying the person's departure while still being able to issue an entry ban is questionable.

Article 14: Imposing the development and use of a new return management system compatible with the IRMA, on Member States that already have a functioning return management system, might be considered as going beyond what is necessary to achieve the relevant aim and, in particular, as being excessively onerous for the concerned Member States (on this point, see also impact assessment study covering the economic aspects of the Proposal).

Article 16: Article 16(1)§2 and 16(4)§2 harmonise rules on remedies, obliging all Member States to conform to the minimum common denominator allowed under EU law. They limit both the scope for national decisions to be made and fundamental rights more than *necessary* in achieving the objective of enabling speedier return procedures. The *suitability* of Article 16(3)§3 in achieving the stated aim might be compromised by its unclear formulation. The interpretation to be given to the expression 'new elements or findings have arisen or have been presented by the third-country national concerned which significantly modify the specific circumstances of the individual case' is unclear. The norm would go beyond what is *necessary* to achieve its aim, if interpreted as excluding the automatic suspensory effect of appeals even when a risk of refoulement exists. The *necessity* of the norm might also be questioned with respect to cases where no risk of refoulement exists. Specifying that in these situations suspension should not be automatic, but should always follow an individual assessment might be sufficient in achieving the relevant aim, while being less intrusive in Member States' procedural norms, and also less restrictive of the right to an effective remedy.

Article 18: Article 18(1)(c) introduces a new ground for detention, namely 'risk to public policy, public security or national security'. The Explanatory Memorandum refers only to 'new risks [that have]… emerged in recent years' to justify its introduction, thus it is difficult to assess the suitability of this ground to achieve the aims of the return policy. Treating criminal law concerns in the context of migration law has important fundamental rights consequences that have to be taken into account when assessing the necessity of measures of this kind.

The suitability of Article 18(5) - providing for a maximum period of detention of at least three months to achieve the objective of increasing return rates - is not sufficiently supported by data.

Article 22: Due to its novelty and its close correlation with the asylum border procedure as set out in the proposed Asylum Procedure Regulation (not yet adopted), the norm is difficult to assess as to its suitability in achieving the aim of ensuring coordination between asylum and return, and ensuring the speedy enforcement of return decisions. Several norms enshrined in Article 22 are very far reaching in limiting the applicant's rights, thereby raising concern as to their necessity in achieving the desired objectives.

2.3. Expected social and human rights impacts

As is clear from Article 67(1) TFEU, the Union shall constitute an Area of Freedom Security and Justice with respect to fundamental rights. It shall further frame a common policy on asylum, immigration and external border control which is 'fair towards third-country nationals' (irrespective of the fact that Article 73(1) TFEU relates to fairness towards legally residing third-country nationals). Fairness is also one of the two objectives of the Proposed Return Directive. First and foremost, it requires compliance with the third-country national's fundamental rights. Article 6 TEU furthermore asserts that EU legislation must comply with a broad range of legal sources on fundamental rights, to which reference will be made below. Limitations on the exercise of the rights and freedoms recognised by the Charter of Fundamental Rights of the EU[219] ('Charter') must comply with its Article 52(1); in particular, and this is common with limitations to rights and freedoms enshrined in other legal sources, such limitations must be justified and proportionate, as will be examined.

In this targeted impact assessment study, we will assess the likely impact of the Proposal on the principle of non-refoulement, as well as on the fundamental rights to asylum, to liberty, to education, to health, to private and family life, to be heard, and to an effective judicial remedy. We will also touch upon the right of children in detention, the right to health, and the right to private and family life. It should be noticed that the Proposal does not modify the requirements concerning the conditions of detention and does not prevent the application to returnees of more favourable provisions deriving from other EU law instruments.

2.3.1. Right to asylum and principle of non-refoulement

Legal framework

Article 18 of the Charter guarantees the right to asylum. The Qualification Directive guarantees refugee status to persons that, if deported, would be at risk of persecution, and subsidiary protection status to persons that, if deported, would be at risk of serious harm, as defined in Article 15 of the Qualification Directive.

The principle of non-refoulement is related to the right to asylum which is why both are dealt with in this section. Yet, the principle of non-refoulement is broader in scope than the right to asylum, as further explained below. The principle of non-refoulement identifies a prohibition to expel people towards countries where they are likely to suffer a serious breach of certain fundamental rights. Its main expression in international refugee law can be found in Article 33 of the Geneva Refugee Convention,[220] prohibiting the return of refugees and asylum seekers to places where they are likely to be persecuted.[221] Article 3 of the European Convention on Human Rights ('ECHR')[222] contains an absolute[223] prohibition of refoulement towards a country where a risk of torture and inhuman or degrading treatment exists. In the Union's legal order, the principle of non-refoulement finds its primary law expression in several articles that protect certain fundamental rights not only against

[219] European Union, Charter of Fundamental Rights of the European Union, 7 July 2016, 2016/C 202/02.

[220] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 ('Geneva Convention').

[221] A prohibition of refoulement to a country were a risk of torture exist is explicitly provided for in Article 3 of the UN UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85), whilst Article 7 of the UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966, United Nations, Treaty Series, vol. 999, p. 171).has been consistently interpreted as encompassing a prohibition of expulsion of people towards countries where they are likely to be subject to torture or inhuman or degrading treatment.

[222] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, November 1950, ETS 5 ('ECHR').

[223] Judgment in App. No. 14038/88 - *Soering* v *The UK*, European Court of Human Rights, July 1989, para 88.

violations by Member States, but also against violations by third states after expulsion.[224] According to Article 78(1) TFEU, the EU's common asylum policy must ensure compliance with the principle of non-refoulement.[225]

In order to assess whether deportation would amount to refoulement, the situation of each individual migrant needs to be examined. From this optic, non-refoulement can only be ensured if the procedural provisions of the relevant legislative instruments, including the Proposed Return Directive, allow for a sufficiently thorough examination of the circumstances of each case.[226] Necessary guarantees include: an automatic suspensory remedy in case of the risk of breaches of non-refoulement;[227] the right to independent and rigorous scrutiny;[228] the right to an accessible remedy, that would be impaired by excessively short time limits to bring a claim or an appeal;[229] insufficient information on the reasons for a decision and available remedies,[230] as well as the lack of linguistic[231] and legal[232] assistance. In this sense, the principle of non-refoulement intersects with the right to an effective remedy (see also section 2.3.5).

Article 7(1)(d) of the Proposal and the right to asylum

Article 7(1)(d) of the Proposed Return Directive, imposing on migrants under a return procedure the duty to lodge a request for obtaining a valid travel document to the competent authorities of third countries, would constitute a clear breach of the right to asylum and, as a consequence, with the principle of non refoulement. The right to asylum encompasses a right to confidentiality and the obligation for the State not to request the asylum seeker to contact his or her home country.[233] Therefore, to ensure fundamental rights compliance, it must necessarily be discarded or confined to migrants whose asylum application has been already rejected with a final decision, and which is no longer subject to appeals.

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[224] Those are Articles 4 (prohibition of Torture and inhuman or degrading treatment or punishment); 19(2) (protection in the event of removal, expulsion or extradition); and 18 (right to asylum) of the Charter.

[225] The fundamental character of the principle for the whole building of the Common European Asylum System was confirmed by the CJEU in the *N.S.* case (Judgment in Joined Cases C-411/10 and C-493/10 - *N.S.* v *Secretary of State for the Home Department* and *M.E. and Others* v *Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, European Court of Justice, December 2011).[225] References to the principle can be found in all the instruments of the EU migration *acquis*. The Proposed Return Directive refers to non-refoulement in Recital (9), Article 4(4)(b), imposing respect of the principle of non-refoulement also with respect to migrants excluded from the scope of application of the Directive, Article 5, and Article 11.

[226] See, in this respect, judgment in App. No. 22689/07 - *De Souza Ribeiro* v *France*, European Court of Human Rights, December 2012, para. 82.

[227] Judgment in App. No. 40035/98 - *Jabari* v *Turkey*, European Court of Human Rights, July 2000, para. 50; judgment in App. No. 51564/99 - *Čonka* v *Belgium,* European Court of Human Rights, February 2002, paras 82-83; judgment in App. No. 41416/08 - *M. and Others* v *Bulgaria,* European Court of Human Rights, July 2011, paras 128-129.

[228] See, for example, judgment in App. No. 20493/07 - *Diallo* v *The Czech Republic,* European Court of Human Rights, June 2011; judgment in App. No. 33210/11 - *Singh and Others* v *Belgium,* European Court of Human Rights, October 2012; *M. and Others* v *Bulgaria*.

[229] See, for example, judgment in App. No. 25894/94 - *Bahaddar* v *the Netherlands,* European Court of Human Rights, February 1998, para. 45; judgment in App. No. 30696/09 - *M.S.S.* v *Belgium and Greece*, European Court of Human Rights, January 2011, paras 180 and 301.

[230] See, for example, judgment in App. No. 27765/09 - *Hirsi Jamaa and Others* v *Italy,* European Court of Human Rights, February 2012, para. 204; *Čonka* v *Belgium*, para 50.

[231] See, for example, judgment in App. No. 9152/09 - *I.M.* v *France*, European Court of Human Rights, May 2012, para. 54; see also Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 64.

[232] See, for example, *I.M.* v *France,* para. 51. See also Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 64.

[233] See UNHCR, Advisory opinion on the rules of confidentiality regarding asylum information, 2005; Art. 25 of the Geneva Convention; Art. 48 of the Asylum Procedures Directive.

Articles 16 and 22 of the Proposal and non-refoulement

As will be further discussed in section 2.3.5, Articles 16 and 22 of the Proposed Return Directive substantially reduce the procedural safeguards for rejected applicants of international protection. The distinction between the latter and other irregular migrants is based on the consideration that non-refoulement concerns are already taken sufficiently into account in the context of asylum proceedings.[234] However, as acknowledged by the Commission in the 2017 Return Handbook, the grounds for international protection under the Qualification Directive do not cover all possible instances in which deportation would amount to refoulement under the ECtHR's and CJEU's case law.[235]

Firstly, the ECtHR has accepted that the principle of non-refoulement is not limited to protection against torture or inhuman and degrading treatment and protection to the right to life,236 but encompasses the protection of other rights,[237] which are not included between the grounds on which international protection can be granted under EU Law.[238] In particular, the ECtHR has accepted non-refoulement claims in cases of flagrant breaches of the right to a fair trial, as enshrined in Article 6 ECHR.[239] It has recognised that non-refoulement concerns might in principle arise from deportation to a risk of slavery and forced labour, which is in violation of Article 4 ECHR,[240] or to a flagrant breach of the right to liberty and security, which is in violation of Article 5 ECHR.[241]

Secondly, even within the scope of EU law as interpreted by the CJEU, there are situations in which a third-country national - who is albeit not entitled to international protection under the Qualification Directive - must not be deported by virtue of the principle of non-refoulement.[242] The CJEU has stated that '[i]n the very exceptional cases in which the removal of a third-country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot … proceed with such removal'.[243] It also acknowledged that, if the lack of appropriate treatment depends on its unavailability in the third country considered, rather than on an intentional deprivation of health care,[244] then the third-

[234] Interviews with experts from the Commission.

[235] Interviews with experts from ICJ, ECRE, FRA, EUI.

[236] Judgment in App. No. 46221/99 - *Öcalan* v *Turkey,* European Court of Human Rights, May 2005; Judgment in App. No. 13284/04 - *Bader and Kanbor* v *Sweden*, European Court of Human Rights, November 2005.

[237] See, for example, Judgment in App. No. 8139/09 - *Othman (Abu Qatada)* v *The UK*, European Court of Human Rights, May 2012, para. 260. For a general overview, see UNHCR, The Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights, 2015, pp. 188 et seq.

[238] Arts 2(d) and 15 of the Qualification Directive (the latter provision has been interpreted by the Court, for instance, judgment in Case c-465/07 - *Meki Elgafaji and Noor Elgafaji* v *Staatssecretaris van Justitie*, European Court of Justice, February 2009.)

[239] In *Soering* v *The UK*, the ECtHR had already accepted that, in principle, flagrant breaches of the right to a fair trial might give rise to non-refoulement concerns. A non-refoulement claim based on Article 6 ECHR was granted for the first time in *Othman (Abu Qatada)*, as deportation would result in 'a breach of the principles of a fair trial as guaranteed by Article 6, which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article' (*Othman (Abu Qatada)* v *The UK*, para 260). See for commentary Christopher Michaelsen, 'The Renaissance of Non-Refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights', *International and Comparative Law Quarterly*, Vol. 61(3), CUP, 2012.

[240] Decision in App. No. 7196/10 - *V.F.* v *France,* European Court of Human Rights, November 2011.

[241] *Othman (Abu Qatada)* v *The UK*, para. 233.

[242] Judgment in Case C-542/13 - *M'Bodji*, European Court of Justice, December 2014, paras 31-42; judgment in Case C-353/16 - *MP*, European Court of Justice, April 2018, paras 38-46, citing Judgment in App. No. 41738/10 - *Paposhvili v. Belgium*, European Court of Human Rights, December 2016; *Abdida*, paras 42-47.

[243] *Abdida*, para. 48.

[244] *M'Bodji*, para. 36.

country national would not be entitled to international protection under the Qualification Directive, albeit being protected by the principle of non-refoulement.[245]

In this context, an interviewee has expressed serious concerns about the reduction of guarantees for rejected asylum applicants, and is singled out as being part of a group whose rights are significantly limited in the context of return procedures.[246]

In conclusion, international protection under the Qualification Directive and non-refoulement differ in scope. Thus, to prevent violations of the principle of non-refoulement, a thorough evaluation concerning the risk of non-refoulement must remain possible in the context of return procedures, even for rejected applicants for international protection.

Article 16 of the Proposal and remedies to ensure non-refoulement

Firstly, according to Article 16(3)§1, '[t]he enforcement of the return decision shall be *automatically* suspended during the period for bringing the appeal at first instance and […] during the examination of the appeal, *where there is a risk to breach the principle of* non-refoulement' (emphasis added). This paragraph codifies the requirement, expressed in the ECtHR's[247] case law, that an effective remedy against non-refoulement requires the automatic suspension of deportation.

Secondly, according to Article 16(3)§1, '[s]hould a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision *shall not be suspended unless a court or tribunal decides otherwise* taking into due account the specific circumstances of the individual case upon the applicant's request or acting ex officio' (emphasis added). Here, the suspensory effect of further appeals is harmonised, adopting the lowest common denominator allowed under EU law (see sections 2.2.4 and 2.4.1). In fact, the CJEU has recognised that, even when a risk of non-refoulement is argued, the right to an effective remedy does *not* compel Member States to 'set up a second level of appeal or to confer, where appropriate, automatic suspensory effect on appeal proceedings'.[248]

Thirdly, Article 16(3)§3 prevents the automatic suspension of the enforcement of the return decision, *in the absence of new elements or findings*, when '(a) the reason for temporary suspension referred thereto was *assessed in the context of [an asylum] procedure* … and was subject to an *effective judicial review* in accordance with Article 53 of [the Proposed Asylum Procedure] Regulation; (b) the return decision is the consequence of the *decision on ending the legal stay* that has been taken following such procedures' (emphasis added). Conditions (a) and (b) are to be understood as cumulative.[249] **The provision seems not to take sufficiently into account the difference in scope between international protection, on the one hand, and non-refoulement, on the other[250]** (see above).

As noted by the Commission, Article 16(3) should still be read in connection with Article 11 of the Proposal, that prohibits removal whenever non-refoulement concerns arise, and that automatic suspension in case of a risk of non refoulement would remain the rule whenever 'new elements or findings' are present, as indicated in Article 16(3)§3. In other words, automatic suspension would have to be granted in all cases in which the non-refoulement concerns are broader (and thus 'new'),

[245] Ibid. para. 40.

[246] Arts. 6, 9, 16 and 22 of the Proposed Return Directive.

[247] *M.S.S.* v *Belgium and Greece,* para. 388, Judgment in App. No. 29094/09 - *A.M.* v *the Netherlands*, European Court of Human Rights, July 2016, para. 66.

[248] Judgment in Case c-180/17 - *X and Y* v *Staatssecretaris van Veiligheid en Justitie*, European Court of Justice, September 2018, para 32, citing *A.M.* v *Netherlands*, para 70. See also *Gnandi*, para 58.

[249] Interview with the second expert from the Commission.

[250] FRA, Opinion 1/2019, p. 11: FRA Opinion 9.

compared to those examined in the context of the asylum procedure.[251] It should also be noticed that 'the enforcement of a return decision entailing the removal of a third-country national suffering from a serious illness to a country in which appropriate treatment is not available may […] constitute, in certain cases, an infringement of Article 5' of the Proposed Return Directive.[252] This Article obliges national authorities to take into consideration the state of health of a third-country national whenever the directive is being applied. This might thus result in a prohibition of removal even in circumstances falling under Article 16(3)§3 of the Proposed Return Directive.

However, **there is a danger that the expression 'new elements or findings' be transposed and interpreted in national law as only referring to elements that relate to the procedure introduced under the Qualification Directive, but which were not raised in the context of the said procedure, for instance because they were not in existence at the time.** This interpretation would not allow for the automatic suspension of deportation when certain elements - such as the serious health condition of a third-country national and the absence of appropriate treatment in the country of origin - were raised and considered in the context of an application for protection under the Qualification Directive, but were not suitable or sufficient for that purpose. This kind of **interpretation of Article 16(3)§3 would conflict with the principle of non-refoulement and should be clearly excluded**.

Fourthly, Article 16(4)§2 imposes a time limit of five days to lodge appeals 'against a return decision when such decision is the consequence of a final decision rejecting an application for international protection'. In light of the reasoning of the CJEU in *Samba Diouf*,[253] a uniform time limit of five days is likely to be too short to comply with the right to an effective remedy (see section 2.3.5). This is especially true in light of the above observations on the different scopes of non-refoulement and international protection. Five days may be considered insufficient to build a solid non-refoulement case, at least when applied to all Member States, regardless of the structure, complexities, and admissibility requirements of the respective appellate procedures.[254]

Article 22 and remedies to ensure non-refoulement

Firstly, Article 22(3) imposes the use of standardised forms instead of individualised return decisions. This might compromise the effectiveness of the principle of non-refoulement, as the third-country national would be required to appeal against the return decision within 48 hours based on a one-size-fits-all information sheet available in five languages,[255] which do not necessarily include a language spoken by him or her.[256] These requirements,[257] and especially the 48-hours time limit, render the lodging of an appeal extremely difficult. The building of a solid non-refoulement case within 48 hours might be practically impossible,[258] also depending on the prompt availability of linguistic and legal assistance on the spot. The targeted modification of Recital (21) of the Proposal,

[251] Interview with the second expert from the Commission.

[252] *Abdida*, para 49.

[253] In *Samba Diouf*, the Court found that in the context of an accelerated procedure, a time limit for appeals of 15 days - namely three times longer than that envisaged in Article 16(4)'s second part of the Proposal - 'does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved'. However, it specified that the ultimate decision on the sufficiency of that time limit in the circumstances of the case was to be left to the national courts.

[254] Interview with expert from ICJ; interview with expert from a national authority.

[255] Art. 15(2)§3 of the Proposed Return Directive.

[256] 'Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned' (Article 15(3) of the Proposed Return Directive).

[257] Interviews with experts from FRA, EUI, PICUM, ICJ, ECRE.

[258] Interviews with experts from ICJ, FRA, EUI.

according to which free legal assistance in the context of return procedures - including the border procedure - is to be provided only 'upon request', introduces a further obstacle in this regard.

Secondly, Article 22(6) subordinates the suspension of enforcement of the return decisions in case of the risk of non-refoulement to further conditions. **As the prohibition of non-refoulement corresponds to an absolute right of the third-country national, suspension of deportation in case of a risk of refoulement, cannot be made subject to further conditions**. **Once the judge considers a risk of refoulement to be present, the suspension of an enforcement should occur systematically**.[259]

2.3.2. Right to liberty

According to Article 6 of the Charter, the right to liberty is granted to everyone. However, as we will see below, the relevant safeguards are particularly protective when limitations or deprivations of liberty concern vulnerable individuals. For this reason, the following section examines the safeguards applicable in case of administrative detention of any third-country national, first, and the specific guarantees related to detention of minors and other vulnerable third-country nationals, then.

Detention of third-country nationals

Legal framework

According to Article 6 of the Charter, 'everyone has the right to liberty and security of person'. A similar formulation is contained in several international law instruments, including Article 5 ECHR and 9 ICCPR. The necessary corollary of the right to liberty is a prohibition of arbitrary detention.[260] Detention is not arbitrary and thus lawful if it complies with a series of requirements, namely: good faith on the part of the authorities,[261] the existence of a clear legal basis in national law,[262] falling within one of the grounds allowed under Article 5(1) ECHR;[263] the respect of certain procedural safeguards; and the humane and dignified nature of detention conditions.[264] With respect to the grounds of detention specifically related to migrants, Article 5(1)(f) ECHR allows for detention in order to 'prevent […] an unauthorised entry into the country or […] with a view to deportation or extradition.' As to the procedural safeguards, particularly relevant are the right to be informed promptly, in a language which the person understands, of the reasons for detention[265] and to 'take proceedings by which the lawfulness of […] detention shall be decided speedily by a court and […] release ordered if the detention is not lawful'.[266]

The Proposed Return Directive intervenes in the area of pre-removal detention with a series of new norms.

Article 18 and the right to liberty

Firstly, the Proposed Return Directive, albeit maintaining the requirement of proportionality of detention for the purpose of removal in Recital (27), erases from that same Recital the indication that

[259] See also FRA, Opinion 1/2019, p. 14: FRA Opinion 17.

[260] Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security, Council of Europe/European Court of Human Rights, August 2018, p. 8.

[261] Judgment in App. No. 13229/03 - *Saadi* v *The UK*, European Court of Human Rights, January 2008, paras 67 and 74.

[262] *Khlaifia and Others* v *Italy*.

[263] Judgment in App. No. 27021/08- *Al Jedda* v *The UK*, European Court of Human Rights, July 2011.

[264] FRA, European legal and policy framework on immigration detention of children, June 2017, p. 33. See also, Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 68-88.

[265] Judgment in App. No. 22696/16 - *J.R. and Others* v *Greece*, European Court of Human Rights, January 2018.

[266] Judgment in App. No. 19776/92 - *Amuur* v *France*, European Court of Human Rights, June 1996; Art. 5 ECHR. Similar guarantees are codified at the international law level by Art. 9 ICCPR.

detention should be limited.267 It also indicates in Article 18(1) that detention is possible in order to prepare return and/or carry out the removal process, rather than 'only' in order to do so as the Proposal would delete this word. The formulation of the 2008 Return Directive clarified that detention had to be considered as a measure of last resort, to be used 'only' when necessary to pursue the objective of removal.[268] Even though the Proposed Return Directive maintains the requirement that detention be based on a case-by-case assessment and proportionate, it may be observed that the changes outlined above modify the tone of the provision, transforming the limiting clause contained in Article 15(1) of the current Return Directive into an enabling clause.[269]

Secondly, Article 18(1) of the Proposed Return Directive requires the grounds of detention to be expressly provided for in national law. This change constitutes a welcome specification of the principle expressed in Article 9, paragraph 1, of the ICCPR,[270] as well as in the case law of the CJEU[271] and ECtHR.[272]

Thirdly, Article 18(1)(c) adds new grounds, namely public policy, public security and national security, to those listed as allowing pre-removal detention. This seems to constitute a reaction of the CJEU's judgment in *Kadzoev*, according to which '[t]he possibility of detaining a person on grounds of public order and public safety cannot be based [the 2008 Return Directive].'[273] Unlike its predecessor, Article 18(c) of the Proposed Return Directive would explicitly enable detention for public order and public security reasons. It should be recalled, in this regard, that the Commission itself had until very recently understood the objective of the Return Directive as to allow for the removal of aliens that have no right to stay in the territory of the relevant state, rather than to protect society from security threats.[274] The Commission explained that the latter function is performed by criminal law that already allows for pre-trial detention in compliance with a series of guarantees. Allowing for a circumvention of these guarantees in the context of migration is problematic, also in terms of permitted grounds of detention under Article 5 ECHR,[275] and it is not sufficiently justified in the Explanatory Memorandum of the Proposed Return Directive, that simply refers to 'new risks [that have] [...] emerged in recent years'.[276]

Should this new ground of detention be kept, it would be necessary to refer - at least in the Recitals -[277] to the CJEU's case law on the need to interpret the concepts of public order and national security

[267] Recital (27) of the Proposed Return Directive.

[268] As held in *El Dridi*, 'deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. [...] such deprivation of liberty is [...] is to be terminated when it appears that a reasonable prospect of removal no longer exists. [...] It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.' See also FRA, Opinion 1/2019, p. 11: FRA Opinion 11.

[269] Interview with experts from FRA.

[270] This provision applies also to migration detention (UN, Human Rights Committee, CCPR General Comment No. 8, para. 1). See also Article 52(1) of the Charter read in conjunction with article 6 of the Charter.

[271] See, for example, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* v *Salah Al Chodor and Others*, para. 38.

[272] *H.L. v The UK*, para. 114; *Khlaifia and Others* v *Italy*.

[273] Judgment in case C-357/09 - *Kadzoev*, European Court of Justice, November 2009, para. 70.

[274] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 69.

[275] According to *Saadi v UK*, para. 74, detention on the basis of Art 5(1)(f) 'must be closely connected to the purpose of preventing unauthorised entry of the person to the country'.

[276] Interview with experts from FRA.

[277] Ibid.

narrowly, in the context of migration legislation.[278] Administrative detention - even if based on national security grounds - is only legitimate as long as the removal of the migrant is possible and the authorities are diligently carrying out the relevant procedures.[279] In the absence of a reasonable perspective of removal, immigration detention is arbitrary, regardless of the ground upon which it has been ordered. Making reference to CJEU and ECtHR's case law in the Recitals may contribute to a more punctual transposition of the new detention grounds in the national law of the Member States. National provisions on detention, including on public policy, public security and national security grounds, will have to comply with the quality requirements established by the ECtHR's case law, namely precision, foreseeability and accessibility.[280]

Article 18 read in conjunction with Article 6 and the right to liberty

The grounds of detention are broadened by the Proposed Return Directive not only because of the new detention ground enshrined in Article 18(1)(c), but also because of the modification of Article 6, identifying a long list of criteria that can indicate a risk of absconding and thus justify detention under Article 18(1)(a).

The detention of migrants solely on the basis of their irregular status would be arbitrary, as confirmed by the CJEU's reasoning in *El Dridi*.[281] Recital 6 of the Proposed Return Directive (left unchanged) specifies that, '[a]ccording to general principles of EU law, decisions taken under [the Return] Directive should be adopted on a case-by-case basis and based on objective criteria*, implying that consideration should go beyond the mere fact of an illegal stay' (*emphasis added).

Several interviewees have expressed the concern that some of criteria to be taken into account to determine the risk of absconding are so broad that their application might result in the arbitrary detention of a vast number of irregular migrants. In fact, many asylum seekers enter the EU with false or forged documents.[282] They may be faced with a presumption of being at risk of absconding, combined with at least another relevant criterion (irregular entry) to aggravate their case. It should be added that, according to some interviewees,[283] the combined chapeaus of paragraphs 1 and 2 of Article 6 do not sufficiently clarify the need for an individual assessment of the case, giving the impression that applying the criteria listed in paragraph 1 might be enough for the purpose of determining the risk of absconding. Concerns have also been expressed as to the possibility to consider ongoing criminal investigations as relevant for the purpose of administrative detention. Custody of persons under investigation is already possible in the context of criminal law, where it is accompanied by adequate safeguards that should not be circumvented through the use of administrative detention.[284] In conclusion, **the long list of criteria contained in Article 6, coupled with the broad nature of some of those criteria, is likely to increase the risk of arbitrary detention decisions.**

Article 22 and the right to liberty

Article 22(7) of the Proposed Return Directive allows for the detention of migrants in the context of a newly established border procedure. Under this article, migrants who have already been detained in the context of the asylum border procedure, as described in Article 43 of the Asylum Procedures

[278] Judgment in Case C-601/15 PPU - *J. N.* v *Staatssecretaris van Veiligheid en Justitie*, European Court of Justice, February 2016; *Zh. and O*.

[279] Judgment in App. No. 3455/05, *A. and Others* v *The UK*, European Court of Human Rights, February 2009, paras. 169 and 170.

[280] *Amuur v. France*, para 50; judgment in App. No. 40907/98 - *Dougoz* v *Greece*, European Court of Human Rights, March 2001, para 55.

[281] *El Dridi,* paras 39-53 and 57-62; see also FRA, Detention of third-country nationals in return procedures, p. 19.

[282] Interview with experts from FRA.

[283] Ibid.

[284] Interview with expert from a national authority.

Directive and Article 41 of the Proposed Asylum Procedure Regulation, can be detained for up to a further four months for the ultimate purpose of being removed from the Member State.

As a preliminary point, it should be noted that Article 22 does not impact on the scope of the derogation enshrined in Article 2(2)(a). Member States remain free to be exempt from the scope of application of the Proposal concerning migrants intercepted at official crossing points, as well as at those they find at irregular crossing points, who have not applied for asylum.[285] Hence, the border procedure is intended to third-country nationals that would, in its absence, be subject to the 'ordinary' return procedure in compliance with the other provisions of the Proposed Return Directive.

Like detention under Article 18, detention under Article 22(7) pursues the purpose of returning third-country nationals irregularly present in the territory of the Member State.[286] It is also intended to prevent their unauthorised entry in the Member State's territory (Recital 36 of the Proposal).

In this respect, the ECtHR has affirmed, in *Saadi v UK*, that '[…] until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry". The simple circumstance that 'an asylum seeker has surrendered himself to the immigration authorities' does not preclude his detention to 'prevent his effecting an unauthorised entry into the country' (first limb of Article 5(1)(f) ECHR).[287]

However, in *Suso Musa v. Malta*, the ECtHR has examined a case 'where a State […] enacted legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application'. In these circumstances, it would no more be possible to consider detention as legitimately aimed at the purpose of preventing unauthorised entry, under the first limb of Article 5(1)(f) ECHR.[288]

In this context, detention for the purpose of preventing unauthorised entry under Article 22(7) of the Proposed Return Directive would only be possible for those third-country nationals whose asylum claim has been rejected within the four-week asylum border procedure. After the first four weeks, in Article 43(2) of the Asylum Procedure Directive, as well as in the current state of Article 41 of the Proposed Asylum Procedure Regulation, asylum seekers have to be authorised to enter the territory,[289] so that detention for the purpose of preventing unauthorised entry would cease to be possible.

The exact personal scope of application of the border procedure envisaged by Article 22 of the Proposal will depend on the final text of Article 41 of the Proposed Asylum Procedure Regulation, which is still under heavy negotiation. The applicability of this procedure to minors or vulnerable persons will depend on their inclusion or exclusion from the scope of detention under the Proposed Asylum Procedure Regulation.[290]

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[285] Interview with second expert from the Commission. See related case law: judgment in Case C-47/15 - *Affum*, European Court of Justice, June 2016, paras 72 and 74.

[286] As confirmed by the interview with the second Commission expert, who explained that the Proposal only applies to migrants irregularly present in the territory of the State and in need to be returned.

[287] *Saadi* v *UK*, para 65.

[288] Judgment in App. No. 42337/12 - *Suso Musa* v *Malta*, European Court of Human Rights, July 2013, para. 97.

[289] Article 41§3 of the Proposed Asylum Procedure Regulation reads 'Where a final decision is not taken within four weeks referred to in paragraph 2, the applicant shall no longer be kept at the border or transit zones and shall be granted entry to the territory of the Member State for his or her application to be processed in accordance with the other provisions of this Regulation'.

[290] See also, FRA, Opinion 1/2019, p. 14: FRA Opinion 17.

According to Article 22(7), 'Member States may keep in detention a third-country national who has been detained' in the context of the asylum border procedure. The text does not explicitly require the adoption of a new detention decision, nonetheless such a decision would be necessary. In *Kadzoev*, the CJEU clarified that the detention of asylum seekers and detention for the purpose of return fall within different legal regimes.[291] The different detention regimes require different decisions, based on the legal grounds available under the relevant rules.[292] The logic behind this conclusion holds true also in the context of the relationship between the asylum border procedure and Article 22(7) of the Proposed Return Directive. More particularly, under **Article 22(7), detention in the context of the border procedure is only optional, and can 'be maintained only as long as removal arrangements are in progress and executed with due diligence'. Thus, to detain an applicant in the context of this article, a decision on detention that takes the prospect of removal into account needs to be taken.** When adopting the detention decision under Article 22(7) the right to be heard of the third-country national needs to be respected[293] (see section 2.3.4).

Recital (36) identifies the purpose of detention under Article 22(7) as that of 'avoid[ing] that a third-country national is automatically released from detention and allowed entry into the territory of the Member State despite having been denied a right to stay [in the context of the asylum border procedure]'. Based on the intention of the drafters, detention for the purpose of removal in the context of the border procedure would not be based on the grounds specified in Article 18(1), for example the existence of a risk of absconding.[294] The applicability to detention under Article 22(7) of other guarantees enshrined in Article 18 is unclear. Article 22(7)§2 specifies that '[e]xcept where otherwise provided in this Chapter, the provisions of Chapters II, III and IV apply' to the border procedure as well, but Article 22(7) does not explicitly reinstate the requirement to consider a less coercive alternative to detention, and has a proviso to release the person as soon as detention is no longer necessary.

Article 22(7)§2 reads: '[d]etention shall be for as short a period as possible, which shall in no case exceed four months. *It may be maintained only as long as removal arrangements are in progress and executed with due diligence*' (emphasis added). This provision codifies the ECtHR's case law, according to which 'any deprivation of liberty under [Article 5(1)(f) ECHR] will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under [Article 5(1)(f) ECHR]'.[295] When interpreting Article 22(7)§2, account should be taken of the fact that a 'policy of keeping the possibility of deporting the applicants "under active review"' was not considered by the ECtHR as 'sufficiently certain or determinative to amount to "action [...] being taken with a view to deportation"'.[296]

The considerable lack of clarity as to the procedural guarantees that will be available under the Proposed Asylum Procedure Regulation makes it difficult to envisage the potential effect of detention under Article 22 in terms of compliance with fundamental rights. The extremely short timeframe for appeals in the context of Article 22 and the lack of automatic suspensory effects of appeals, even in cases where a risk of non-refoulement is present, will be examined below (see section 2.3.5). They raise serious concerns as to the norm's compliance with the principle of non-refoulement and the right to an effective remedy.

In order to avoid arbitrary detention, the grounds for detention under Article 22(7) will need to be specified in national law, in a way that corresponds to the requirements set out by the ECtHR on the

[291] *Kadzoev,* para 45.

[292] See CJEU's reasoning in *Kadzoev*, para. 47 and Judgment in Case C-534/11 - *Arslan*, European Court of Justice, May 2013, paras 61-62.

[293] Judgment in Case C-383/13 PPU - *G&R*, European Court of Justice, September 2013, paras 29-32.

[294] As confirmed by the interview with the second expert from the Commission.

[295] Judgment in App. No. 22414/93 - *Chahal* v *The UK*, European Court of Human Rights, November 1996, para 113.

[296] *A. and Others* v *The UK*, para 167.

quality of the law.[297] It should be reinstated here that, under the ECtHR's case law, 'to avoid being branded as arbitrary, detention [with a view to deportation] must be carried out in good faith; it must be closely connected to the ground of detention relied on […]; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued'.[298]

The configuration of the Proposed Return Directive, read in conjunction with either Article 43 of the Asylum Procedures Directive or Article 41 of the Proposed Asylum Procedure Regulation, would allow for detention for four weeks in the context of the asylum border procedure, followed by further detention for up to four months. It is unclear why the four months of detention under Article 22 are not counted towards the absolute maximum of 18 months that the authorities are allowed to use in order to carry out forced removals while keeping migrants in custody under Article 18.[299] **As detention for up to four months at the border is also intended to ensure return,[300] these four months should be counted towards the absolute maximum of 18 months under Article 18 of the Proposed Return Directive.[301]** Indeed, detention aims at ensuring removal both under Article 18 and under Article 22 of the Proposed Return Directive. In both cases, it is only legitimate whilst removal is still possible and pursued with due diligence by the Member State's authorities.[302] This conclusion is reinforced by the consideration, directly following on from the right to liberty that detention should last for the shortest period possible.[303]

Detention of minors and vulnerable persons in the context of migration

Legal framework

In addition to all of the considerations developed above, some remarks need to be made as to the possible impact of the Proposed Return Directive on the detention of minors and other vulnerable migrants (see also section 2.3.3).

According to Article 24 of the Charter, 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. The consideration of the best interest of the child is also imposed at the level of international law, with respect to 'all actions concerning children' by Article 3 of the UN Convention on the Rights of the Child ('CRC'),[304] and it is explicitly referred to in Article 20(5) of the Proposed Return Directive (left unchanged).

Notwithstanding the call from the UN Committee on the Rights of the Child[305] to end the immigration detention of children, as a measure never corresponding to their best interests, neither EU law nor the ECHR in their current state completely forbid the detention of minors.[306] Nonetheless,

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[297] *Amuur* v *France*, para 50; *Dougoz* v *Greece*, para 55.

[298] *A. and Others* v *UK*, para 164.

[299] The reading of Article 22(7)§3 as allowing for a cumulation of the four months of detention under the border procedure with the maximum period of detention under Article 18 is justified by the text of Article 22(7), read in light of Recital (36). It has been confirmed as corresponding to the intention of the drafters (interview with the first expert from the Commission).

[300] As confirmed by the Interview with the second expert from the Commission.

[301] See also FRA, Opinion 1/2019, p. 14: FRA Opinion 17.

[302] Arts. 18(1) and 22(7) of the Proposed Return Directive.

[303] *El Dridi*, paras 40 and 43. See also Arts. 18(1) and 22(7) of the Proposed Return Directive.

[304] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 ('CRC').

[305] UN Child Rights Experts call for EU-wide ban on child immigration detention, 21 February 2018.

[306] Twenty Guidelines on Forced Return, Council of Europe, Committee of Ministers, May 2005, Guideline 11 - children and families; Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, pp. 86-88 (?); FRA, European legal and policy framework on immigration detention of children, p. 8.

in light of the lasting effect that the deprivation of liberty can have on children's development,[307] the consideration of their best interest must always entail an examination of all possible alternatives to detention. In the absence of such an evaluation, the detention of children is always arbitrary.[308]

Article 20(1) of the Proposal states that '[u]naccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time', and Article 20(4) specifies that '[u]naccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age'. If detention of children together with their family is sometimes considered to be in their own best interest, the detention of unaccompanied children is presumed to be contrary to the child's best interest - and is thus prohibited - in several EU Member States.[309] The vulnerability of children also impacts the procedural safeguards that have to be made available in case of detention, requiring the provision of information in a child friendly manner[310] and in particularly frequent judicial reviews of the necessity of detention.[311] Detention facilities should be equipped to host minors, taking into account their needs and vulnerability and offering appropriate support.[312]

Article 5 of the Proposal imposes the consideration of the best interest of the child when applying the provision of the Proposed Return Directive. The Proposed Return Directive may have indirect consequences on children's detention in the context of return proceedings.

Possible impact of the Proposal on the right to liberty of minors and vulnerable migrants

Firstly, **increasing the grounds for the detention of adults**, in some cases through rebuttable presumptions as a consequence of a joint reading of Article 6(2) and 18(1) of the Proposed Return Directive, **might result in an increased number of children being detained together with their parents.**[313] In this case, the relevant facilities have to be suitable to accommodate the needs of families with children, allowing their separation from other detainees.

Secondly, the obligation stipulated in Article 18(5) of the Proposal, to provide for a maximum period of detention of at least three months for the purpose of removal, might be interpreted as not allowing for carve-outs in relation to children or other vulnerable categories. As mentioned, several EU Member States do not, in principle, allow for the detention of unaccompanied minors for the purpose of removal. To avoid a significant increase in the number of detained minors, **it would be appropriate to specify that the requirement that national law allows detention for a maximum**

[307] Judgment in App. No. 15297/09 - *Kanagaratnam and Others* v *Belgium*, European Court of Human Rights, December 2011, paras 67-69.

[308] Judgment in App. No. 8687/08 - *Rahimi* v *Greece*, European Court of Human Rights, April 2011, para. 109. See also judgment in App. No. 13178/03 - *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, European Court of Human Rights, October 2006, para. 83.

[309] FRA, European legal and policy framework on immigration detention of children, p. 36.

[310] Ibid. p. 65.

[311] Ibid. p. 60. See also judgment in App. No. 75157/14 - *Bistieva and Others* v *Poland*, European Court of Human Rights, April 2018, according to which detention of minors calls for particular speed and diligence.

[312] Art. 17(3) and (4) of the 2008 Return Directive; see also *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*; judgment in App. Nos. 39472/07 and 39474/07 - *Popov* v *France*, European Court of Human Rights, January 2012; judgment in App. No. 29217/12 - *Tarakhel* v *Switzerland*, European Court of Human Rights, November 2014; judgment in Apps. Nos. 25794/13 and 28151/13 - *Abdullahi Elmi and Aweys Abubakar* v *Malta*, European Court of Human Rights, November 2016; judgment in App. No. 14902/10 - *Mahmundi and Others* v *Greece*, European Court of Human Rights, July 2012.

[313] It should be noticed that, as of 2017, only one Member State completely forbid detention of children for return purposes, whilst one other prohibited it in principle, but allowed for exceptions, and three others had a practice of not detaining families with children (FRA, European legal and policy framework on immigration detention of children, pp. 34-35).

of at least three months does not prevent legislation excluding or strongly limiting detention for children and other vulnerable categories.[314]

Thirdly, the harmonisation of procedural safeguards, and in particular the time limit of five days for appeals against return decisions issued against rejected applicants for international protection, might have a consequence on the possibility for Member States to cater for the special needs of children in terms of guardianship, assistance, and the provision of child-friendly information, as well as sufficiently individualised assessments of their best interest. Finally, **the extent to which minors will be included or excluded from the scope of detention under Article 22(7) of the Proposal will depend on the configuration of the border procedure envisaged in the Asylum Procedure Regulation. Thus, the impact of the article on children's right to liberty is impossible to assess.** This, coupled with the very limited procedural safeguards offered by this procedure, may lead to the arbitrary detention of minors, in the absence of specific and explicit carve-outs.

2.3.3. Right to education, health, private and family life

Legal framework

Irregular migrants undergoing deportation procedures are entitled to respect for their social rights.

These include the right to education, the right to health, and the right to private and family life. In accordance with Article 5 of the Proposed Return Directive[315], the implementation of the Directive shall take into account (a) the best interest of the child, (b) family life, and (c) the state of health of the third-country national.

The right to education for 'everyone' is enshrined in Article 14 of the Charter and Protocol 1 of the ECHR. In the context of migration law, it applies to all children, even if they are illegally present in the territory of a State,[316] as confirmed by Article 17(1) of the Proposed Return Directive (left unchanged), according to which 'Member States shall … ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure … and during periods for which removal has been postponed… (c) minors are granted access to the basic education system subject to the length of their stay'. Furthermore, according to Article 20(3) (left unchanged), minors in detention 'shall have, depending on the length of their stay, access to education'.

The right to health is enshrined in Article 35 of the Charter and in Article 12 of the International Covenant on Economic, Social and Cultural Rights,[317] to which all EU Member States are parties. In the context of return procedures, the right to health care is codified in Article 17(1)(b) of the Proposed Return Directive (left unchanged) as imposing upon Member States the provision of 'emergency health care and essential treatment of illness.' According to Article 19(3) (left unchanged), '[e]mergency health care and essential treatment of illness shall be provided' to persons in detention.

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[314] Interview with expert from ICJ; interview with experts from FRA.

[315] Unchanged with respect to the 2008 Return Directive.

[316] Judgment in App. No. 5335/05 – *Ponomaryovi* v *Bulgaria*, European Court of Human Rights, June 2011, para. 339. See also FRA, European legal and policy framework on immigration detention of children, p. 71, referring to UN, Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 63 and to UN, Rules for the protection of juveniles deprived of their liberty, A/RES/45/113, 14 December 1990 (Havana Rules), para. 38, which apply to any deprivation of liberty, on the right to education in detention; and FRA, Fundamental rights of migrants in an irregular situation in the European Union, 2011.

[317] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

The right to private and family life is protected by Articles 8 of the ECHR and 7 of the Charter. It has to be taken into account when adopting decisions related to return, including entry bans. The right to private and family life can, in certain cases, constitute an obstacle to deportation, as is recognised by the case law of the ECtHR.[318] The concept of private life is broader than that of family life and it encompasses 'the totality of social ties between settled migrants and the community in which they are living'.[319] Expressions of the right to private and family life may also be found in several provisions of the Proposed Return Directive that remain unchanged for that purpose, such as Article 20(2) on the detention of minors and families.

Articles 18, read in combination with Article 6, and the right to education

Concerning the right to education, Article 17(1)(c) of the Proposal states that, during periods of voluntary departure or periods during which removal has been postponed, '(c) minors are granted access to the basic education system subject to the length of their stay'. The 2017 Return Handbook helps to interpret this norm, specifying that '[i]n cases of doubt about the likely length of stay before return, access to education should rather be granted than not be granted. A national practice where access to the education system is normally only established if the length of the stay is more than fourteen days may be considered as acceptable.'[320]

The right to access education, depending on the length of their stay, is granted also to minors who are detained in the context of return procedures, according to Article 20(4) of the Proposal. However, the increased possibilities of detention offered by Article 18 of the Proposal, read in combination with Article 6 (see above section 2.3.2), may affect the right to education in practice. In fact, the quality and appropriateness of education for detained migrants, especially when provided within the detention facility, can be difficult to ensure.[321]

Articles 16 and 22 and the right to health

As noted, Article 5 of the Proposed Return Directive states that Member States should 'take due account of … the state of health of the third-country national concerned' when implementing the Directive. This provision has been interpreted by the CJEU, in light of the ECtHR's case law,[322] as precluding the deportation of 'a third-country national suffering a serious illness to a country where appropriate treatment is not available', when such deportation would amount to refoulement because of the 'seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national'.[323]

As discussed in sections 2.3.1 and 2.3.5, **the limitation of the suspensory nature of judicial remedies against return decisions which are imposed on rejected applicants for international protection under the Qualification Directive do not adequately take this case law into account. They might be interpreted as allowing deportation of seriously ill rejected applicants for international protection even when a risk of refoulement is present. This would breach not only the principle of non-refoulement, but also Article 5 of the Proposal and the right to health of the third-country national concerned.**

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[318] Judgment in App. No. 1638/03 – *Maslov* v *Austria*, European Court of Human Rights, June 2008, paras. 74-75; judgment in App. No. 49441/12 – *Kolonja* v *Greece*, European Court of Human Rights, May 2016, paras. 56-57; judgment in App. No. 46410/99 – *Uner* v *the Netherlands*, European Court of Human Rights, October 2006, paras. 59-60; judgment in App. No. 12738/10 – *Jeunesse* v *the Netherlands*, European Court of Human Rights, October 2014, paras. 114-123.

[319] *Maslov* v *Austria,* para 63.

[320] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 66.

[321] FRA, European legal and policy framework on immigration detention of children, 2017.

[322] Judgment in App. No. 26565/05 – *N.* v *The UK,* European Court of Human Rights, May 2008, para. 42.

[323] *Abdida*, para 48-50.

Article 18, read in combination with Article 6, Article 22(7) and the right to health

As mentioned, under Article 17(1)(b) of the Proposal, all Member States have to guarantee emergency health care to all irregular migrants. It has been noticed that this obligation is generally respected, although only some Member States go beyond it, to guarantee primary and secondary health care to third-country nationals in return procedures.[324] Nonetheless, in *Abdida*, the CJEU has clarified the implications of the obligation to provide for emergency healthcare, specifying that provision has to be made for the basic need of a seriously ill migrant, when not doing so would render the requirement to provide emergency health care and essential treatment of illness meaningless.[325] Article 17(1)(b) 'must be interpreted as precluding national legislation which does not make provision, in so far as possible, for the basic needs of a third-country national suffering from a serious illness to be met, in order to ensure that such a person may in fact avail himself of emergency health care and essential treatment of illness during the period in which the Member State concerned is required to postpone removal of the third-country national following the lodging of an appeal against a decision ordering that person's return.'[326]

In light of this case law on Article 17(1)(b), and *a fortiori* in situations of detention, **the increased possibilities for detention of third-country nationals, offered by Article 18, read in combination with Article 6 (see section 2.3.2), might lead to far reaching limitations of the right to healthcare, as interpreted by the Court, in light of the practical difficulties that Member States have already encountered - under the 2008 Return Directive - in ensuring dignified detention conditions to third-country nationals in return procedures, especially for vulnerable groups.[327]**

The extent to which vulnerable and seriously ill migrants will be included or excluded from the scope of detention under Article 22(7) of the Proposal will depend on the configuration of the border procedure envisaged in the Asylum Procedure Regulation. Thus, the impact of the article on the right to health is impossible to assess.

Articles 8(6), 9(4), and 13 and the right to private and family life

The case law of the ECtHR recognised that family and, more generally, social ties have to be considered when deciding upon expulsion.[328] Article 5(b) of the Proposed Return Directive itself obliges Member States to take family life into account when implementing the Directive. The CJEU has specified in *K.A.* that Article 5 of the 2008 Return Directive (left unchanged and appearing as Article 5 in the Proposal), 'must be interpreted as precluding a national practice pursuant to which a return decision is adopted with respect to a third-country national, who has previously been the subject of a return decision, accompanied by an entry ban that remains in force, without any account being taken of the details of his or her family life'.[329]

This ruling holds valid and acquires an important protective function in the context of the Proposal, which explicitly requires return decisions to be issued immediately after any decision ending legal stay (Article 8(6)). In fact, in *K.A.,* the CJEU clarifies that the third-country national must be granted

[324] FRA, European legal and policy framework on immigration detention of children, p. 82.

[325] *Abdida*, para 60.

[326] Ibid. para 62.

[327] European Migration Network, The effectiveness of return in EU Member States (2017), pp. 66-67.

[328] See, for example, judgment in App. No. 56811/00 – *Amrollahi* v *Denmark*, European Court of Human Rights, July 2002; judgment in App. No. 54273/00 – *Boultif* v *Switzerland*, European Court of Human Rights, August 2001; judgment in App. No. 11870/03 – *Zakayev and Safanova* v *Russia*, European Court of Human Rights, February 2010; judgment in App. No. 55597/09 – *Nuñez* v *Norway*, European Court of Human Rights, June 2011; judgment in App. No. 10730/84 – *Berrehab* v *the Netherlands*, European Court of Human Rights, June 1988; FRA, Handbook on European law relating to asylum, borders and immigration, 2014.

[329] *K.A. and Others* v *Belgische Staat*, para 107.

the right to be heard and be able to provide detail concerning his or her family life before the adoption of a return decision (see section 2.3.4).

Article 9(4) prevents Member States from granting a period of voluntary departure in specific cases. Based on the case law of the CJEU, this provision seems likely to be in breach of both the right to be heard and the principle of proportionality, as explained in detail below (see section 2.3.4). **As it prevents migrants falling within its scope from making circumstances about their private and family life known to the authorities before they adopt the decision to deny a period of voluntary departure, the provision is also likely to lead to breaches of the third-country nationals' right to private and family life.**[330] Even in the circumstances listed in Article 9(4), Member States should be left free to 'tak[e] into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links', as required by Article 9(2) of the Proposal.

The right to be heard with respect to, *inter alia*, the details of one's private or family life that may be relevant for the adoption of decisions related to return, must also remain available to irregular migrants who are found leaving the Schengen area, whenever the authorities envisage the possibility of imposing an entry ban under Article 13 of the Proposal (see section 2.3.4).

Articles 16 and 22 and the right to private and family life

The right to private and family life of the migrant has to be taken into account when deciding whether a return would be lawful. Thus, these rights are likely to be substantially affected by provisions that substantially reduce the chance, for the third-country national, to make considerations related to his or her private or family life known to the authorities. This possibility must be granted not only before the adoption of decisions related to return, as discussed above, but also after their adoption, in the context of the relevant judicial remedies.[331]

The limitation of the suspensory effect for appeals against return decisions, following the rejection of applications for international protection under the Qualification Directive, might make it impossible for the third-country nationals concerned to access an effective remedy. Respect for family life does not require the suspension of deportation to be automatic in case of appeal.[332] However, as confirmed by the Commission in the 2017 Return Handbook, judicial authorities must still be in a position to order a suspension of deportation, pending the appeal, based on an individual assessment of the circumstances of the case.[333] **Article 16(3)§3 would lead to breaches of the right to private and family life, to the extent that it might be interpreted as precluding suspension of deportation, based on considerations related to private and family life that were not relevant in the context of the asylum procedure, but would still ensure protection from removal** (see section 2.3.5 on the unclear wording of Article 16(3)§3). As observed by FRA, '[t]he envisaged new modalities regulating the suspensory effect to appeals for rejected asylum seekers subject to a return decision [Article 16 (3)§3] do not take into account the different nature of the judicial review in the asylum and return context, notably when assessing the risk of refoulement and whether the right to respect for private and family life bars the removal.'[334]

Articles 6, 18, 22(7) and the right to private and family life

Firstly, Article 6 only codifies criteria that indicate a risk of absconding, leaving out elements that might, on the contrary, lead to excluding a risk of absconding. Thus, as discussed above (section

[330] See CJEU's reasoning in *Boudjida*, 48-51.

[331] *De Souza Ribeiro* v *France*, 83; *M. and Others* v *Bulgaria,* paras. 122-123; and judgment in App. No.50963/99 – *Al Nashif* v *Bulgaria*, European Court of Human Rights, June 2002, para. 133.

[332] *De Souza Ribeiro* v *France*, 83.

[333] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p 63.

[334] FRA, Opinion 1/2019, p. 11: FRA Opinion 9.

2.3.2), the list of criteria in Article 6 risks been used as a checklist by national authorities, *de facto* limiting the individual assessment of all of the circumstances of the case, required in Article 6(2)§1. The codification of elements that might indicate that the third-country national is not at risk of absconding, including the presence in the Member State of family members or the existence of a social network or a long period of stay,[335] would help to ensure that the fundamental right to private and family life is taken into due account before detention decisions and decisions concerning the granting of a period of voluntary departure are adopted, as is required in compliance with the right to be heard.[336]

Secondly, Articles 22(7) and Article 18, read in combination with Article 6, are likely to increase the possibilities for detention of third-country nationals. In this context, it should be remembered that Article 20(1) and (2) of the Proposal states that '[f]amilies detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy'. **In light of the practical difficulties that Member States have already encountered - under the 2008 Return Directive - in ensuring dignified detention conditions to third-country nationals in return procedures, the likely increase in the number of detained third-country nationals (see above, section 2.3.2) might make it difficult to comply with this provision, leading to breaches of the right to private and family life.[337]**

2.3.4. Right to be heard

Legal framework

Article 41 of the Charter affirms that the right to good administration 'includes […] the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.

As noted by the CJEU in *Mukarubega,* the right to good administration as enshrined in Article 41 Charter is addressed solely to the institutions, bodies, offices and agencies of the EU. Nevertheless, the right to be heard is inherent in 'the rights of the defence, which is a general principle of EU law'.[338] The right to be heard is also affirmed in Articles 47 and 49 of the Charter which ensure respect for both the rights of the defence and the right to a fair legal process in all judicial proceedings.[339] It 'guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'.[340]

Article 8 and the right to be heard

Article 5 of the Proposal, left unchanged if compared to the 2008 Return Directive, reads: '[w]hen implementing this Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement'.

In order to be able to give effect to Article 5 the competent authority must necessarily hear the person concerned before adopting return decisions.[341] This observation remains valid even in the context of Proposed Article 8(6), according to which 'Member States shall issue a return decision *immediately after* the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status'.

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[335] Meijers Committee, CM1816 Comments.

[336] *G&R*, paras 31-32; Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 57.

[337] European Migration Network, The effectiveness of return in EU Member States (2017).

[338] Judgment in Case C-166/13 - *Mukarubega*, European Court of Justice, November 2014, paras 44-45.

[339] Ibid. para 43.

[340] Ibid. para 46.

[341] *Boudjlida*, para 49.

The CJEU noted that 'the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement'[342] owing to the principles of effectiveness and equivalence.[343] Member States are thus under a legal obligation to ensure its respect when adopting return decisions, even in the absence of a specific indication to that effect in Article 8.

However, legal clarity and greater access to the relevant legal safeguards would be ensured if an explicit reference to the right to be heard, especially in relations to the rights enshrined in Article 5, was made in Article 8(6) or in a horizontally applicable provision.[344]

Article 9(4) and the right to be heard

In *Boudjlida*, the CJEU noted that 'the right to be heard before the adoption of a return decision implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure and whether return is to be voluntary or coerced.'[345] This, together with general principles of EU law, including the principle of proportionality, mean that a Member State 'cannot refrain automatically, by legislative means or in practice, from granting a voluntary period for departure where the person concerned poses a risk to public policy. The correct exercise of the option to that effect provided for in Article 7(4) of Directive 2008/115 requires that there must be a case-by-case assessment of whether the refusal to grant such a period is compatible with that person's fundamental rights'.[346]

In light of the above**, a provision such as Article 9(4), obliging Member States to automatically refrain from granting a voluntary period of departure in specific cases is in breach of the right to be heard, as well as of the principle of proportionality, as interpreted by the Court.** As noted by one interviewee, Article 9(4) would, for example, prevent national authorities from considering that the application for asylum, presented by the returnee in good faith, might have been rejected as manifestly unfounded because of a change in the situation of the country of origin during the asylum procedure.[347]

Article 13 and the right to be heard

In the context of the 2008 Return Directive, the right to be heard 'enable[s the concerned] person to correct an error or submit such information relating to his or her personal circumstances [that] will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'.[348] It 'also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision [...]; the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence.'[349] As confirmed by the Commission in the 2017 Return Handbook, compliance with the right to be heard is necessary with respect to all decisions related to return, including entry bans.[350]

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[342] *Mukarubega*, para 49.

[343] Ibid. para 52.

[344] See also FRA, Opinion 1/2019, p. 9: FRA Opinion 5.

[345] *Boudjlida*, para 51.

[346] *Zh. and O.*, paras 69-70.

[347] Interview with experts from FRA.

[348] Ibid. para 47.

[349] Ibid. para 48.

[350] Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, p. 57.

This entails that **the right to be heard will also need to be guaranteed to migrants who are detected while leaving the Schengen area, whenever the authorities intend to issue an entry ban in the absence of a return decision.** In the current version of the Proposal, the need to respect the right to be heard can be inferred by the indication, enshrined in Article 13(2) of the Proposal, that entry bans issued upon exit must be 'justified on the basis of the specific circumstances of the individual case and taking into account the principle of proportionality'. However, legal clarity and greater access to the relevant legal safeguards would be ensured if the main findings of the CJEU in the cases summarised above were codified in Article 13 or in a horizontally applicable provision.

2.3.5. Right to an effective remedy

Legal framework

The right to an effective remedy is enshrined in Article 47 of the Charter, as well as in Article 13 of the ECHR.[351] In the context of returns, this right is essential in order for other rights, such as the principle of non-refoulement, the right to asylum and the right to liberty, to be respected.[352]

The right to an effective remedy requires access to an independent judicial authority which is capable of assessing all the circumstances of facts and law relevant to adopt the decision.[353] It also entails the need for a remedy with automatic suspensory effect in cases of arguable non-refoulement claims, and the possibility of requesting suspension in all other cases where fundamental rights might be compromised by the enforcement of the decision.[354] The effectiveness of the remedy translates into a series of ancillary safeguards, including complete and comprehensible information on the content and reasons for a decision affecting one's right, and the availability of linguistic and legal assistance, if needed.[355]

The analysis of compliance of the Proposed Return Directive with the fundamental right to an effective remedy, complemented with reference to legal materials taken from other fields of EU law as well as international law, will focus on two articles of the Proposed Return Directive. Articles 16 and 22 of the Proposal contain numerous provisions on remedies and are subject to important changes compared to the 2008 Return Directive.

The CJEU has ruled on several occasions on the concrete content of the right to an effective remedy in the context of procedures for international protection. The relevant case law is useful, with the appropriate distinctions, for our understanding of the fundamental right to an effective remedy in the different but related context of the Proposed Return Directive itself. As the Proposed Asylum Procedure Regulation has not yet been adopted, reference is primarily be made to either the current instrument, the Asylum Procedures Directive[356] or to its predecessor, the 2005 Asylum Procedures Directive,[357] if necessary for the understanding of related case law.

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[351] It should be noted that Article 6 of ECHR is not applicable in the context of migration proceedings, as it only applies in the spheres of civil and criminal law.

[352] See, on non-refoulement, *De Souza Ribeiro* v *France*, para. 82.

[353] See, for example, judgment in App. No. 13867/88 - *Brincat* v *Italy,* European Court of Human Rights, November 1992, para. 21; judgment in Case C-199/11 - *Europese Gemeenschap* v *Otis NV and Others*, European Court of Justice, November 2012, para 49; *Jabari* v *Turkey*.

[354] *De Souza Ribeiro* v *France*; judgment in App. No. 25389/05 - *Gebremedhin [Gaberamadhien]* v *France,* European Court of Human Rights, April 2007, paras 66 - 67; judgment in App. No. 41872/10 - *M.A.* v *Cyprus*, European Court of Human Rights, July 2013, para. 133 and the case law cited therein; *Čonka* v *Belgium,* para. 79; *Khlaifia and Others* v *Italy,* paras 279 - 281.

[355] *I.M.* v *France*, paras 145-155; *M.S.S.* v *Belgium and Greece,* para. 319.

[356] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60-95.

[357] Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, pp. 13-34.

Article 16(1) and number of levels of jurisdiction

Article 16(1)§2 of the Proposed Return Directive establishes that the third-country national shall be afforded an effective remedy to appeal against or seek review of return decisions before a competent judicial authority. Such an appeal shall be granted before a single level of jurisdiction 'only' as is clear from Article 16(1) read in light of Recital (17) of the preamble of the Proposed Return Directive.

The number of levels of jurisdictions sufficient to guarantee compliance with the right to an effective remedy was examined by the CJEU in two cases concerning, respectively, the 2005 Asylum Procedures Directive,[358] the 2013 Asylum Procedures Directive and the 2008 Return Directive.[359] In *Diouf*, the CJEU stressed that '[a]ll that matters is that there should be a remedy before a judicial body [...]. The principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.[360] The matter was further elaborated upon in the *X and Y* ruling, which also usefully summarises earlier case law, in relation to both the current version of the Asylum Procedures Directive (Article 46(5)) and the 2008 Return Directive (Article 13(1) read in conjunction with Article 12(1)). The CJEU noted that neither the wording of the relevant provisions, nor the scheme or purpose of the said directives[361] - even when read in the light of the Charter[362] - establish a requirement that 'there be two levels of jurisdiction'.[363] In this respect, the CJEU's case law mirrors the ECtHR's, also considering one level of jurisdiction to sufficiently ensure respect for the right to an effective remedy.[364]

In light of this line of cases, the proposal by the Commission to limit judicial review to a single level of jurisdiction in case of an appeal against a return decision that is based on a decision rejecting an application for international protection is, therefore, not in breach of EU fundamental rights law. As is discussed in Section 2.4.1, however, it is likely to prevent the Member States from applying higher levels of protection by virtue of their own constitutional requirements, raising serious doubts of compliance about the principle of proportionality (see above section 2.2.4). The latter requires the Union to 'leave as much scope for national decision as possible while achieving satisfactorily the objectives set', and to take into account the 'special circumstances applying in individual Member States'.[365] It is therefore suggested that the case law of the CJEU, requiring one level of judicial remedy without preventing the setting up of further levels, be codified in Article 16(1) instead.[366]

Articles 16 and 22: ordinary v special procedures and the right to an effective remedy

Similarly as the Asylum Procedures Directive both in its current and previous version, the Proposed Return Directive provides for different types of procedures. More particularly, in the Proposed Return Directive, a distinction is made between remedies under Article 16, on the one hand, and the border procedure under Article 22, on the other.

The case law of both the CJEU and the ECtHR admits that, in principle, this type of differentiation in terms of procedural safeguards can be legitimate. The CJEU noted, in *Diouf*, that the differences between the accelerated and ordinary procedures, in the context of the 2005 Asylum Procedures Directive, were connected to the nature of the procedure put in place. The CJEU recognised that '[t]he provisions at issue in the main proceedings are intended to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications

[358] Ibid; *Samba Diouf.*

[359] *X and Y* v *Staatssecretaris van Veiligheid en Justitie*.

[360] *Samba Diouf*, para. 69.

[361] *X and Y* v *Staatssecretaris van Veilighseid en Justitie*, paras 23 and 24.

[362] Ibid. para. 33.

[363] Ibid. para. 30.

[364] *A.M.* v *the Netherlands*.

[365] Better Regulation Toolbox, European Commission, p. 25.

[366] See also FRA, Opinion 1/2019, p. 10: FRA Opinion 8.

submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently'.[367]

Therefore, different sets of procedural safeguards may co-exist within a single directive. Such differences must nevertheless be objectively justified with reference to the aim pursued, and these procedural safeguards shall comply with fundamental rights. The reasoning of the ECtHR on the possibility of distinguishing between fast-track and ordinary procedures in the context of migration law is analogous: the possibility that such differences might be justified is admitted, but the compliance with fundamental rights of all procedures is required.[368]

In this context, **the existence of a set of standards applicable to the border procedure under Article 22 that derogates from the ordinary safeguards enshrined in Article 16 is not problematic *per se***. Nonetheless, the legislator must be able to objectively justify the substantially less favourable regime[369] applicable to third-country nationals who are mandatorily subject to the border procedure: such a procedure must still comply with fundamental rights standards and, more specifically, with the right to an effective remedy.

Article 16(4) and 22(5) and time limits

The reasonable nature of time limits to lodge claims and bring appeals constitutes an essential aspect of the right to an effective remedy, under both Article 47 of the Charter and Article 13 of the ECtHR. As noted already, time limits for ordinary and special procedures can be different, but they must not compromise the fundamental right to an effective remedy.

According to Article 16(4) of the Proposed Return Directive, 'Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective remedy [...] Such time limits shall not exceed five days to lodge an appeal against a return decision when such a decision is the consequence of a final decision rejecting an application for international protection' taken in accordance with the Asylum Procedures Directive.[370]

Under Article 22(3) of the Proposed Return Directive, '[r]eturn decisions [in the context of the border procedure] shall be given by means of a standard form'. Article 22(5) specifies that the period to lodge an appeal against return decisions shall not exceed 48 hours,[371] when the return decision is based on a final decision rejecting an application for international protection in the context of the border procedures enshrined in Article 43 of the Asylum Procedures Directive.[372]

In *Diouf*, the CJEU analysed time limits for bringing an action in the context of the 2005 Asylum Procedures Directive. The CJEU noted that 'the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action'.[373] More specifically, in the context

[367] *Samba Diouf,* para. 65.

[368] See judgment in App. No. 45223/05 - *Sultani v France*, European Court of Human Rights, September 2007, paras 64-65 and *I.M.* v *France*, para. 142.

[369] More specifically, in the context of the border procedure, return decisions shall be given by means of a standard form (Art. 22(3)) with less procedural safeguards than under article 15(1-2) of the Proposed Return Directive. The period to lodge an appeal against return decisions based on a final decision rejecting an application for international protection in the context of the border procedures enshrined in Article 43 of the Procedures Directive shall not exceed 48 hours. (Art. 22(5)) Furthermore, the enforcement of a return decision during the period for bringing the appeal at first instance and, where that appeal has been lodged within the period established, during the examination of the appeal, shall be automatically suspended where there is a risk of breach of the principle of non-refoulement subject but this is subject to two conditions set out in Article 22(6).

[370] The Proposed Return Directive refers to the Proposed Asylum Procedure Regulation, not yet adopted.

[371] Article22(5) of the Proposed Return Directive actually refers to provisions of the Proposed Asylum Procedure Regulation; as noted above, our analysis is however based on the current state of the law.

[372] The Proposed Return Directive refers to Article 41 of the Proposed Asylum Procedure Regulation, not yet adopted.

[373] *Samba Diouf*, para. 66.

of accelerated procedure for the examination of an application for international protection, a '15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved'.[374] The CJEU ultimately left the decision on the sufficiency of that time limit, in the specific circumstances of the case, to the national court.

The consideration of the sufficiency of time limits in the context of the right to an effective remedy also plays a key role in the ECtHR's case law. In *I.M. v. France*, the ECtHR found a violation of Article 13, combined with Article 3 of the ECHR, when examining a *time limit of five days*, non-extendable, to submit an asylum application in the context of an accelerated procedure. The Court noted 'the particularly short and compulsory nature of this time limit', also considering that the applicant was required to 'prepare, while retained, a complete and documented asylum application in French, subject to the same conditions than those applicable for applications lodged outside the context of retention and in accordance with the normal procedure.'[375] The Court also noted that the very limited nature of the linguistic assistance available to the applicant had an impact on the evaluation, as well as the circumstance that the applicant was retained in, rendering collection of evidence more difficult.[376]

In the same case, and with respect to the remedy granted to the applicant against the return decision, the ECtHR went on to note the 'extremely short character of the *48 hours time limit* imposed on the applicant to prepare his appeal'.[377] Aggravated by the fact that the applicant was in detention and deprived of linguistic and legal assistance, this had prevented his appeal from being substantiated, ultimately leading to its rejection.[378] As in other cases,[379] the ECtHR reached the conclusion of a violation of the right to an effective remedy based on a comprehensive assessment of the circumstances of the case. In fact, the sufficiency of a certain time limit for the purpose of effectiveness of a judicial remedy depends on a series of interrelated aspects, including the availability of linguistic and legal assistance, the structure of the remedy, the rules related to admissibility of claims or appeals, and the distribution of the evidentiary burden. However, in the ECtHR's reasoning on *I.M.*, the particularly short nature of the time limit was a central consideration.

The time limits of, respectively, five days and 48 hours established by the Proposed Return Directive have not been examined in their specific context by either the CJEU or the ECtHR. Nevertheless, in light of the CJEU's reasoning in *Diouf* and of the ECtHR's judgment in *I.M.*, **it appears unlikely that either of these two time limits would fulfil the requirement of being sufficient in practical terms to enable the applicant to prepare and bring an effective action.** [380] With respect to the 48 hours' time limit, the conclusion is reinforced by the same considerations detailed by the ECtHR in *I.M.* - namely linguistic difficulties due to the fact that the decisions are given in a standard form and do not need to be specifically translated into the migrant's language as well as other challenges related to access to legal assistance and collection of evidence while in detention.

In this context it should be added that, according to Article 16(5) of the Proposed Return Directive, third-country nationals 'shall have the possibility to obtain legal advice, representation and, where

[374] Ibid. para. 67.

[375] Authors' translation from the original text in French: '144…La Cour relève le caractère particulièrement bref et contraignant d'un tel délai, s'agissant pour le requérant de préparer, en rétention, une demande d'asile complète et documentée en langue française, soumise à des exigences identiques à celles prévues pour les demandes déposées hors rétention selon la procédure normale'.

[376] *I.M. v France,* paras 145-146.

[377] Ibid. para 150 '[…]Avant tout, la Cour met en exergue le caractère extrêmement bref du délai de quarante-huit heures imparti au requérant pour préparer son recours'.

[378] Ibid. para 151.

[379] See, for example, *Čonka* v *Belgium*; *M.S.S.* v *Greece and Belgium*.

[380] See also FRA Opinions 10 and 17.

necessary, linguistic assistance.' Article 16(6) specifies that 'Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions.' By virtue of Article 22(2), these provisions are also applicable in the context of the border procedure. However, the 2013 evaluation of the Return Directive noted a number of shortcomings concerning both legal and linguistic assistance in the practice of several Member States,[381] and related concerns were expressed by several interviewees.[382]

Articles 16(3) and 22(6) and suspensory effects of judicial review

Article 16(3)§1-2 of the Proposed Return Directive, read in conjunction with Recitals (18-19), establishes that the appeal against a return decision should have an automatic suspensory effect 'only' in cases where there is a risk of breach of the principle of non-refoulement. The judicial authorities remain able to temporarily suspend the enforcement of a return decision in individual cases for other reasons, either upon request of the third-country national concerned or acting *ex officio*, where deemed necessary.

The ECtHR's case law on the right to an effective remedy requires at least one level of judicial remedy with automatic suspensory effect in case of a risk of non-refoulement (see 2.3.1). The same requirement is expressed in the CJEU's case law.[383] The ECtHR's case law does not seem to require automatic suspensory effect in any other case, provided that the suspension of deportation is possible on a case-by-case basis, to ensure that fundamental rights other than non-refoulement are not breached.[384]

In light of the above, Article 16(3)§1 is consistent with EU and international fundamental rights law, that require automatic suspensory effect of the judicial remedy only in case of a risk of breach of non-refoulement.

Article 16(3)§3 affirms that suspensory effect shall not apply, unless new elements or findings have arisen or been presented, where (a) the reason for temporary suspension was assessed in the context of a procedure carried out in application of the Asylum Procedures Directive, and was subject to an effective judicial review in accordance with Article 46 of the Asylum Procedures Directive,[385] and (b) the return decision is the consequence of the decision on ending the legal stay that has been taken following such procedures.

With respect to Article 16(3)§3, there is a danger that the expression 'new elements or findings' will be transposed and interpreted in national law as only referring to elements that relate to the procedure introduced under the Qualification Directive, but which were not raised in the context of the said procedure, for instance because they were not in existence at the time. This interpretation would not allow for the automatic suspension of deportation if certain elements - such as the serious health condition of the third-country national and the absence of appropriate treatment in the country of origin - were raised and considered in the asylum procedure, but would not be sufficient to grant subsidiary protection to the applicant. As a remedy without automatic suspensory effect is never effective in case of an arguable non-

[381] Evaluation on the application of the Return Directive (2008/115/EC), Directorate-General for Migration and Home Affairs, European Commission, 2013, pp. 124-128.

[382] Interview with experts from FRA; interview with expert from ICJ, interview with expert from EUI.

[383] *X and Y* v *Staatssecretaris van Veiligheid en Justitie*, para. 29.

[384] *De Souza Ribeiro* v *France*, paras 82 - 83.

[385] Art.16(3) of the Proposed Return Directive actually refers to provisions of the Proposed Asylum Procedure Regulation; as noted above, our analysis is however based on the current state of the law.

refoulement claim,[386] such an interpretation of Article 16(3)§3 would conflict with the right to an effective remedy. Thus, it should be clearly excluded.

A specific regulation of the suspensory effect of judicial remedies is enshrined in Article 22 of the Proposed Return Directive, with reference to the border procedure. Under Article 22(6)§1, enforcement of a return decision during the period of bringing the appeal at first instance and, where that appeal has been lodged within the period established, during the examination of the appeal, shall be automatically suspended where there is a risk of breach of the principle of non-refoulement subject to further two conditions:[387] (a) new elements or findings after a decision rejecting the application taken by virtue of Article 43 of the Asylum Procedures Directive, which significantly modify the specific circumstances of the individual case; or (b) the decision rejecting an application for international protection taken by virtue of Article 43 of the Asylum Procedures Directive, and which was not subject to an effective judicial review in accordance with Article 46 of the Asylum Procedures Directive.[388] The incompatibility of the norm, as currently formulated, with the principle of non-refoulement has been discussed above (see section2.3.1). Suffice it here to repeat that, according to the ECtHR case law, **an effective remedy against an arguable claim to non-refoulement must always have automatic suspensory effect**.[389]

Article 22(6)§2 of the Proposed Return Directive provides for a prohibition of suspensory effect in all other cases, including in the case of further levels of appeals, unless a court or tribunal decides otherwise, taking the specific circumstances of the individual case into account. To the extent that it allows for a case-by-case assessment concerning the necessity of suspension, the provision does not seem to violate the right to an effective remedy.

Articles 16 and 22 and cumulative effects of the lower procedural safeguards

Within Article 16 of the Proposed Return Directive a set of rules on the limitations of suspensory effects (Art. 16(3)§3) and shorter time limits (Art. 16(4)§2) are specific to the situation of persons having placed a request under the Asylum Procedures Directive.

Taken jointly, the tight time limit for appeals and restricted possibility of temporary suspension increase the hindrance on the fundamental right to an effective judicial remedy of the third-country nationals concerned. **The combination of adjusted standards places third-country nationals who have applied for international protection in the context of the Asylum Procedures Directive in a significantly less favourable situation than irregular migrants not having done so.[390] If this approach is maintained, the legislature will have to justify these hindrances to the fundamental rights for this category of third-country nationals and to demonstrate their proportionality.**

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[386] *A.M.* v *the Netherlands*, para 62, reads: 'The Court also reiterates that, where a complaint concerns allegations that a person's expulsion would expose him or her to a real risk of suffering treatment contrary to Article 3 of the Convention, the effectiveness of the remedy for the purposes of Article 13 requires imperatively - in view of the importance the Court attaches to Article 3 and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised - that that complaint be subject to independent and rigorous scrutiny by a national authority and that this remedy has automatic suspensory effect.'

[387] The compatibility of these further two conditions with the duty to protect against non-refoulement are discussed in Section2.3.1.

[388] Art.22(6) of the Proposed Return Directive actually refers to provisions of the Proposed Asylum Procedure Regulation; as noted above, our analysis is however based on the current state of the law.

[389] *A.M.* v *the Netherlands*, para 62 and the case law cited therein.

[390] Interview with experts from FRA.

Key Findings on Social and Human Rights

Question 3: What are the expected social and human rights impacts of the Proposal on irregular migrants, including as compared to the current acquis?

Article 6: The long list of criteria contained in Article 6, read in conjunction with Article 18, coupled with the broad nature of some of those criteria, is likely to increase the risk of arbitrary detention decisions.

Article 7: Article 7(1)(d), which imposes on returning migrants the 'duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document', would constitute a clear breach of the right to asylum.

Article 8: Legal clarity and greater access to the relevant legal safeguards would be ensured if an explicit reference to the right to be heard, especially in relations to the rights enshrined in Article 5, was made in Article 8(6) or in a horizontally applicable provision.

Article 9: A provision such as Article 9(4), obliging Member States to refrain from automatically granting a voluntary period of departure in specific cases is likely to be in breach of the right to be heard, as interpreted by the CJEU. As it prevents migrants falling within its scope from making circumstances about their private and family life known to the authorities before they adopt the decision to deny a period of voluntary departure, the provision is also likely to lead to breaches of the third-country nationals' right to private and family life.

Article 13: The right to be heard will unquestionably also need to be guaranteed to migrants who are detected when they attempt exit the Schengen area, whenever the authorities intend to issue an entry ban in the absence of a return decision.

Article 16: With respect to Article 16(3)§3, there is a danger that the expression 'new elements or findings' will be transposed and interpreted in national law as only referring to elements that relate to the procedure introduced under the Qualification Directive, but which were not raised in the context of the said procedure, for instance because they were not in existence at the time. This interpretation would not allow for the automatic suspension of deportation if certain elements – such as the serious health condition of the third-country national and the absence of appropriate treatment in the country of origin – were raised and considered in the asylum procedure, but would not be sufficient to grant subsidiary protection to the applicant. Such an interpretation of Article 16(3)§3 would conflict with the principle of non-refoulement, as well as with the right to health if applied to seriously ill rejected applicants for international protection. Thus, it should be clearly excluded.

Article 16(3)§3 would lead to breaches of the right to private and family life, if interpreted as precluding suspension of deportation based on considerations related to private and family life that were not relevant in the context of the procedure for international protection under the Qualification Directive, but would still ensure protection from removal.

Article 18: The increase of grounds of detention enshrined in Article 18, also read in light of Article 6, are likely to increase the risk of arbitrary detention. The augmentation of the possibilities of detention of third-country nationals might lead to far reaching limitations of the rights to health care, private, and family life of detained returnees, in light of the practical difficulties that Member States have already encountered – under the 2008 Return Directive - in ensuring dignified detention conditions to third-country nationals in return procedures, especially for vulnerable groups.

Increasing the number of grounds for detention for adults, in some cases through rebuttable presumptions, as a consequence of a joint reading of Article 6(2) and 18(1), might result in an increased number of children being detained together with their parents. This increased possibilities of detention may affect the right to education. In fact, the quality and appropriateness of education for detained migrants, especially when provided within the detention facility, can in practice be difficult to ensure.

It would be appropriate to specify that the requirement that national law allows detention to be imposed for a maximum of at least three months does not prevent legislation excluding or strongly limiting the possibility of detaining children and other vulnerable people.

Article 22: As the prohibition of non-refoulement corresponds to an absolute right of the third-country national, suspension of enforcement of a return decision, pending an appeal against that decision, in case of risk of refoulement (Article 22(6)) cannot be made subject to further conditions. If there is a risk of refoulement, suspension of enforcement should occur systematically.

Detention in the context of the border procedure (Article 22(7)) is only optional, and can 'be maintained only as long as removal arrangements are in progress and executed with due diligence'. Thus, to detain an applicant in the context of this article, a new decision needs to be made on detention, taking the prospect of removal into account.

The considerable lack of clarity as to the procedural guarantees that will be available under the Proposed Asylum Procedure Regulation makes it difficult to foresee the potential effect of detention under Article 22, in term of fundamental rights compliance.

As detention for up to four months at the border is also intended to ensure returns are effected, these four months should be counted towards the absolute maximum of 18 months under Article 18 of the Proposed Return Directive.

Articles 16 and 22: Because of the difference in scope between international protection and non-refoulement, a thorough evaluation concerning the risk of non-refoulement must remain possible in the context of return procedures, even for applicants for whom international protection requests were rejected, to prevent violations of the principle of non-refoulement.

It appears unlikely that either of the time limits set for appeals of five days by Article 16(4)§2, or of 48 hours by Article 22(5), would fulfil the requirement of being sufficient in practical terms of enabling the applicant to benefit from an effective judicial remedy.

The combination of adjusted standards places third-country nationals who have applied for international protection under the Asylum Procedures Directive in a significantly less favourable situation than irregular migrants who have not done so. If this approach is maintained, the legislature will have to justify hindrances to the fundamental rights for this category of third-country nationals and to demonstrate the proportionality of those obstacles.

2.4. The consistency of the Proposed Return Directive with other selected EU migration and asylum legislation

The Proposed Return Directive is intended to 'ensure coherence and synergies with asylum procedures'.[391] As noted already, it is also part of the broader 2015 European Agenda on Migration. The Proposal asserts that it ensures consistency with existing provisions in the policy area[392], several of which, such as the 2017 Recommendation on Return and 2017 Return Handbook, have been mentioned already. The Proposal also seeks to ensure consistency with other Union policies at a legislative level.[393] This study focuses on the consistency with the Asylum Procedures Directive,[394] the Reception Conditions Directive,[395] the Qualification Directive,[396] and the European Border and Coast Guard Regulation[397] from a legal perspective.

2.4.1. The Proposed Return Directive in the current legislative and constitutional framework

Firstly, we will clarify the relationship between the Proposed Return Directive and the set of legislative instruments to which it belongs in the field of border checks, asylum and immigration. The Proposal forms part of a series of documents presented by the Commission as 'contributions to the Leaders' meeting in Salzburg on 19-20 September 2018.' Those included an amended proposal for a Regulation on the European Union Agency for Asylum[398] and a proposal for a new Regulation on the European Border and Coast Guard.[399] These proposals followed a first package of legislative initiatives which were submitted with the aim of substantially revising the EU migration management regulation in light of the 'migration crisis'. The first package included proposals for an asylum procedure regulation;[400] a qualification regulation;[401] a new reception conditions directive; a regulation establishing a Union Resettlement Framework; [402] and finally, a regulation on the use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals.[403]

Except for the proposal on the SIS, all of the other instruments have yet to be adopted. However, the Proposed Return Directive refers to several of these initiatives, rather than their predecessors

[391] Proposed Return Directive, Explanatory Memorandum, p. 2.

[392] As listed at p.3.

[393] As listed at p. 3.

[394] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection.

[395] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection.

[396] Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

[397] Regulation (EU) 2016/1624 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[398] COM(2018) 633.

[399] COM(2018) 631.

[400] COM(2016) 467.

[401] Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466, European Commission, July 2016 ('Proposed Qualification Regulation').

[402] Proposal for a regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468, European Commission, July 2016.

[403] Proposal for a regulation on the use of the Schengen Information System for the return of illegally staying third-country nationals, COM(2016) 881, European Commission, December 2016.

currently in force. References are made to the Proposed Asylum Procedure Regulation;[404] the Proposed EBCG Regulation;[405] and the Proposed Qualification Regulation.[406]

The European Council clarified the negotiating position of the Member States in the field as follows: the European Council 'calls for further efforts to conclude negotiations on the Return Directive, on the Asylum Agency and on all parts of the Common European Asylum System [...] taking into account the varying degree of progress on each of these files'[407]. As a consequence, the Proposed Return Directive belongs to a highly unstable legislative environment which makes it difficult to assess its relationship with other related proposals for new legislation**.** For the purpose of the present targeted study, the assessment is limited to the relationship between the Proposed Return Directive and the legislation currently in force.

Secondly, we observe that the directives currently in force in the field of asylum and migration more broadly are largely based on the logic of minimum harmonisation. As confirmed by the CJEU in relation to the Asylum Procedures Directive,[408] these instruments are primarily designed to establish a set of minimum common standards beyond which the Member States are free to adopt further rules, as long as they do not call into question the wording and effectiveness of the said legislation.

The Proposed Return Directive departs from that approach on a number of points, in relation to which it **identifies both minimum and maximum standards**. This is particularly clear for provisions about the organisation of judicial remedies. For instance, Article 16(1) of the Proposed Return Directive, read in light of Recital (17) of the Proposal, explains that the 'appeal against a return decision that is based on a decision rejecting an application for international protection which was already subject to an effective judicial remedy should take place before a single level of jurisdiction *only'*. The Proposed Return Directive also establishes several specific rules, such as the exclusion of temporary suspension of the effects of return decisions in specific circumstances (Article 16(3)§3), or a maximum period of 48 hours to lodge an appeal against return decisions in the context of the border procedure (Article 22(5)).

As well as creating a discrepancy in the nature of legislation when compared to other instruments in the field,[409] such specific standards, unless they are themselves deemed to constitute a breach of fundamental rights (as is discussed in Section 2.3.5), are likely to prevent Member States from applying higher standards of fundamental rights protection in breach of the principle of proportionality (as discussed in Section 2.2.4). As the CJEU noted in *Melloni*: 'allowing a Member State to avail itself of Article 53 of the Charter to [offer higher standards of fundamental rights protection where the possibility is not provided for under specialised EU secondary law], by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that [secondary law], may compromise the efficacy of EU secondary law.'[410] For instance, the current 2008 Return Directive does not preclude a Member State from making provisions for a second level of jurisdiction for appeals against return decisions.[411] This possibility would, however, disappear if Article 16(1) of the Proposal remained unchanged.

The regulatory approach underpinning the Proposed Return Directive would contrast with the Return Directive currently in force. The 2008 Return Directive only establishes minimum thresholds

[404] Recital (32) and Articles. 16 and 22 of the Proposed Return Directive.

[405] Recitals (38) and (40) and Article 14(2) of the Proposed Return Directive.

[406] Article 8(6) of the Proposed Return Directive.

[407] Point 6 of European Council Conclusions of 13 and 14 December 2018.

[408] *Samba Diouf*, paras 29-30; see also judgment in Case C-175/11 - *D. and A.*, European Court of Justice, January 2013, paras 57 et seq. See also *X and Y* v *Staatssecretaris van Veiligheid en Justitie*.

[409] As noted by FRA.

[410] Judgment in Case C-399/11 - *Melloni*, European Court of Justice, February 2013, para. 63.

[411] *X and Y* v *Staatssecretaris van Veiligheid en Justitie*, para. 26.

of protection and enables the Member States to develop higher thresholds of procedural protection. The legislature is therefore faced with a choice between two regulatory techniques, each of which has important implications. On the one hand, as proposed by the Commission, the legislature may set both minimum and maximum standards. Once such standards are spelled out in EU legislation, they offer clarity but are most likely to exclude higher standards of fundamental rights protection at a domestic level. Importantly, these legislative standards may be placed at the level deemed best suited by the legislature as long as they do not, *per se*, constitute a breach of EU fundamental rights (they could for instance ensure a high level of procedural protection). On the other hand, the legislature may set only minimum standards of protection. Such standards of protection can once again be placed at the level deemed best suited by the legislature, as long as they do not, *per se*, constitute a breach of EU fundamental rights. However, Member States would be free to offer protection beyond these standards, benefitting from national procedural autonomy, constrained by the principles of effectiveness and equivalence as well as with EU fundamental rights.

2.4.2. The Proposed Return Directive and the Procedures Directive

Objectives of the two instruments: differences and complementarities

The Proposed Return Directive is particularly closely related to the Asylum Procedures Directive, it explicitly purports to 'secure a better link between asylum and return procedures'.[412] The Asylum Procedures Directive[413] establishes common procedures for granting and withdrawing international protection pursuant to Directive 2011/95.[414] As already noted, the Proposed Asylum Procedure Regulation is currently under discussion,[415] we will therefore primarily refer to the Asylum Procedures Directive.[416]

The respective objectives of the Asylum Procedures and 2008 Return Directives have been identified by the CJEU as corresponding primarily to 'the further development of standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the European Union',[417] for the Asylum Procedures Directive; and to 'the establishment of an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned', for the 2008 Return Directive.[418] Some of the common objectives of the Asylum Procedures Directive and the Proposed Return Directive are to avoid secondary movement[419] and to allow for the adoption and entry into force of speedy decisions on the status of migrants.[420]

Relationship between the procedures enshrined in the two Directives

Although the Asylum Procedures Directive and the 2008 Return Directive perform complementary functions, they must be clearly distinguished. In *Arslan*, the CJEU stressed that the 2008 Return Directive does not apply to a third-country national who has applied for international protection within the meaning of the Asylum Procedures Directive, during the period from the making of an application to the adoption of the decision at first instance on that application or, as the case may

[412] Proposed Return Directive, Explanatory Memorandum, p. 2.

[413] That repealed and replaced Directive 2005/85 on minimum standards on procedures for granting and withdrawing refugee status.

[414] Art.1 of Asylum Procedures Directive.

[415] COM(2016) 467.

[416] COM(2016) 467.

[417] *X and Y* v *Staatssecretaris van Veiligheid en Justitie*, para. 24.

[418] Ibid.; *Gnandi*, para. 48 and the case law cited therein.

[419] Recital (13) of the Asylum Procedures Directive, as also highlighted in judgment in Case C-585/16 - *Alheto*, European Court of Justice, July 2018, para. 107 and in Recital (7) of the Proposed Return Directive.

[420] See for instance, Recitals (16), (20) and (34) of the Proposed Return Directive.

be, until the outcome of any action brought against that decision is known.[421] This approach to the relationship between the two Directives is based on the wording, scheme and purpose of the Asylum Procedures Directive[422] and the 2008 Return Directive.[423]

Interviewees[424] have suggested that issuing a return decision immediately after the adoption of a decision ending a period of legal stay, as requested by Article 8(6) of the Proposed Return Directive read in light of Recital (7),[425] would run against the spirit of Recital (10) if interpreted as applying to the first instance - as opposed to the last instance - of decisions denying international protection. This would be so, in the view of the interviewee, even if the effects of the return decision may be suspended until the end of the procedure on asylum, as suggested in Recital (7) of the Proposed Return Directive,[426] because the purpose of Recital (10) is to ensure that applicants of international protection requests are not regarded as 'illegally staying'. Nevertheless, in *Gnandi*, the CJEU made it clear that, while the 2008 Return Directive prevents an applicant for international protection from being regarded as 'staying illegally' until the adoption of a first-instance decision,[427] this does not preclude the stay from becoming illegal after a negative decision on international protection at first-instance.[428] Even in case of an appeal against such a negative decision at first-instance, accompanied by authorisation to remain pending resolution of the appeal, EU legislation does not prevent the stay from being regarded as 'illegal'.[429]

When considering the relationship between the Asylum Procedures Directives and the Proposed Return Directive, the EU legislature shall therefore pay attention to either maintaining a clear distinction between the two procedures,[430] or reconsider the overall relationship between the two instruments while ensuring compliance with the EU's duties under international and EU fundamental rights law. In particular, the CJEU has emphasised that 'the mere fact that an asylum seeker, at the time of the making of his application, is the subject of a return decision and is being detained on the basis of Article 15 of Directive 2008/115 does not allow it to be presumed, without an assessment on a case-by-case basis of all [of] the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention'.[431]

It shall be noted that, although the 2008 Return Directive is not applicable during the procedure in which an application for asylum is examined, the CJEU has stressed that that does not mean that the return procedure is thereby definitively terminated, as it may continue if the application for asylum is rejected.[432]

Detention under Article 15 of the 2008 Return Directive (now Article 18 of the Proposed Return Directive) is also possible, even after an application for asylum has been made.[433] In fact, the objective of the 2008 Return Directive, namely the effective return of illegally staying third-country nationals,

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[421] *Arslan*, para. 49.

[422] The ruling related to Directive 2005/85, now replaced by the Asylum Procedures Directive.

[423] More specifically on Recital (9) and Art. 2(1) of the 2008 Return Directive that would remain unchanged under the current Proposal (see Recital (10) and art. 2(1) of the Proposed Return Directive) (*Arslan*, paras 48 and 49).

[424] Interview with expert from ECRE, interview with expert from EUI.

[425] See also Proposed Return Directive, Explanatory Memorandum, p.7.

[426] See also Proposed Return Directive, Explanatory Memorandum, p.7.

[427] *Gnandi*, paras 40-41.

[428] *Gnandi*, para 44.

[429] *Gnandi*, para 46.

[430] As currently called for by the design of the two relevant Directives as well as Recital (9) and Art. 2(1) of the 2008 Return Directive.

[431] *Arslan*, para. 62.

[432] Ibid. para 60.

[433] Ibid. para 57.

would be undermined if detained returnees could automatically secure their release by making an application for asylum.[434] Furthermore, Article 31(8)(g) of the Asylum Procedures Directive expressly provides for the fact that the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his removal. This may also be taken into account in the procedure in which that application is examined, since that fact may justify an accelerated or other fast-tracked procedure.[435] The Procedures Directive thus ensures that Member States have the necessary instruments at their disposal to ensure the effectiveness of the return procedure, by avoiding its suspension beyond what is necessary to process the application properly.[436]

The duty to cooperate under each of the two Directives

Article 13 of the Asylum Procedures Directive creates an obligation to cooperate with a view to establishing identity and checking criteria in Article 4(2) of the Qualification Directive.[437] Member States may impose other obligations to cooperate *in so far as necessary*. Article 13(2) of the Asylum Procedures Directive also includes examples of what Member States may request. Although the duty to cooperate under Article 7 of the Proposed Return Directive to some extent mirrors that in Article 13 of the Asylum Procedures Directive,[438] the aim of the duty to cooperate in each of the instruments differ significantly.[439]

In the context of the Asylum Procedures Directive, the applicants' duty to cooperate is a natural corollary to his or her rights and personal interest in a successful application for international protection under the Qualification Directive.[440] There are no equivalent positive incentives in the context of the Proposed Return Directive. Instead, the lack of cooperation is listed as a criterion that shall be taken into account to assess the risk of absconding, possibly leading to detention.[441] Moreover, in relation to the Asylum Procedures Directives, the CJEU highlighted the importance of collaborating with organs having resources and specialised staff.[442] In its current form, the Proposed Return Directive does not establish requirements as to resources and staff of the authorities in charge of the return procedure. Nor is there a clear link between the duty to cooperate and the possible rights of applicants. Although the purpose of the Proposed Return Directive is unquestionably different from that of the Asylum Procedures Directive, the legislature may want to further clarify the

[434] Ibid. para 60 (see, by analogy, *Achughbabian*, para 30).

[435] *Arslan*, para 61.

[436] Ibid.

[437] Article 4 of the Qualification Directive on Assessment of facts and circumstances:

'1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection. […]'.

[438] Proposed Return Directive, Explanatory Memorandum, p. 7.

[439] Interview with expert from ECRE.

[440] See CJEU's reasoning in *Alheto,* para. 116, according to which 'the examination of the application for international protection by an administrative or quasi-judicial body with specific resources and specialised staff in this area is a vital stage of the common procedures established by that directive. Accordingly, the applicant's right recognised by Article 46(3) of that directive to obtain a full and ex nunc examination before a court or tribunal cannot diminish the obligation on the part of that applicant, which is governed by Articles 12 [guarantees for applicants'] and 13 ['obligations of the applicant'] of that directive, to cooperate with that body'.

[441] Art. 6(1)(j) of the Proposed Return Directive.

[442] See court reasoning in *Alheto*, para 116.

balance between fairness and effectiveness in relation to the duty to cooperate, with a view to ensuring greater consistency with the Procedures Directive.

A more specific, yet important tension between the legislative frameworks, may be found in Article 7(1)(d) of the Proposed Return Directive and Article 48 of the Asylum Procedures Directive, as further analysed above in section 2.3.1.

Modalities of assessment of the criteria for detention in each of the two Directives

In *Arslan*, the CJEU established general standards to assess the lawfulness of detention under its Article 15(1)(a) on the risk of absconding and (b) on avoidance or hampering of the preparation of return or removal (corresponding to Article 18(a) and (b) of the Proposal) of the 2008 Return Directive. The case concerned the decision to maintain in detention a third-country national that had applied for asylum. At the time of the judgment, the grounds for detention of Asylum seekers were not harmonised, and the only explicit limit to national autonomy in this respect was the prohibition of detention solely based on the presentation of an application for asylum.[443]

In the judgment, the CJEU relied on the 'conduct'[444] of the person who gave rise to concerns as well as the intention behind the application for asylum, to assess the lawfulness of the detention. The CJEU noted that detention in *Arslan*, under the 2008 Return Directive, is compatible with the Asylum Procedures Directive, as it does not result from making the application for asylum but from 'circumstances characterising the individual behaviour of the applicant before and during the making of that application'[445]. In other words, the decisive criteria used by the CJEU to assess the lawful detention under the 2008 Return Directive in the absence of further legislative guidance on this at the time is therefore the individual conduct or behavior, as well as the time-frame for assessing this individual behaviour.

Article 6 of the Proposed Return Directive requires 'an overall assessment of the specific circumstances of the individual case'[446]. It is unclear that this formula offers the same safeguards in terms of an individual assessment as that warranted by the CJEU's analysis in *Arslan*. It is recommended to use the same formula as that used by the CJEU to assess the lawfulness of detention in the context of the *Arslan* ruling, in particular if the extensive list of criteria that might indicate a risk of absconding remains unchanged, and in light of the risks of arbitrary detention discussed above (see section 2.3.2).

Detention under each of the Asylum Procedures and Proposed Return Directive

Detention of applicants for international protection and detention for removal fall under distinct legal regimes.[447] In principle, the legal rules established in case of detention covered by the Asylum Procedures Directive do not apply to the situation of detention under the Proposed Return Directive. This calls for two remarks.

Firstly, despite this principled distinction, the protection against refoulement is applicable both in the context of the Asylum Procedures Directive and Proposed Return Directive.[448] The question arises as to what extent several provisions of the Asylum Procedures Directive might be instrumental towards a better protection against refoulement (such as Article 8 of the Asylum Procedures Directive, on information and counselling in detention facilities and at border crossing-points; as well as Article 29 of the Asylum Procedures Directive, on the role of the UNCHR), and which should remain

[443] Article 18(1) of Directive 2005/85 on minimum standards on procedures for granting and withdrawing refugee status.

[444] See also a reference to the 'conduct' of the third-country national for the purpose of deciding on extension of the period of detention under Article 15(6) of the 2008 Return Directive in *Mahdi*, para 82.

[445] *Arslan*, para. 58.

[446] Art.6(2)§1 of the Proposed Return Directive.

[447] *Arslan,* para. 52.

[448] See for instance arts. 16(3) and 22(6) of the Proposed Return Directive.

applicable in the context of the detention by virtue of the Proposed Return Directive. The legislature is invited to clarify the relationship between the procedural safeguards enshrined in the Procedures Directive and the processes provided for in the Proposed Return Directive.

Secondly, and importantly, the periods of detention in the context of the Asylum Procedures Directive and Proposed Return Directive may be cumulated. The compatibility of this cumulative effect with the fundamental right to liberty is discussed in section 2.3.2.

Relationship between the border procedures enshrined in the two Directives

The Proposed Return Directive is intended to increase synergies between asylum and return procedures, especially in the context of border procedures. More specifically, the border procedure provided for in the Proposed Return Directive is expected to ensure the return of illegally staying third-country nationals, whose application for international protection under the asylum border procedure enshrined in Article 43 of the Asylum Procedures Directive has been rejected, in order to ensure direct complementarity between the asylum and return border procedures and prevent gaps between the procedures.[449]

Article 22(7) of the Proposed Return Directive ensures that a third-country national who was already detained during the examination of his or her application for international protection as part of the border procedure provided for in the Asylum Procedures Directive may be kept in detention in order to prepare for the return and/or carry out the removal process, once his or her application has been rejected. The idea is to thereby avoid that a third-country national is automatically released from detention despite having been denied a right to stay.[450]

Indeed, in accordance with Article 22(7) of the Proposed Return Directive, Member States may keep in detention a third-country national who has been detained in accordance with Article 8(3) of the Reception Conditions Directive[451], in the context of a procedure carried out by virtue of Article 43 of the Asylum Procedures Directive[452], and who is subject to return procedures pursuant to the border procedure provided for in the Proposed Return Directive. While Article 22(7) of the Proposed Return Directive is thereby intended to enhance the consistency between the border procedures of the Asylum Procedures Directive and of the Proposed Return Directive, two uncertainties about that relationship arise.

Firstly, Article 43(1) of the Asylum Procedures Directive only permits Member States to use border procedures in the context of that Directive. This ought to be contrasted with the mandatory tone of Article 22 of the Proposed Return Directive, according to which Member States 'shall' establish border procedures concerned with return and immediately adjust to border procedures established in the context of the Asylum Procedures Directive.[453]

Secondly, the Proposed Return Directive refers specifically to Article 41 of the Proposed Asylum Procedure Regulation, the content of which appears to be far from settled, and it is completely new. It is therefore difficult to predict how it will be transposed in national law and to assess any reasonable effect it might have in terms of consistency between return and asylum.[454]

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[449] Recital (32) of the Proposed Return Directive.

[450] Recital (36) of the Proposed Return Directive; Proposed Return Directive, Explanatory Memorandum, p. 8.

[451] Reference is made to the proposed recast Reception Conditions Directive; as noted earlier, the present study is however based on an analysis of EU law as it currently stands.

[452] Reference is made to the Proposed Asylum Procedure Regulation; as noted earlier, the present study is however based on an analysis of EU law as it currently stands.

[453] Interview with expert from ECRE.

[454] It may be noted that the provisions on border procedures in art. 22 of the Proposed Return Directive do not include the specific safeguards provisions on unaccompanied minors that are currently envisaged in art. 41(5) of the Proposed

Procedural safeguards in the Procedures Directive: a summary of key provisions and comparison

As discussed above, the Proposed Return Directive goes much further into detail than the 2008 Return Directive in harmonising remedies for certain categories of returnees, setting not only minimum (as done by the 2008 Return Directive) but also maximum guarantees. However, no similar development in terms of the detailed nature of the relevant provisions can be identified with respect to the procedural safeguards that will have to be put in place to ensure the quality of decision-making in the new regulatory context. In this respect, the comparison with the Asylum Procedures Directive is instructive.

Chapter II of the Asylum Procedures Directive sets out a long list of basic principles and guarantees intended to support the quality of the decision-making process.[455] Furthermore, most of these principles and guarantees are applicable also in the context of border procedures provided for in the Asylum Procedures Directive, which is particularly closely related to Article 22 of the Proposed Return Directive.[456]

Article 46 of the Asylum Procedures Directive contains a long list of basic principles and safeguards to ensure that the right to an effective remedy is respected in the context of appeals against decisions denying international protection.[457] Not only are these guarantees applicable to the border procedure, but they are even subject to adjustments to enhance protection for the right to an effective remedy in the context of such a procedure. For instance, Member States may provide for *ex officio* review of decisions taken in the context of border procedures (Art. 46(4)§2) and must provide an additional layer of safeguards, should they want to obtain a decision, in accordance with Article 46(6), on the right to remain in the territory of an applicant subject to the border procedure (Art. 46(7)).

The long list above contrasts with the more limited procedural safeguards on the quality of the decision-making process, empowerment of third-country nationals, and involvement of third-parties in the Proposed Return Directive. The Proposed Return Directive does include rules on detention conditions, including contact with legal representatives, family members, and competent consular authorities; vulnerable persons; access to detention facilities for competent organisations; information on rules applied in the detention facility, rights and obligations, as well as entitlement to contact third party organisations (Article 19). It also refers to the obligation of Member States to guarantee the necessary legal assistance, representation, and linguistic assistance (Article 16(5) and

Asylum Procedure Regulation. An analysis of the impact of the Proposed Return Directive on unaccompanied minors is performed in section 2.3.2.

[455] These guarantees concern (i) access to the procedures (Art. 6); (ii) applications made on behalf of dependant or minors (Art. 7); (iii) information and counselling in detention facilities and at border crossing points (Art. 8); (iv) right to remain in the Member State pending the examination of the application (Art. 9); (v) requirements for the examination of the applications, including on the quality of the examination (Art. 10); (vi) requirements as to the duty to give reasons and information on the possibility to challenge a negative decision (Art. 11); (vi) guarantees for applicants in the context of the procedures at first instance, including timely and understandable information; services of an interpreter; opportunity to communicate with the UNHCR (Art.12), (vii) personal interview (Arts. 14-18); (viii) legal and procedural information; legal assistance and representation (Arts. 19-23); (ix) guarantees for unaccompanied minors and other vulnerable applicants (Arts. 24-25); (x) detention (Art. 26); (xi) procedures in the event of withdrawal or abandonment of the application (Arts. 27-28), (xii) role of the UNHCR (Art. 29);(xiii) collection of information on individual cases (Art. 30).

[456] Article 43(1) of the Asylum Procedures Directive.

[457] The main guarantees to this end are the following: a full and ex nunc examination of both facts and points of law, at least before a court or tribunal of first instance (art. 46(3)); reasonable time limits to exercise the right to an effective remedy (art.46(4)); possibility for the applicants to remain in the territory until the time limit to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy; the power, by a court or tribunal, to rule whether or not the applicant may remain on the territory of the Member State (art. 46(6)).

(6)).[458] Yet, the procedural safeguards and provisions empowering the third-country national to exercise his or her rights have not been modified to increase the procedural safeguards of third-country nationals (other than the notable requirement to have a remedy before a judicial authority[459]), although the proposed changes overall significantly increase the possibilities of detention of third-country nationals, including in the context of newly created border procedures.

By way of example, the Proposed Return Directive does not include a provision equivalent to Article 4 of the Asylum Procedures Directive, containing requirements on the resources, training and knowledge of personnel of the responsible authorities. This is so although the Commission has made several references to the importance of trained and competent staff in the field of return.[460]

In the context of the Proposed Return Directives, procedural safeguards on the quality of the decision-making process, the empowerment of third-country national to exercise their rights and the involvement of third-parties are therefore primarily left to the procedural autonomy of the Member States. The latter ought to exercise that autonomy in compliance with the principles of effectiveness and equivalence, as well as with fundamental rights.[461] This contrasts with the remarkably detailed nature of the provision limiting procedural safeguards for certain categories of returnees, and might prompt further reflection.

2.4.3. The Proposed Return Directive and the Qualification Directive

The purpose of the Qualification Directive is to lay down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted. Recital (13) of the Qualification Directive specifies that '[the approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks'. The objective to prevent secondary movement is common to the Proposed Return Directive. [462]

Similarly to the current Asylum Procedures Directive, the current Qualification Directive is also not directly referred to in the Proposed Return Directive. Article 8(6) of the Proposal, establishing that 'Member States shall issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status', mentions the Proposed Qualification Regulation (not yet adopted), rather than the Directive currently in force.

As mentioned above (see sections 2.3.1 and 2.3.5), the denial of international protection under the Qualification Directive has important consequences in the context of the 2008 Return Directive, as it determines a strong limitation of the procedural safeguards during return procedures, even when an arguable claim of non-refoulement is made. We can briefly recall that, under Article 16(3)§3, the rejection of an international protection claim determines a presumption against suspension of enforcement of the return decision. The same consequence is attached to the rejection of an

[458] It should be noted that Article 16(6) has not been updated and still refers to the 2005 Asylum Procedures Directive.

[459] Article 16(1) of the Proposed Return Directive, this is discussed above in section 2.3.5.This requirement was welcomed by a number of interviewees (interview with expert from the ICJ, interview with expert from the EUI).

[460] For instance: Commission recommendation (EU) 2017/432, Recital (10) as well as points 2(c) and (4); Return Handbook, Annex to Commission Recommendation (EU) 2017/2338, pp. 78-79.

[461] Judgment in Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG*, European Court of Justice, December 1976; judgment in Case 45/76 - *Comet BV*, European Court of Justice, December 1976; judgment in Case C-617/10 - *Åkerberg Fransson*, European Court of Justice, February 2013 . See by analogy: *X and Y* v *Staatssecretaris van Veiligheid en Justitie*, paras 27 and 34.

[462] Proposed Return Directive, Explanatory Memorandum, p. 7.

application for international protection in the context of the border procedure (Article 22(6)§1). Under Article 16(4)§2 of the Proposal, the time limit for an appeal is capped at a maximum of five days against return decisions that are 'the consequence of a final decision rejecting an application for international protection'. Finally, Article 9(4)(b) of the Proposal prohibits the granting of a period for voluntary departure when 'an application for legal stay [including as beneficiary of international protection] has been dismissed as manifestly unfounded or fraudulent'.

In light of this overview, two observations can be made on the consistency of the Proposal with the Qualification Directive.

Firstly, the limitation of the procedural safeguards, even in cases where there is an arguable claim of non-refoulement, seems to be based on the consideration that such non-refoulement claims must have been thoroughly examined in the context of the asylum procedure. However, as mentioned several times above (see, for example, section2.3.5), **Article 15 of the Qualification Directive, indicating the grounds for the granting of subsidiary protection, does not encompass all of the circumstances that might give rise to a non-refoulement claim in accordance with the ECtHR's case law. This raises concerns of fundamental rights compliance, as discussed earlier in the study, and constitutes an element of inconsistency in the legislative framework on migration and asylum.**

Secondly, as suggested by numerous provisions of the Qualification Directive[463] and confirmed by the case law of both the CJEU[464] and the ECtHR[465], international protection has to be granted or refused based on the circumstances as they present themselves at the moment the decision is taken. In light of this, applicants of international protection with a strong claim for either subsidiary protection or asylum at the start of the procedure might see their application rejected as 'manifestly unfounded' at the end of the procedure, because, for example, of a significant change of circumstances in their home country.[466] In this context, the reason why they would be prohibited from returning voluntarily, rather than being allowed to do so if appropriate in light of all the circumstances, is unclear and seems to create an inconsistency between the Proposed Return Directive and the Qualification Directive. If the returnee is penalised for submitting a manifestly unfounded application, then the relevant finding should always be linked to his or her conduct, rather than to external circumstances.

2.4.4. The Proposed Return Directive and the Reception Conditions Directive

The purpose of the Reception Conditions Directive is to lay down standards for the reception of applicants for international protection. It is, therefore, immediately clear that the group of migrants to which this directive applies is different than that to which the Proposed Return Directive applies, namely illegally staying third-country nationals. As mentioned above, applicants for international protection under the Qualification Directive cannot be considered as illegally staying until the rejection of their application (see section 2.4.2).

Like the Proposed Return Directive, the Reception Conditions Directive also allows for detention in certain instances. By reason of the fact that both detention regimes are of an administrative nature and subject to the constraints imposed by the fundamental right to liberty (see above section 2.3.2), they share certain common features, including the preference to be accorded to less coercive

[463] Articles 5, 11 and 16 of the Qualification Directive.

[464] Judgment in Case C-348/16 - *Sacko,* European Court of Justice, July 2017, paras 42-49.

[465] *Chahal v The UK,* para. 86; judgment in App. No. 43611/11 - *F.G. v Sweden*, European Court of Human Rights, March 2016, para 115.

[466] Interview with experts from FRA.

measures,[467] the obligation on the authority to carry out the relevant administrative procedure with due diligence,[468] and the requirement that judicial review of detention be 'speedy'.[469]

Nonetheless, the grounds for detention under the two directives are different, as they correspond to the specific objectives of the respective instruments.

More particularly, Article 18 of the Proposed Return Directive indicates three *non-exhaustive* grounds upon which detention for the purpose of removal is justified, namely (a) risk of absconding; (b) conduct of the third-country national, that 'avoids or hampers the preparation of return or the removal process', or (c) risk to public policy, public security or national security.

On the other hand, Article 8(3) of the Reception Conditions Directive indicates six *exhaustive* grounds that can be relied upon to justify the detention of international protection applicants, specifying that:

> 'An applicant may be detained only:
>
> (a) in order to determine or verify his or her identity or nationality;
>
> (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
>
> (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
>
> (d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
>
> (e) when protection of national security or public order so requires;
>
> (f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (10).'

Two preliminary observations can be made when comparing the two lists.

Firstly, grounds (c) of the Proposed Return Directive and (e) of the Reception Conditions Directive are analogous.[470] As mentioned above, doubts exist about the suitability of these grounds in pursuing return-related objectives (see section 2.2.4). Nonetheless, should Article 18(1)(c) of the Proposed Return Directive ground be adopted, it should be read consistently with Article 8(3)(e) of

[467] Recital (27) and art. 18(1) of the Proposed Return Directive; Art. 8(2) of the Reception Conditions Directive.

[468] Recital (16) and Art. 9 of the Reception Conditions Directive; arts. 18(1) and 22(7) and Recital (36) of the Proposed Return Directive.

[469] Article 18(2) of the Proposed Return Directive and Article 9(3) of the Reception Conditions Directive. Analogous points are made, with reference to the 2008 Return Directive, in Valeria Ilareva, 'Detention of asylum seekers: interaction between the Return and Reception Conditions Directives in Bulgaria', *EU Immigration and Asylum Law and Policy*,25 November 2015.

[470] Proposed Return Directive, Explanatory Memorandum, p. 8.

the Reception Conditions Directive, which has already been narrowly interpreted by the CJEU in *J.N,*[471] and more generally with the strict interpretation of the concept of public policy in the context of immigration legislation (see, for example, *ZH and O*).[472]

Secondly, ground (d) under the Reception Conditions Directive explicitly creates a bridge between its detention regime and that of the Proposed Return Directive, allowing for migrants detained in the context of return proceedings to be maintained in detention notwithstanding the lodging of an application for international protection. This, however, is only possible when the condition established in Article 8(3)(d) of the Reception Conditions Directive itself is met, namely that: 'the Member State concerned can substantiate on the basis of objective criteria [...] that there are reasonable grounds to believe that [the person] is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision'. As confirmed by the CJEU in *Arslan,* this implies that, to keep a returnee in detention after he or she has applied for international protection, a new decision on the necessity of detention must be taken. Such a decision will have to result from 'an assessment on a case-by-case basis of all the relevant circumstances'[473] and determine that the condition established by Article 8(3)(d) of the Reception Conditions Directive is fulfilled.

Such a conclusion is consistent with the different purposes of detaining returnees and international protection applicants, respectively. It also implies that, once the grounds of detention have changed and the person falls under the scope of the Reception Conditions Directive, the relevant guarantees in terms of, for example, a right to health[474] and the protection of vulnerable groups,[475] which are much more detailed than the corresponding provisions of the Proposed Return Directive,[476] become applicable.

As confirmed by the CJEU in *Kadzoev*, a new decision about detention would also be necessary if a rejected asylum applicant, who was previously in detention in accordance with the Reception Conditions Directive, were to be further detained for the purpose of return under the Proposed Return Directive. The need for a new determination, with specific reference to the purposes of the 2008 Return Directive, acquires all of its importance for the safeguards of the detainee's rights, when considering that periods of detention under the Reception Conditions Directive are not counted towards the maximum period of detention of 18 months allowed by the 2008 Return Directive for the purpose of removal.[477]

The above considerations are particularly relevant **in the context of the Proposed Return Directive, whose Article 8(6), read in light of Recital (7), might be interpreted as allowing the issuance of a return decision immediately after the adoption of a first instance decision denying international protection** (see above, section 2.4.2). **In this context, until at least the outcome of an appeal against the decision rejecting the application of international protection, the detention regime applicable would be that of the Reception Conditions Directive.[478]** Thus, detention could only be based on one of the six grounds listed therein and it would need to comply with all the relevant safeguards. Particular attention should be paid in this context to the requirement for national authorities to decide on the necessity of detention anew

[471] *J. N.* v *Staatssecretaris van Veiligheid en Justitie*, paras 57 - 64.

[472] *Zh. and O.,* para. 48.

[473] *Arslan,* paras. 62-63.

[474] Articles. 17 and 19 of the Reception Conditions Directive.

[475] Article 11 and Articles. 21 - 25 of the Reception Conditions Directive.

[476] See Article 17(1)(b) and Article 19(3) of the Proposed Return Directive.

[477] *Kadzoev.*

[478] *Gnandi*, para 63.

whenever the status of the migrant changes from returnee to international protection applicant, or vice-versa.

2.4.5. The Proposed Return Directive and the European Border and Coast Guard Regulation

As mentioned in relation to the Procedures and Qualification Directives, the European Border and Coast Guard Regulation currently in force is not directly referred to in the Proposal. Recitals 38 and 40 and Article 40 of the Proposal refer to the proposed European Border and Coast Guard Regulation (not yet adopted).

The current EBCG Regulation[479] attributes to EBCG an essential coordination and support role in the implementation of the EU return policy. In particular, under Article 8 of the EBCG Regulation, EBCG is competent to, inter alia, '(l) assist Member States in circumstances requiring increased technical and operational assistance to implement the obligation to return returnees, including through the *coordination or organisation of return operations*; … (n) set up pools of forced-return monitors, forced-return escorts and return specialists; (o) set up and deploy European return intervention teams during return interventions' (*emphasis added*).

For the purpose of ensuring the effectiveness of the EU return policy, the Commission has consistently stressed the importance of coordination, through communication between Member States and with the help of EBCG (see above, section 2.1.4). In this context, the exchange of data is of particular relevance for the prevention and detection of secondary movement, collection of aggregated data, identification and mutual recognition of entry bans and return decisions, as well as the organisation of joint return operations. EBCG has already taken initiative to improve data exchanges[480] in the context of the current IRMA, which was developed by the Commission and rolled out in 2017.[481] However, not all Member States currently have an integrated return management system at the national level and, among those who do, not all have ensured the compatibility of such systems with other EU databases.[482]

Article 14 of the Proposal requires each Member State to 'set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive, in particular as regards the management of individual cases as well as of any return-related procedure.' It further specifies that '[t]he national system shall be set up in a way which ensures technical compatibility allowing for communication with the central system established in accordance with' the Proposed EBCG Regulation.

The provision does not impose the creation of a unified return management system, which would have been very difficult to set up in practice, due to the heterogeneous nature of the national return management systems, and the high number and diversified character of the authorities involved.[483]

To the extent that Article 14 intends to allow the IRMA to be managed at the central level by EBCG, ensuring the compatibility of national return management systems with it,[484] and thus the immediate exchange of certain categories of data - including statistics or information on returnees ready to be deported to specific countries - this provision seems likely to create synergies with the EBCG Regulation. In fact, it allows EBCG to be more proactive in organising

[479] And even more so the Proposed EBCG Regulation.

[480] Interview with expert from the EBCG.

[481] The IRMA was first provided in the 2015 Action Plan on return, see pp. 9 and 10 of COM(2015) 453.

[482] Interview with expert from the Commission; interview with expert from the EBCG.

[483] Interview with expert from the EBCG.

[484] Interview with the first expert from the Commission.

return operations, as the information on persons to be returned will be more complete and more readily available, and to carry out more tailored interventions based on accurate national data.[485]

However, Member States have noticed that the responsibility to ensure the interoperability of the IRMA and the national return management systems is allocated differently in Article 14, that imposes the relevant administrative burden on the Member States, and in Article 50 of the Proposed EBCG Regulation, that imposes the relevant administrative burden on Frontex.[486] Some have suggested that regulating the return management system only within the context of the Proposed EBCG Regulation would be more appropriate and avoid contradictions.[487]

The potential effect of the interoperability of national and central systems on data protection will depend, *inter alia*, on the type of data exchanged on those platforms. This is, however, outside the scope of the present study (the European Parliament requested the opinion of the European Data Protection Supervisor on the matter).

Key Findings on Consistency with related EU Legislation

Question 4: Are the proposed changes consistent with EU asylum law and policy and other related EU legislation?

Article 8: If Article 8(6) of the Proposed Return Directive is to be interpreted as allowing the issuance of a return decision immediately after the adoption of a first instance decision denying international protection, particular attention has to be paid to the applicable detention regime, if any. In the case of applicants for international protection against whom a return decision has already been issued and who then appeal against the decision rejecting the international protection application, the detention regime applicable would be that of the Reception Conditions Directive. Therefore detention could only be based on one of the six grounds listed therein and it would need to comply with all the relevant safeguards.

Article 14: The creation of national return monitoring systems which are compatible with a central system managed by the EBCG, is likely to increase the alignment of standards with the EBCG Regulation, as it enables better compliance by the EBCG with its tasks under the latter instrument.

Article 16 and 22: Procedural standards acting both as minimum and maximum thresholds of protection of related fundamental rights significantly depart from the regulatory approach underpinning the 2008 Return Directive. The latter only sets minimum thresholds of protection, always enabling Member States to develop higher standards.

The limitation of the procedural safeguards for third-country nationals having claimed international protection under EU asylum law - even for persons who may have an arguable claim of non-refoulement - seems to be based on the consideration that such non-refoulement claims must have undergone thorough examination in the context of the asylum procedure. However, Article 15 of the Qualification Directive, indicating the grounds for the granting of subsidiary protection, does not encompass all of the circumstances that might give rise to non-refoulement. This constitutes an element of inconsistency in the EU migration and asylum legal framework.

Article 22: As Article 22 refers specifically to Article 41 of the Proposed Asylum Procedure Regulation, the content of which is completely new and appears to be far from settled, analysing the effects that it might have in terms of consistency between the legal frameworks for both return and asylum is extremely difficult.

[485] Interview with expert from the EBCG.

[486] Interviews with experts from national authorities.

[487] Interview with expert from a national authority.

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Annex 2

Targeted impact assessment study on the proposed Return Directive (recast) – economic aspects

Economic Aspects

In September 2018, the European Commission presented a proposal for a recast of the 'Return Directive'. This study seeks to shed light on the economic impacts that may result from the key proposed changes. As a starting point, the study investigates the cost of the status quo for the EU and a representative selection of four Member States (Belgium, Czech Republic, Germany and Italy). It then considers the additional costs implied for the EU and Member States, and the potential benefits that may accrue, should the Proposed Return Directive (Recast) enter into force. The benefits are understood in terms of effectiveness – defined here as the return of irregular migrants – and efficiency – defined here as reducing the length of the return procedure and identifying the type of return (voluntary or forced).

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in January 2019.

PE 631.727
ISBN: 978-92-846-3607-5
DOI:10.2861/187601
CAT: QA-02-19-058-EN-N

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List of Abbreviations and Acronyms

AIDA	Asylum Information Database
AMIF	Asylum, Migration and Integration Fund
BAMF	German Federal Office for Migration and Refugees
CGRS	Office of the Commissioner General for Refugees and Stateless Persons in Belgium
CPR	Centri di Permanenza per i Rimpatri in Italy
DRC	Danish Refugee Council
EASO	European Asylum Support Office
ECA	European Court of Auditors
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EMN	European Migration Network
EPRS	European Parliamentary Research Service
EU	European Union
EUTF	EU Emergency Trust Fund
Frontex	European Border and Coast Guard Agency
IOM	UN International Organization for Migration
IRMA	Irregular Migration Management Application
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
NGO	Non-governmental organisation
PICUM	Platform for International Cooperation on Uncdocumented Migrants
SIS	Schengen Information System
TCN	Third country national
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)

Executive summary

In September 2018, the European Commission proposed a 'recast' of the Return Directive to increase the rate of return of irregular migrants from the EU[1]. Only an estimated 36.6% of individuals who received a return order actually left the EU in 2017[2]. Despite the potential scale of its impact on the EU and its Member States, the Commission's proposal was not accompanied by an impact assessment. The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested subsequently a targeted substitute impact assessment to assess the expected main positive and negative impacts of the key provisions of the Commission proposal, with a focus on the social, human rights and financial impacts, as compared to the current situation (status quo). This impact assessment study focuses on the economic aspects and complements a separately commissioned study on the legal aspects. The targeted nature of the study translates into a focus on the main changes that the Proposal introduces: Articles 6, 7, 9, 13, 14, 16, 18 and 22. The investigation was guided by the following questions:

- What are the expected costs and benefits of the changes that the Commission proposal would bring, taking into account the proposed rules on detention and border procedures?
- How will the proposed measures affect the numbers of returns of third country nationals (TCNs) who stay irregularly in the EU?

The assessment included an original, focused quantitative analysis for four countries (BE, CZ, DE and IT), three of which experienced a high or very high level of return orders in the status quo (BE, DE and IT).

The main costs and benefits of the proposal are summarised in the table below. Many of the revisions imply substantial new costs for Member States, as well as additional costs for EU bodies. In terms of the impacts, the likelihood of pre-removal detention would increase due to the wide range of criteria that can put a person at risk of being detained (Articles 6 and 7). New detention facilities would need to be constructed given existing overcrowded conditions leading to higher costs. For example, in the case of Italy, the government budgeted EUR 13 million to build new facilities and an additional EUR 35.5 million to manage them during the 2017-2019 period[3]. In terms of the benefits, financial savings may be generated from the estimated reduction in reception costs due to shortened time limit for appeal. These costs however, may be offset to a large extent by costs connected to the failure to respect the right to appeal. These costs may stem from the lower quality of appeal applications, which may be expected from the reduction in the time limit and an increased number of claims before courts regarding violations of procedural rights.

[1] European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals (recast), 2018/0329.

[2] *Ibid.*

[3] Global Detention Project, Country Report on Italy.

Table 1: Summary of economic assessment & direct costs

		Articles	BE	CZ	DE	IT
Costs	Operating and staffing changes to return procedures		All eight articles imply new costs for Member States and the EU, while four articles imply substantial costs for Member States (see Chapter 3).			
	Pre-removal detention	6	Substantial increase (***) to build new detention facilities and manage them (e.g. facility staff, food for detainees).			
	Forced returns	6, 7, 18, 22	Expected to increase due to higher utilisation of detention.			
	Voluntary returns	9	Voluntary returns are expected to decline due to the introduction of the border procedure and the reduction in the time limit for voluntary departure, which is below current time limits in all countries.			
	Costs connected to the failure to respect the right to appeal	16	The cost per handling an appeal is expected to increase due to the lower expected quality of appeal application files. Other costs may include compensation costs awarded by courts for failure to respect right to appeal.			
Benefits	Estimated reduction in reception need for appeals	16	Moderate decrease (**)	Minor decrease (*)	Moderate decrease (**)	Minor decrease (*)
	Irregular migrants leaving the EU...	Increased opportunities for returns, in particular forced returns. However, the extent to which they can be implemented depends on the existence and/or use of readmission agreements and arrangements.				
	... subsequent lower risk of them falling into the shadow economy	No robust evidence linking irregular migrants and the shadow economy (which is also driven by EU nationals). The extent to which the shadow economy would reduce is uncertain.				

Note: * <EUR 10 million, ** EUR 10-100 million, *** >EUR 100 million, **** >EUR 500 million. These findings assume that Member States comply with the proposed changes to the Directive.

Some key findings from the assessment:

The proposal would generate substantial costs for Member States and the EU. Four of the articles would require substantial new investments, primarily in terms of staffing but also in terms of infrastructure (e.g. judicial bodies to hear asylum appeals and building new detention facilities). The additional costs for the EU would chiefly stem from monitoring and coordination across agencies.

The proposal would likely increase the utilisation of detention, which may not be lead to more effective returns. The evidence suggests that detention periods of longer than one month do not increase the return of irregular migrants. Rather, it appears that readmission agreements are critical, as demonstrated in the case of the UK, which has a relatively high return rate.

The revisions would increase opportunities for forced return while decreasing the likelihood of voluntary return. The potential impact on the rate of return cannot be forecast. The shift in

focus towards forced return runs contrary to practitioners' experiences with regards to effective, sustainable returns. With respect to Article 22, research on hotspots has found a low effective rate of return.

Reducing the time limit for launching an appeal could possibly reduce the quantity and quality of appeal applications. However, the effects on the overall appeal rates are difficult to forecast, and reducing the time limit might imply that lawyers would not have the time to properly assess the case, leading to low-quality appeals. Furthermore, it would not address an underlying driver of appeals which is the lack of harmonisation in qualification for asylum decisions. As shown in previous studies, the recognition rate varies for asylum seekers of the same nationalities who present their applications in different Member States. The quality of return and asylum decisions has also been questioned in a number of Member States, and may be a driver of the rate of appeals. Reducing the time limit for appeals would not address this root problem nor would it discriminate between persons with a valid claim for appeal and those without any such claim.

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1. Introduction

1.1. Background

Following the European Council meeting on 28 June 2018, the European Commission put forward a legislative proposal that seeks to address Member State concerns with respect to asylum and migration. One such concern is the ineffective management of external borders, in particular the low rate of return of rejected asylum seekers to countries outside the EU. Only an estimated 36.6% of individuals who received a return order actually left the EU in 2017[4]. The Commission proposal seeks to increase the rate of return of irregular migrants from the EU through several modifications of the Return Directive[5]. The identified problem of low return rates is greatest in Member States with a high number of return orders and a low return rate. In 2017, the number of irregular migrants with a return order exceeded 10,000 in 10 Member States[6]. These countries face the greatest costs in the status quo and the greatest potential benefits from a policy change.

The proposed policy change raises two concerns with regards to economic impacts. Firstly, it is not clear if the proposal will lead to a more effective and fair return policy, given the multiple and well-documented challenges in carrying out returns. Secondly, while the explanatory memorandum for the proposal notes that it would not create additional financial or administrative burden for the EU, the costs to Member States are not addressed[7]. As the Commission proposal was not accompanied by an impact assessment, further enquiry is needed to determine the practical feasibility of the proposal to achieve its objectives and the costs it might impose on Member States.

1.2. Objectives

The European Parliament Committee on Civil Liberties Justice and Home Affairs (LIBE) requested a targeted substitute impact assessment to identify the critical issues and the main costs and benefits. This research study focuses on the economic aspects and complements a separately commissioned study on the legal aspects.

The objectives of the study are:

- What are the expected costs and benefits of the changes that the Commission proposal would bring, taking into account the proposed rules on detention and border procedures?
- How will the proposed measures affect the number of returns of TCNs who stay irregularly in the EU?

The assessment focuses on the following articles from the proposed recast of the Return Directive, as compared to the current situation (status quo):

- Article 6: Provisions on the risk of absconding
- Article 7: Obligation to cooperate

[4] European Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals (recast), 2018/0329.

[5] *Ibid.*

[6] BE, FR, DE, EL, IT, NL, PL, ES, SE and UK.

[7] Tender Specifications and European Commission, Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018/0329, p. 6.

- Article 9: Voluntary departure
- Article 13: Entry bans issued during border checks
- Article 14: Return management
- Article 16: Remedies and appeals
- Article 18: Detention
- Article 22: Border procedure

1.3. Methodology

This study broadly follows the European Commission's Better Regulation guidelines for an impact assessment and contributes to three of the seven steps: Step 1 - problem definition; Step 3 – what should be achieved; and Step 5 – what are the economic impacts of the changes under consideration[8]. The analysis for Step 5 identifies the main costs implied by the proposal for the EU and Member States and investigates the potential increase in the effectiveness of returns.

Chapter 2 assesses the impact of the problems currently experienced, which the recast Directive seeks to ameliorate. Chief among these is the low effective return rate of irregular migrants to their countries of origin. **Chapter 3** investigates the costs and consequences of the proposed changes to the Directive for each of the eight articles assessed here. Costs for the EU and Member States are highlighted, and the magnitude of the expected costs is indicated using a qualitative scoring approach. Lastly, **Chapter 4** then examines the economic impacts stemming from the consequences described in Chapter 3.

The assessment of the economic impacts in Chapter 4 draws on desk research, together with a specific quantitative analysis of data gathered from four selected Member States: Belgium, Czech Republic, Germany and Italy[9]. The data included Eurostat return statistics for the four Member States, country-specific unit cost estimates for a range of return procedures (e.g. detention, reception, forced return, voluntary return), and Member State policies. Key sources covered in the desk research included evaluations from the European Commission, national websites and studies, research carried out by the European Migration Network (EMN) and economic investigations carried out by the European Parliamentary Research Service (EPRS) into EU asylum policy. Information from these various sources were triangulated to support the construction of quantitative estimates and to provide a basis for underlying assumptions. The resulting figures highlight the different types of costs and benefits that Member States can expect to face, as well as the extent of the variation across Member States. Other types of costs that could be not quantified are reviewed qualitatively.

Key assumptions and limitations are as follows. First, the quantitative analysis of impacts draws on data from 2017. The situation in that year (in terms of policies and the number of asylum applications and returns) may not be representative of future years. Second, asylum seekers and economic migrants are two different populations and it may not be accurate to assess their returns in the same way. The analysis could not make the distinction as Eurostat statistics do not provide a decomposition of returns into rejected asylum seekers and economic migrants. Third, the analysis focused on a selection of four Member States (BE, CZ, DE, IT) that are disproportionately more affected by the problem. The potential impacts on other Member States may be more attenuated. Lastly, the assessment of impacts considers the scenario where Member States comply with the proposed changes of the Directive - in reality, they may not.

[8] European Commission, Better Regulation guidelines - Chapter III Guidelines on impact assessment.

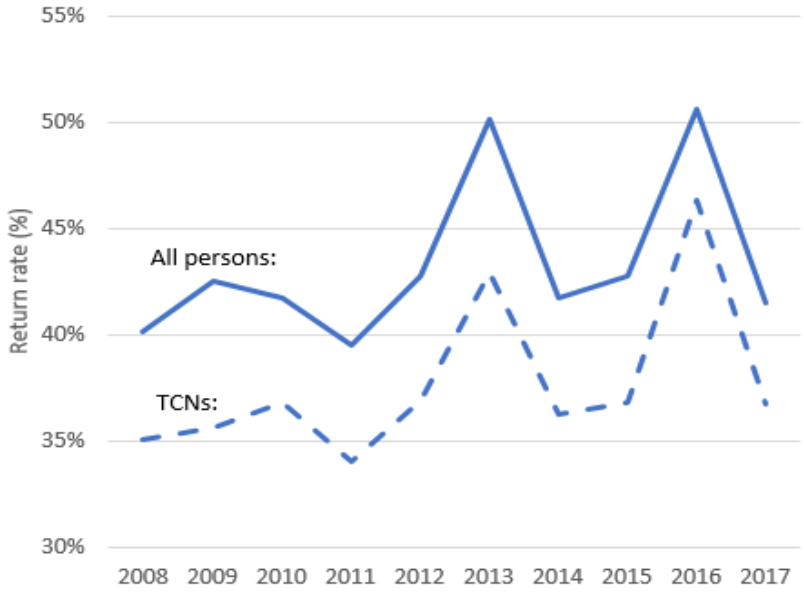
[9] Member States were selected based on an overall mapping and classification approach (see Annex 1).

2. Impacts of the status quo

2.1. EU

The status quo is characterised by a **low return rate of irregular migrants** in the EU to their countries of origin. In 2016, the return rate of irregular migrants was 45.8%, declining to 36.6% in 2017[10]. The figure below presents the trend over time in the overall rate of return of irregular migrants and irregular migrants from third countries (TCNs).

Figure 1: Trend in the return rate in the EU-28

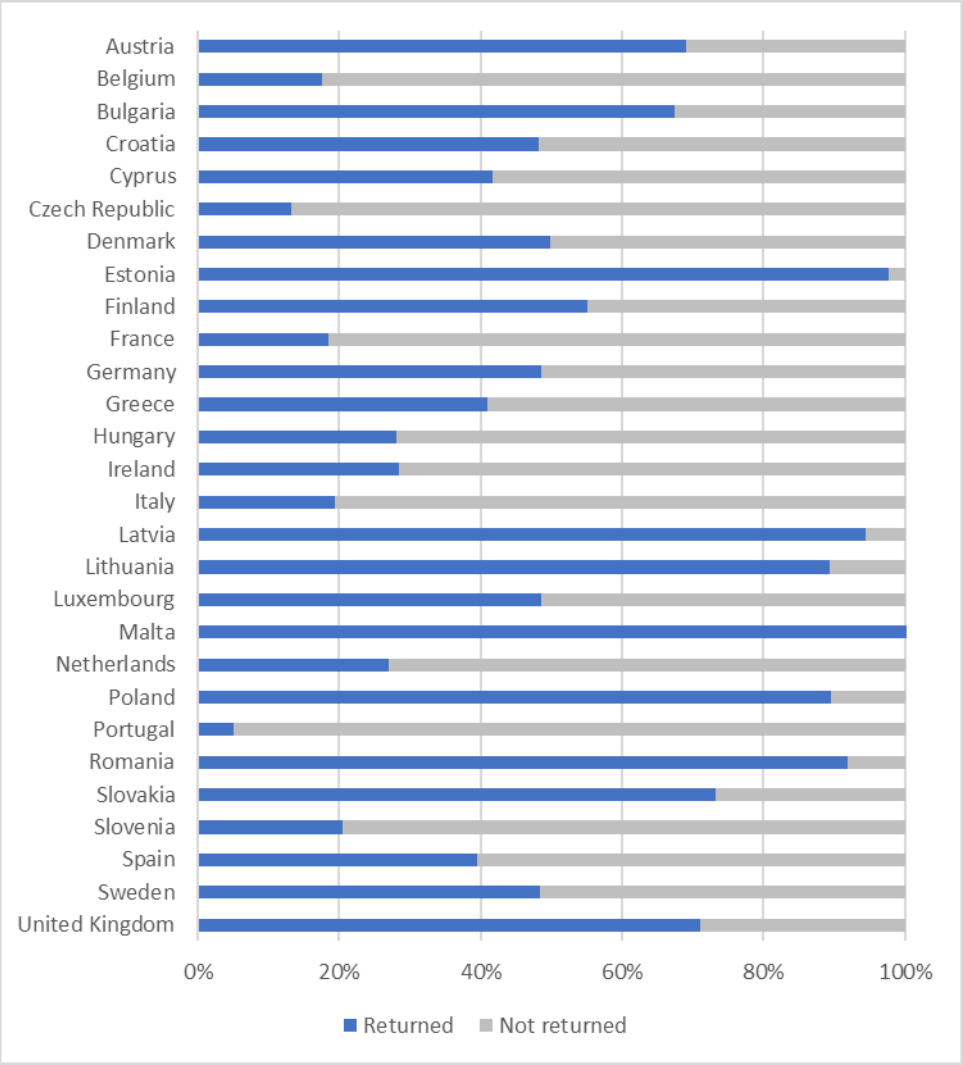


Source: Eurostat immigration statistics (see Annex 2).

The figure below presents the rate of return by Member State in 2017. The return rate is close to 100 % in Malta and Estonia and notably low in Portugal, the Czech Republic and Belgium. It is important to note that the number of returns may exceed the number of orders to return in a year as a return may not occur immediately after an order is issued.

[10] European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals (recast), 2018.

Figure 2: Breakdown of orders to return in 2017 by whether the individuals return or not

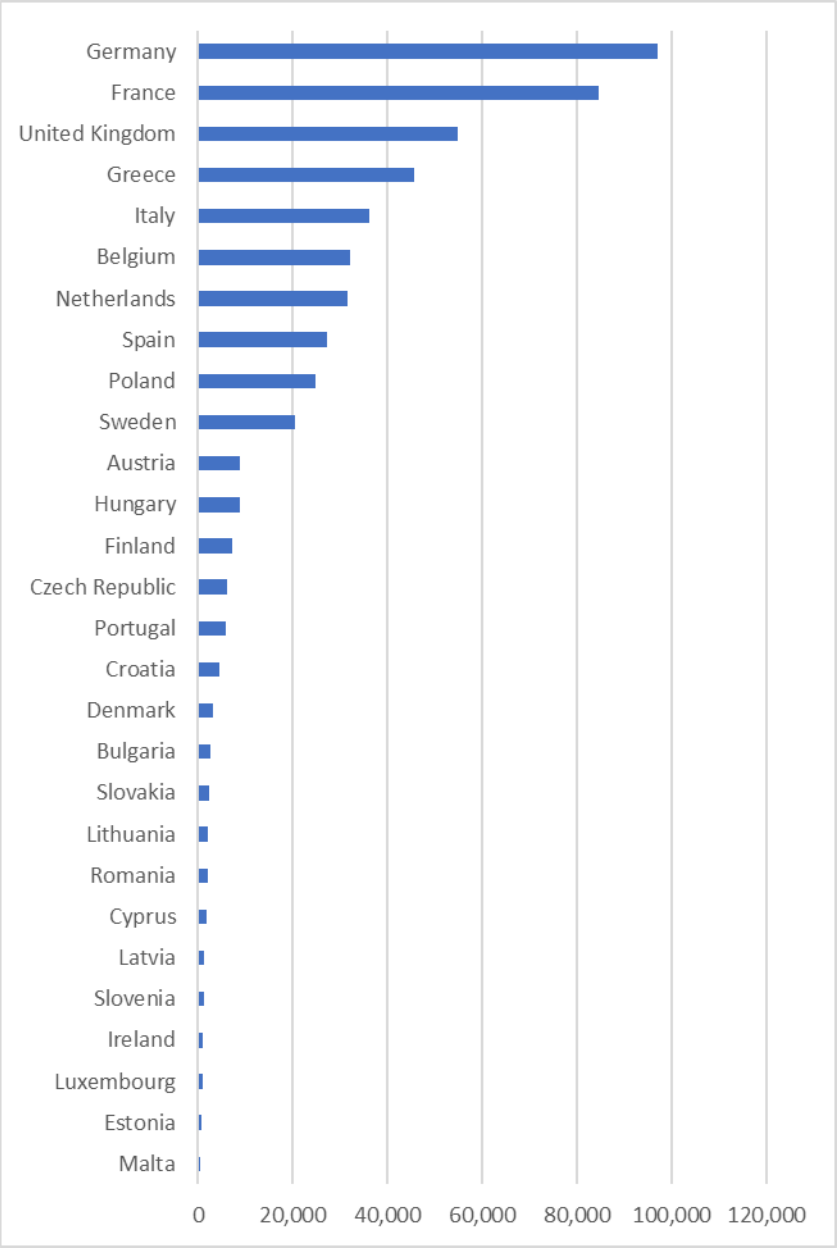


Source: Eurostat immigration statistics, 2017.

Irregular migrants are not evenly distributed across the Member States. In 2017, the number of irregular migrants with a return order exceeded 10,000 in 10 Member States (see figure below) [11]. The impacts of the status quo are greater in countries with a higher number of irregular migrants and comparatively less in others.

[11] BE, FR, DE, EL, IT, NL, PL, ES, SE and UK.

Figure 3: Orders to return issued in 2017 by Member State



The status quo is also characterised by **inefficiencies related to the extended length of the procedure and the use of punitive methods**. The use of detention, for example, is more expensive than the alternatives and also imposes a cost in the heightened threat to the fundamental rights of detainees. The Commission proposal has been issued in the **context of an overall plan to scale-up EU action in the area of border management**. The 2021-2027 Multi-Annual Financial Framework would double spending in the area of migration and border control with the budgets for some agencies (such as the European Border and Coast Guard Agency (Frontex)) trebling compared to current levels[12].

[12] European Commission press release, Questions and Answers: Future EU funding for Borders and Migration, 12 June 2018.

Four economic impacts are evident at the EU level (see Table 2 below). These include the direct costs for Frontex to support Member States in carrying out **joint forced returns**. In 2017, Frontex carried out 341 return operations for 14,189 persons[13], compared to 232 return operations for 10,693 persons in 2016[14]. Direct costs also include the **facilitation of voluntary returns** via funds available from the Asylum, Migration and Integration Fund (AMIF). An estimated 75% of the costs of operating voluntary return programmes comes from European funding, with the remainder from national budgets[15]. The main actors carrying out voluntary returns are national governments, the UN International Organization on Migration (IOM) and national non-governmental organisations (NGOs) such as Caritas and the Danish Refugee Council (DRC). In 2017, IOM supported 72,176 migrants through assisted voluntary return and reintegration programmes[16].

The remaining impacts may be partly – but not entirely - explained by the costs incurred in preventing irregular migrants and are thus, referred to as 'indirect impacts'. For example, EU or bilateral readmission agreements or arrangements can facilitate returns (in particular forced returns) which require the consent of the country of origin. Readmission agreements may also limit the arrival of persons from the third country to the EU. Similarly, **third country agreements and development cooperation** may facilitate the return of irregular migrants while also addressing the drivers of displacement and security threats in those countries[17]. At present, the EU has 17 readmission agreements and six readmission arrangements in place, with more under discussion[18]. The EU Emergency Trust Fund (EUTF) for Africa includes a strategic objective on managing migration, with a total annual allocation of EUR 555.1 million, of which EUR 285 million is earmarked for North Africa, EUR 99 million for the Horn of Africa and EUR 162.5 million for the Sahel and Lake Chad, while EUR 8.6 million provides for a cross-window[19]. Development funds also include emergency funds for development cooperation that are aimed to address the underlying drivers of migration to the EU.

[13] European Border and Coast Guard Agency, Risk Analysis for 2018, 2018.

[14] Council of the European Union, Frontex Annual Activity Report 2016, 2017.

[15] European Migration Network, Overview: Incentives to return to a third country and support provided to migrants for their reintegration, 2016. This source notes that a total budget of EUR 111.8 million was devoted to assisted voluntary return and reintegration programmes in 23 Member States in 2015.

[16] UN International Organization for Migration, Assisted and Voluntary Return an Reintegration: 2017 Key Highlights, 2018.

[17] See Policy Option 6 in Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

[18] As of 30 December 2018, the EU had readmission agreements with the following countries: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde. For more information, see: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en. The EU has readmission arrangements in place with the following six countries: Afghanistan, Guinea, Bangladesh, Ethiopia, The Gambia, Côte d'Ivoire, see European Commission Communication, Managing migration in all its aspects: progress under the European Agenda on Migration, COM(2018), 4 December 2018, pp. 9-10.

[19] European Commission, EU Emergency Trust Fund for Africa – Annual Report 2016, 2017. The overall budget for the EU Emergency Trust Fund is estimated to be EUR 4.1 billion. The figures are regularly updated on the European Commission website.

Table 2: EU-level impacts of the status quo

	Type of impact	Total annual cost (EUR)	Assessment
Direct	Forced returns	53 million	In 2017, about 24% of Frontex operating funds were dedicated to the return of irregular migrants[20]
	Voluntary return assistance	55-73 million	IOM Assisted Voluntary Return and Reintegraton budget in 2018[21]
Indirect	Third country agreements	2.3 billion	EUTF for Africa: EUR 555.1 million; Turkey agreement: EUR 1.5 billion[22]
	Development cooperation	2.5 billion	Regional Development and Protection Programmes, Common Agendas for Migration and Mobility and other EU instruments to foster cooperation and manage migration[23]

2.2. Member States

This section reviews the impacts of the status quo on the Member States. It focuses on four countries – **Belgium, Czech Republic, Germany and Italy** – selected to ensure coverage of different key issues underlying the low effectiveness of returns, the availability of relevant information and geographical location (see Annex 1 for more information). Germany was characterised by a very high number of return orders (more than 50,000 in 2017) and a relatively high return rate (greater than the average). Belgium and Italy were notable for having a high number of return orders (between 20,000 and 50,000 in 2017) and a relatively low rate of return (less than the average). The Czech Republic issued comparatively few return orders in 2017 and experienced a low rate of return. Information concerning pre-removal detention, returns and appeals were available for all four countries. Table 3 below presents return statistics for the four countries obtained from Eurostat as well as several calculations by the authors (return rate, rate of forced return, and the estimated number of irregular migrants estimated as the difference between return orders and the number of persons returned).

[20] Frontex Amended Budget, N3. Table A3 Operational Activities, 2017. Also cited in: Van Ballegooij, W., with Navarra, C., Humanitarian Visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiatve report, EPRS, European Parliament, 2018.

[21] Lower-bound estimate taken from IOM, 2018, Programme and Budget: Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018 (see Annex 2). Upper-bound estimate taken from European Parliamentary Research Service, Reintegration of returning migrants, 2017.

[22] Van Ballegooij, W., with Navarra, C., Humanitarian Visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiatve report, EPRS, European Parliament, 2018.

[23] *Ibid.*

Table 3: Overview of returns in four Member States, 2017

	BE	CZ	DE	IT
Eurostat statistics[a]				
Orders to leave	32,235	6,090	97,165	36,240
TCNs returned following order to leave	5,880	680	44,960	7,045
- Voluntary	3,445	446	20,994	2,110
- Forced	2,435	224	23,966	4,935
Estimated by authors[b]				
Rate of appeals to asylum decisions	44%	38%	60%	27%
Irregular migrants	26,355	5,410	52,205	29,215
Return rate	18%	11%	46%	19%
Rate of forced return	41%	65%	53%	73%

Notes: [a] Other types of return were classified under voluntary return. See Annex 2 for more information. [b] The appeal rate is estimated as the number of final decisions as a share of rejected first instance decisions; The number of irregular migrants was estimated as the difference between orders to leave and the number of TCNS who returned in that same year. The return rate is the share of persons who received a return order who then in fact returned. Lastly, the rate of forced return is the share of returns that were carried out in a forced manner.

The Commission proposal does not present a target return rate to indicate what it considers as an effective policy. Such a return rate should be less than 100% due to the risk of non-refoulement and the lack of agreements with all of the countries of origin. Furthermore, the maximum possible return rate would vary by Member State, according to migrants' main countries of origin and the extent of the Member State's readmission agreements with those countries.

Irregular migrants who do not leave the EU do not have the right to work and may be faced with no alternative other than working in the **shadow economy**. Individuals working in the shadow economy create an economic impact by not contributing to tax revenue while benefiting from public social services (e.g. healthcare and education). The extent to which irregular migrants contribute to the shadow economy is unknown. Available figures suggest that the number of TCNs working illegally in the EU are low[24]. Table 5 below presents the estimated costs of the shadow economy to the selected Member States.

[24] A total of 1,187 cases were noted by Member States in 2016; European Migration Network, Illegal employment of third-country nationals in the European Union, Synthesis Report, 2017.

Table 4: Costs of the shadow economy

	BE	CZ	DE	IT
Shadow economy[25]	16.2%	13.6%[26]	12.2%	20.6%
GDP (EUR million)	439,052	191,643	3,277,340	1,724,955
Estimated size of the shadow economy (EUR million)	71,126	26,063	393,281	355,341

Notes: GDP figures from Eurostat, 2017, Gross domestic product at market prices (current prices, EUR million).

Member States face costs in implementing the Return Directive. There are four main types of costs, which may be affected by the Commission's proposal: (1) pre-return detention; (2) the costs of carrying out forced returns; (3) the costs to assist voluntary return; and (4) the provision of reception during the suspension period of appeals.

Table 6 below presents an overview of the findings[27]. Each type of cost is described in more detail in the subsequent sub-sections.

Table 5: Member State costs in the status quo, 2017 – quantitative assessment

	BE	CZ	DE	IT
Pre-removal detention (EUR)	61,762,190	271,728	2,484,405	6,907,680
Voluntary returns (EUR)	5,684,250	17,840	67,180,800	205,725
Forced returns (EUR)	7,473,668	445,903	43,968,690	9,726,099
Reception during period of appeals (EUR)	65,280,517	8,331,120	181,910,370	49,902,480
Total annual cost (EUR)	140,200,625	9,066,591	228,363,465	66,741,984

[25] Tudose, B. M. and Clipa, I. R., An analysisof the shadow economy in EU countries. CES Working Papers – Vol VIII, Issue 2, n.d.

[26] EU-15 average figure used here (national figure not available).

[27] Another relevant cost would be the shadow economy activities of irregular migrants who do not return. As discussed in the section, it was not assessed quantitatively and therefore is not reflected in the summary table.

Pre-removal detention costs were estimated using three variables. The first was the number of persons in pre-removal detention facilities in 2016. All four countries except the Czech Republic use specialised facilities for this purpose. The second variable was the average duration of detention. In the absence of this information from Germany, the analysis assumed a value of 25 days based on the limited available information on actual detention lengths. The time limit for detention under the German law is six months. The third variable was the average daily cost of detention per person. In the Czech Republic and Germany, detainees are required to cover the fee, but the extent to which detainees actually pay these costs could not be determined. The cost in the Czech Republic is relatively low and may not cover the cost of building maintenance and staff. The three variables were multiplied to reach an overall estimated annual figure of pre-removal detention per country (see Table 7 below).

It is also worth highlighting the **high level of overcrowding in detention facilities** in the four Member States in the status quo, i.e. the number of people in detention exceed the number of places available[28].

Table 6: Pre-removal detention in the four Member States – estimated annual costs

	BE	CZ	DE	IT
Number of persons in pre-removal detention in 2016 [29]	6,106	444	2,151[30]	1,968
Available places[31]	585	850	416	359
Average duration of detention	34.6 days [32]	72 days[33]	Time limit of 6 months [34]; assumption – 25 days	26 days[35]

[28] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017. Figures for pre-removal detention are 2016 figures from EMN national reports.

[29] *Ibid*.

[30] *Ibid.*

[31] *Ibid*.

[32] Myria, Retour, detention et eloignement des etrangers en Belgique. Droit de vivre en famille sous pression, 2018, p. 10.

[33] Average of figures provided in Global Detention Project, Country Report on the Czech Republic.The report notes the following: "According to official sources, the average length of detention was 51 days in 2013; 77 days in 2012; 83 days in 2011; 79 days in 2010; and 60 days in 2009.[50] According to the management of the Bělá-Jezová centre, the average length of detention in the centre was approximately 80 days in 2014".

[34] Asylum Information Database, Country Report on Germany. The report notes the following: "A significant number of persons spent between 10 and 40 days in these facilities. Cases of longer detention were rare, but there were a few cases in which persons were detained for more than 90 days".The midpoint of 10 and 40 days (25 days) was used for the assessment.

[35] Global Detention Project, Country Report on Italy.

	BE	CZ	DE	IT
Cost per day (EUR)	289 /day[36]	8-9/day, paid for by the detainee[37]	231/day, paid for by the detainee[38]	135/day[39]
Estimated annual cost (EUR)	61,762,190	271,728	2,484,405	6,907,680

Note: Numbers of persons held in detention are estimated figures from 2016 (2017 figures were not available).

The cost of carrying out **returns** excludes the costs of joint forced returns supported by Frontex. An estimated 19% of forced returns in 2017 were carried out by Frontex, while the remaining 81% were carried out by the Member States themselves[40]. Member States contribute about 25% of the cost of voluntary return and reintegration programmes[41]. The desk research yielded some information about the four Member States' spending on returns. For example, in 2016 in Belgium, the cost of carrying out forced and voluntary returns was estimated to be EUR 8 million, in addition to EUR 11 million for staff[42]. In Germany, the national budget for funding assisted voluntary return programmes was reported to be EUR 11 million in 2015[43]. The allocated funding has likely increased since then. In Italy, the government spent an estimated EUR 6 million on assisted voluntary return in 2015[44]. Both Belgium and Germany also offer reintegration programmes, which are likely to promote the sustainability of returns.

Table 8 below reviews the assistance provided through **voluntary return programmes** in the four countries. The cost for the Member States to carry out voluntary returns was calculated as the product of the estimated assistance per person and the number of voluntary returns in 2017.

Table 7: Voluntary returns - Assistance provided in the four Member States and estimated costs

	BE	CZ	DE	IT
In-cash assistance at the point of departure/after arrival (EUR)	250 per adult; Travel expenses covered.	May receive partial reimbursement of travel expenses	200 per adult; Travel expenses covered	150-400 per person

[36] Global Detention Project, Country Report on Belgium. The figure presented was calculated using information on the costs of running closed centres and the estimated number of detainees and the estimated duration of detention. EUR 289 = (EUR 72 million/(35*7105)).

[37] Global Detention Project, Country Report on the Czech Republic.

[38] Global Detention Project, Country Report on Germany. The figure presented is the average of EUR 42 and EUR 420 taken from two detention centres in Germany in 2014.

[39] In the absence of information gathered from the country, an average figure for the daily cost of detention was obtained from Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy EPRS, European Parliament, 2018.

[40] Frontex statistics indicate that 75,115 forced returns were carried out in 2017, of which 14,189 were carried out by Frontex.

[41] European Migration Network, Overview: Incentives to return to a third country and support provided to migrants for their reintegration, 2016.

[42] Global Detention Project, Country Report on Belgium. The number of forced returns in 2017 were comparable to 2016. The 2017 figures are likely to be very similar.

[43] European Migration Network, Overview: Incentives to return to a third country and support provided to migrants for their reintegration, 2016.

[44] European Commission, Managing Migration: EU Financial Support to Italy, 2018.

	BE	CZ	DE	IT
In-kind assistance in the country of return (EUR)	700 per adult	40 per person	2,200 per adult; Travel expenses covered[45]	1,100-2,000 per person
Reintegration assistance (EUR)	700 in material aid to local partners; Additional 1,500 possible	N/A	800 plus in-kind housing assistance[46]	N/A
Estimated assistance per person (EUR)	1,650	40	3,200	975
Voluntary returns, 2017	3,445	446	20,994	2,110
Estimated annual cost (EUR)	5,684,250	17,840	67,180,800	205,725

Source: European Migration Network, Overview: Incentives to return to a third country and support provided to migrants for their reintegration, 2016.

The costs of **forced returns** are shared between the EU (Frontex) and the Member States (see table below). The costs to Frontex were obtained through an information request about joint return operations (JROs). Average per-person costs were calculated with the obtained information. In practice, the cost of a returning a person through a JRO may be related to a number of factors such as the source countries involved, the security and personnel needed and the number of persons in each operation. The cost for Member States to carry out forced returns to the remaining persons was also estimated. Due to lack of comprehensive information from the desk research, an average figure of EUR 2,000 was used, as per previous studies[47].

Table 8: Forced returns (Frontex and nationally managed) in the four Member States and the estimated costs

	BE	CZ	DE	IT
Overall forced returns, 2017	2,435	224	23,966	4,935
EU costs (Frontex)[a]				
Persons returned by Frontex in 2017	108	3	5,445	98
Share of returns carried out by Frontex	4%	1%	2%	2%

[45] REAG/GARP programme website. Last reviewed 25 January 2019. The website presents information on the types of support and the amounts. It notes that the assistance covers medical costs up to EUR 2,000. A figure of EUR 1,000 was used for the table. Other covered costs include EUR 200 for financial travel assistance and EUR 1,000 for financial start-up assistance.

[46] Starthilfe Plus website. Last reviewed 25 January 2019. The website notes that returnees receive EUR 800 if the asylum application was rejected and the individual returns within the granted period for departure.

[47] Voluntary return: Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy. EPRS, European Parliament, 2018 (see Annex 2 of this report); Forced return: European Commission, Evaluation of the Dublin III Regulation, Final Report, 2015.

	BE	CZ	DE	IT
Estimated annual cost (EUR)	2,819,668	3,903	6,926,690	52,099
Per-person cost[b]	26,108	1,301	1,272	532
Member State costs				
Persons returned by MS in 2017[b]	2,327	221	18,521	4,837
Per-person cost (EUR)[c]	2000			
Estimated annual cost (EUR)	4,654,000	442,000	37,042,000	9,674,000
EU and Member State costs				
Estimated annual cost (EUR)	7,473,668	445,903	43,968,690	9,726,099

[a] Information provided through a request to Frontex. Number of persons returns through JRO organised by the Member State or partiication of the Member State in a JRO organised by another Member State. The costs for Belgium may be higher due to its inclusion of costs for providing several charters to another Member State. [b] These figures were estimated as the total forced returns minus the number of persons returned through Frontex JROs; [c] in the absence of national information, this figure was taken from an evaluation of the Dublin III Regulation conducted for the European Commission.

The last category of impacts assessed for Member States was appeals. As information on appeals to return orders could not be obtained, the analysis used appeals to asylum decisions as a proxy. The estimates for the appeal rate and the duration of appeals are for asylum decisions and not return decisions. **Member States face a high rate of appeals , which extends the asylum procedure and delays the return procedure for those with a negative decision.** The high rate of appeals may be driven to some extent by the lack of harmonisation on the qualification of asylum seekers, a gap in the EU's asylum policy that has been highlighted in other research[48]. For example, the recognition rates for the same nationality vary widely across Member States (see Figure 5 in Annex 2). Media inquiries also found that many persons deciding on asylum cases had been working for more than a year without completing any training[49].

A high level of appeals has associated costs for Member States, including the cost of providing free legal aid and translation, and the costs for maintaining judges and courts to review the appeals. The costs for these services could not be obtained. Another relevant cost is the continued reception for persons awaiting a decision on their appeal. This cost was estimated using information gathered on the cost of reception in the four Member States (see Table 9 below).

Table 9: Appeals to return orders in the four Member States - estimated annual costs to provide reception

	BE	CZ	DE	IT
Return orders, 2017[a]	32,235	6,090	97,165	36,240

[48] Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy. EPRS, European Parliament, 2018

[49] Asylum Information System Database, Country Report on Germany.

	BE	CZ	DE	IT
Appeal rate of asylum decisions [a]	44%	38%	60%	27%
Estimated number of appeals [a]	14,183	2,314	58,299	9,785
Duration of appeal	Three months[50]	Six months[51]	3 months[52]	5 months[53]
Cost of reception (EUR)[b]	51/day	20/day	35/day	34/day
Estimated cost (EUR)	65,280,517	8,331,120	181,910,370	49,902,480

[a] Eurostat asylum statistics. The appeal rate is estimated as the number of final decisions as a share of rejected first instance decisions; [b] see Annex 2.4 (Member State reception costs).

[50] Asylum Information System Database, Belgium Country Report.

[51] In the absence of information, the average figure for a length of appeal was taken from Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

[52] The BAMF website notes that the time limit has been reduced to 3 months and that compliance is noted. This finding appears to be compatible with a 2017 report (BAMF, 2017, Das Bundesamt in Zahlen) found that the average time of an asylum application including appeals was 13.2 months. Thus, the estimate of 3 months was used for the assessment.

[53] The report notes that the duration of appeals ranged between 1.5 and 8 months in Rome in 2014. After 2015 the duration may have increased, but the courts in Rome are more congested and these figures can be understood as an upper bound. The average value was used for the assessment. Roma Tre Universita Degli Stude, Analisi dei Procedimenti di Opposizione al Decreto di Espulsione nella Sede di Roma. 2014.

3. Overview of the costs and consequences of the proposed revisions

This chapter reviews the direct costs and consequences associated with implementing the proposed revisions to the eight articles of the Returns Directive. The economic impacts of the proposed revisions are presented in Section 4.

Article 6 would introduce EU-wide criteria to identify individuals at risk of absconding and who should be kept in detention. One of the criteria put forward is the obligation to cooperate, which is detailed further in **Article 7**. These revisions carry several costs. One set of costs would relate to the practical application and monitoring of the criteria at national level. For example, focus groups or discussions with relevant stakeholder groups would need to be organised to clarify certain broad or vague criteria, such as the lack of identity documents (which documents would be acceptable?) or financial resources (which types of resources would qualify and what would be sufficient to prove their existence?). Other costs include the training of personnel who vet TCNs or information provided to the national authorities. More personnel may also need to be hired, depending on the extent to which the EU-wide criteria are more substantive than the national criteria.

All Member States - with the exception of the UK and Ireland - have defined objective criteria to determine the risk of absconding[54]. The four selected Member States cover the obligation to cooperate to some extent. Among the four Member States only the Czech Republic has a criterion related to financial resources. Other Member States also have this criterion (e.g. AT, CZ, EL, ES, HR, HU, LT, LU, MT, SI, SK). None of the four countries have of lack of identity documents as a criterion. Therefore, EU-wide criteria appear to be broader than national ones.

Table 10: Criteria for risk of absconding

	BE	CZ	DE	IT
Refusal to cooperate in the identification process	✓	✓	✓	✓
Violent or fraudulent opposition to the enforcement of return	✓	✓		✓
Explicit expression of the intention of non-compliance with a return decision	✓	✓		✓
Non-compliance with the period for voluntary departure	✓	✓		✓
Lack of financial resources		✓		
Conviction for a serious criminal offence in the MS		✓	✓	
Non-compliance with a measure aimed at preventing absconding	✓	✓	✓	✓
Non-compliance with an entry ban	✓	✓		✓
Unauthorised secondary movements to another MS	✓	✓		

[54] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017.

Source: European Migration Network, 2017, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network.

Article 8 would introduce a new obligation for return decisions to be issued immediately after a decision terminating the legal stay (e.g. after a first-instance refusal of an asylum application). This obligation could mitigate the delay of the return procedure, with lower reception costs for the Member State, as well as provide irregular migrants with a clearer indication of their status. This obligation is already evident in three of the four Member States (CZ, DE and IT)[55]. In Germany, for example, rejected asylum seekers receive a document that includes a return decision. In Belgium, the Immigration Office issues a return order typically within a week of the negative decision by the Office of the Commissioner General for Refugees and Stateless Persons (CGRS)[56]. The revisions to Article 8 are unlikely to impose a sizeable new burden on the four selected Member States.

Article 9 relates to voluntary departure. The proposed revisions remove the minimum of seven days for voluntary departure. This proposed change can allow for Member States to impose a shorter time period (less than seven days) for voluntary return, which would be practically impossible and place substantial pressure on individuals with a genuine interest in returning voluntarily. At present, a number of Member States report challenges in complying with existing time limits[57]. Their capacity would need to be enhanced to comply with existing time limits and even further with a reduced time limit for voluntary departure.

Article 9 also links the option of voluntary departure to the assessment of the risk of absconding, as outlined in **Article 6**. The proposed changes have implications for countries where voluntary departure is automatically granted with a return decision (e.g. BE and DE, see table below). These countries would need to establish a procedure to not grant or suspend voluntary return depending on whether the criteria for the risk of absconding are satified. Additional personnel would be needed to manage this procedure alongside the assessment of the risk of absconding. Given the broad nature of the risk of absconding criteria set out in Article 6, it is expected that these countries will see refusals of voluntary departures increase and the use of detention and forced returns will also increase. Under the proposed revisions to Article 6, an individual who does not return within the period of voluntary departure fulfills a criterion for the risk of absconding and would be subject to detention[58]. Only in the case of Belgium is the use of detention tied to the exhaustion of the period for voluntary departure (see Table 11 below).Thus it is also likely that the use of detention and forced returns will also increase in the Czech Republic and Italy.

Table 11: Measures related to voluntary return

	BE	CZ	DE	IT
Period for voluntary departure automatically issued with return decision	Yes	No – individual needs to apply	Yes	No – Individual needs to apply

[55] *Ibid.*

[56] European Migration Network, Returning rejected asylum seekers: Challenges and good practices in Belgium, Study of the Belgium Contact Point of the European Migration Network, 2016.

[57] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017. The countries that reported challenges were: AT, CY, DE, EE, HU, LU, SE, SI, SK.

[58] See Article 6(1)(h); European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals (recast), 2018.

	BE	CZ	DE	IT
Flexible approach to duration of voluntary departure period	Yes - up to 30 days	No	Yes - up to 30 days	No
Detention used when period of voluntary return finishes	Yes	No	No	No

Source: European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017.

Several revisions are proposed for **Article 13** concerning entry bans. The most significant is the application of an entry ban on illegally staying TCNs, including those for whom a return decision has not been issued but who leave the EU and are detected when border checks are carried out at exit. The expected costs to modify the Schengen Information System (SIS) at the central level are not expected to be major in part due to technical upgrades to the SIS that are already in the plans. The changes may disincentive voluntary return among irregular migrants, as they would know they could not re-enter the Schengen area.

Article 14 requires that Member States establish national return management systems as voluntary return schemes that are compatible with the Irregular Migration Management Application (IRMA). Frontex has developed a model system that Member States can use as a guide in developing their systems, which could be established within existing structures. For example, in the case of Germany, it could be established as a Group or Division within the Federal Office for Migration and Refugees (BAMF). In Belgium, it could be established within the CGRS. This would incur costs in terms of staff to manage the system and ensure its operability in central and regional offices (where applicable). The central management system could enhance linkages between voluntary and forced returns (e.g. individuals who do not leave within the voluntary departure period). It would also likely require interoperability with systems monitoring detention utilisation.

The cost of a national return management system can be estimated from the annual budgets of existing national organisations related to the management of asylum. In Germany, for example, the 2018 budget for the BAMF was EUR 822,967,000 [59]. Assuming that the introduction of a national return management system could increase costs by 1-3%, the estimated costs would be EUR 7.8 to 23.4 million in Germany. The costs of such a system may be lower in smaller, non-federal countries or in countries whose voluntary return programmes are less developed than in Germany.

All four selected Member States offer voluntary assistance programmes, although the conditions and benefits vary substantially. The proposed revisions do not indicate a minimum standard and thus no cost implications are evident. Belgium and Germany also offer reintegration programmes, which are mentioned but not required by Article 14.

Substantial changes are proposed for **Article 16** on remedies. The proposed changes include a time limit of five days to lodge an appeal against a return decision where the return decision is the consequence of a decision rejecting an application for international protection which is final. At present, the time limit to lodge an appeal is substantially longer in most Member States, including the four case studies here. In Belgium[60] and Italy[61] the time limit is 30 days, while the time limit in

[59] Bundeshaushaltsplan 2018, Germany.

[60] AIDA, Country Report: Belgium, 2016.

[61] AIDA, Regular Procedure: Italy.

the Czech Republic is 15 days, and in Germany 14 days[62]. The introduction of a more stringent time limit may imply that asylum seekers do not find the necessary legal support in time or lawyers would not have enough time to properly assess the case, which could presumably result in a reduction in the quality and number of appeals filed. However, in other cases, including where legal assistance is properly available, reduced time limits may lead to higher appeal rates. Lawyers who do not have the necessary time to prepare and screen the appeal, might in any case file the necessary appeal paperwork to meet the stipulated deadline to file for an appeal, leading to low-quality appeals.[63] The European Council on Refugees and Exiles (ECRE), in its opinion on the Return Directive 'recast', stresses the challenges for applicants to meet strict time limits due to the inavailability of legal aid and intepretation, particularly in remote areas[64]. However, the proposed revisions to the Return Directive also include harmonisation of rules regarding free legal assistance, which could ensure higher safeguards.

Proposed changes to **Article 16** would also require the presentation of appeals to a judicial authority. At present, appeals can be brought in front of a judicial body in all four Member States. Nonetheless, significant costs could be expected to expand the capacity of the judicial authority to hear appeals.

Article 18 establishes a maximum period of not less than three months and not more than 6 months for detention, and expands the scope of persons who may qualify for detention. The costs to introduce this revision would be minimal and similar to the case of Articles 6 and 8. Clear guidelines would need to be established to support assessments on whether or not a person should be detained. Stakeholder and focus groups may need to be organised to translate the proposed revisions into practice while taking account of the national context.

Article 22, which introduces border procedures, has substantial cost implications. Additional personnel would be needed to set up parallel systems at the border and transit zones to issue return decisions and to manage return procedures. Countries that have set up temporary border controls would also have to introduce a border procedure[65]. More and bigger detention centres would be needed to detain asylum seekers while their applications are being examined, and for up to four months subsequently, should the decision be negative. The time limit of 48 hours to lodge an appeal is extremely limited, with individuals unlikely to gain access to an interpreter and legal aid in that period[66]. The European Asylum Support Office (EASO) has found that accelerated procedures result in a higher rate of rejection, thus higher levels of detention should be expected[67]. This is particularly concerning for vulnerable groups including unaccompanied minors. These individuals may experience adverse health impacts as a result of detention as highlighted in previous research[68].

Among the selected countries, Italy and the Czech Republic do not have border asylum procedures apart from international airports. In Germany, a total of 444 border procedures were registered in

[62] AIDA, Country Report: Germany, 2016. While an appeal against a Simple Rejection needs to be submitted within 14 calender days, if the rejection is manifestly unfounded, the timeframe to submit an appeal is reduced to 1 week.

[63] See targeted impact assessment study on the Recast Return Directive - legal aspects (as included in Annex 1), pp. 33-34 (Annex 1).

[64] European Council for Refugees and Exiles, ECRE Comments on the Commission Proposal for Recast Return Directive COM(2018) 634, 2018.

[65] European Council for Refugees and Exiles, ECRE Comments on the Commission Proposal for Recast Return Directive COM(2018) 634, 2018.

[66] *Ibid.*

[67] European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2017, 2018. The report notes that the recognition rate for border procedures was about 8%.

[68] Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

2017, most of which were at the Frankfurt Main airport[69]. Officials have a time limit of two days to review an application. In other cases, the BAMF determines that a decision cannot be made and access to the regular asylum procedure is granted. However, some NGOs have raised concerns about the quality of the review. Belgium has 13 external border posts and the most developed border procedure of the four countries. An estimated 469 asylum applications were lodged at border posts in 2017, primarily at Zaventem airport. Applications for asylum can be reviewed while asylum seekers are held in detention close to the border post. Under the Chicago Convention, air carriers have the obligation to remove rejected asylum seekers from airport border posts. The Convention applies here, as the individuals never formally entered the territory[70]. Lastly, the desk research suggests Italy recently introduced a border procedure, but has not carried out any to date[71].

Table 12: Summary table – direct costs to put in place the proposed changes to the Directive

Article		Member State Costs		EU costs
6 and 7	Risk of absconding and obligation to cooperate	++	• More personnel and training • Stakeholder and focus groups to develop guidelines	✓ Additional cost incurred by EASO in providing necessary training
8	Issuance of return decision	+	• Increased institutional coordination to provide return order within asylum decision	N/A
9	Voluntary departure	+++	• Increased staffing to manage voluntary returns within a shorter timeframe • Institutional coordination to link failure to return voluntarily to detention	✓ Additional costs provided through AMIF for voluntary departure
13	Entry ban	+	• Minimal cost of entering the entry ban for the identified person exiting the EU	✓ Additional costs to monitor and ensure coordination across countries for Frontex
14	Return management system	+++	• New unit with staff in migration and asylum departments • Modifications to information management systems to promote interoperability	✓ Additional costs to monitor and ensure coordination across countries for Frontex
16	Remedies and appeals	-	• Increase in translation and free legal aid available at short notice • Increase in time needed to review and process an application for appeal (due to lower quality)	✓ Additional costs to monitor the adequacy of procedural rights

[69] Asylum Information System Database, Country Report on Germany.

[70] Asylum Information System Database, Country Report on Belgium.

[71] http://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/ Section 2.2, 3rd para.

Article		Member State Costs		EU costs
18	Detention	+++	• Increase in detention centres due to higher numbers of detainees • Increase in personnel within detention centres • Training of personnel including to handle bigger crowds; specialised training to deal with detainees who are considered to pose a risk to public policy, security and national security	✓ Bigger role for EASO in monitoring the asylum system, including detention.
22	Border procedure	+++	• Additional staffing at all border and transit areas • Higher costs due to the failure to respect the right to appeal[72]	✓ Bigger role for EASO in moritorning the asylum border procedure.

Note: The magnitude of costs was assessed qualitatively (+ = low, ++, medium and +++ = high).

[72] Border/ accelerated procedures have a high risk of a breach of the principle of non-refoulement (ECRE, ECRE Comments on the Commission Proposal for a Recast Return Directive, November 2018, available from: https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-Commission-Proposal-Return-Directive.pdf). Furthermore, the right to appeal when there is a border procedure is within 48hrs.

4. Economic assessment of the proposed revisions

The proposed revisions to the Return Directive would have several consequences with potentially significant economic impacts. These include:

- Increased utilisation of detention;
- Increased likelihood of forced return;
- Decreased likelihood of voluntary return;
- Decrease in length of return procedure.

Detention is generally more costly than the alternatives, while forced returns are more expensive than voluntary returns[73]. Thus, the first three consequences have the potential to increase costs for Member States compared to the status quo. **The additional costs of detention and forced return may be justified if they lead to greater effectiveness in the return of irregular third country migrants to their countries of origin.** However, the Commission proposal does not cite evidence to support this assertion, nor was any other supporting evidence identified.

The fourth consequence may reduce direct costs and increase the efficiency of returns. However, the assessment finds that Article 22 may lead to additional costs, such as compensation from the European Court of Human Rights (ECtHR) if TCNs claim that their right to judicial remedy was not adequately safeguarded due to the very short timeframe for appeal (48 hours).

Table 13 below reviews the likely consequences for each of the articles under consideration. The subsequent sections review the economic impacts associated with each consequence, drawing from the information gathered from the desk research and the four Member States examined here.

Table 13: Mapping the consequences that lead to economic impacts

Article		Increased utilisation of detention	Increased likelihood of forced return	Decreased likelihood of voluntary return	Decrease in length of return procedure
6	Risk of absconding	✓		✓	
7	Obligation to cooperate	✓			
8	Issuance of return decision				✓
9	Voluntary departure				
13	Entry ban			✓	
14	Return management system				
16	Remedies and appeals				✓

[73] Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy. EPRS, European Parliament, 2018.

Article		Increased utilisation of detention	Increased likelihood of forced return	Decreased likelihood of voluntary return	Decrease in length of return procedure
18	Detention	✓		✓	
22	Border procedure	✓	✓		

The table summarises the estimated costs associated for each of the types of economic impacts. The calculations are described in more detail in the subsequent sub-sections.

Table 14: Summary of economic impacts of proposed revisions (annual EUR)

Economic impact	Result	BE	CZ	DE	IT
Increased utilisation of detention	Costs increase:	138,636,190	1,108,944	46,029,060	61,253,010
Increased likelihood of forced return/ Decreased likelihood of voluntary return	Costs increase[b]	241,150	174,440	-5,038,800	432,550
Decrease in length of return procedure[c]	Costs decrease:	13,056,103	1,666,224	36,382,074	9,980,496
Overall assessment:		Substantial increase (***)	Minor decrease (*)	Minor increase (*)	Moderate increase (**)

Notes: [a]In Germany, the cost of voluntary return was considered to be more expensive than a forced return and thus the shift resulted in lower costs; [b] This estimation draws from the scenario of a shift from voluntary to forced return of 20%. The negative estimate for Germany implies that costs actually decrease due to the lower relative costs of forced return in that country; [c] These costs are likely to be mitigated the increased costs per handling each appeal and other costs connected to the failure to respect the right to appeal.

4.1. Increased utilisation of detention

Four articles (6, 7, 18 and 22) in the proposed recast of the Return Directive may increase the likelihood or duration of detention. In the status quo, the rate of pre-removal detention ranged from 3% in Germany to 18% in Belgium**. The new articles 6 and 7 would greatly increase the likelihood of detention, in particular the broad criteria for the risk of absconding in Article 6.** An investigation of the potential costs was carried out using a conservative assumption that about 60% of persons with orders to return may be considered 'at risk of absconding', uncooperative or unable to comply with the time limits of voluntary departure. This figure is conservative in light of other research that has noted that more that 90% of asylum seekers enter the EU irregularly[74]. The analysis found that the costs of pre-removal detention would increase compared to the status quo. For

[74] Van Ballegooij, W., with Navarra, C., Humanitarian Visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiatve report, EPRS, European Parliament, 2018

example, in Belgium, the costs of accomodating detainees would increase by EUR 139 million while in Germany it would increase by EUR 46 million (see Scenario in the table below and Annex 2).

The revisions to Article 18 with respect to the minimum period for detention would be unlikely to affect the duration of detention and further alter costs. This conclusion is based on a review of detention periods in three countries (BE, CZ and IT). In Belgium, the initial period of detention is two months and may be extended to five months. In the Czech Republic, the initial period cannot exceed six months and the period may be extended up to 18 months. Lastly, in Italy the maximum period of detention is 90 days. Information for Germany could not be readily obtained[75].

Table 15: Cost of pre-removal detention in the four Member States

	BE	CZ	DE	IT
Orders to return, 2016[76]	33,020	3,760	70,005	32,365
Number of persons in pre-removal detention [77]	6,106	444	2,151[78]	1,968
Share of persons with a return order who are in pre-removal detention – status quo	18%	12%	3%	6%
Scenario – consider an increase in pre-removal detention to 60%				
Estimated number of persons in pre-removal detention	19,812	2,256	42,003	19,419
Additional cost (EUR)	138,636,190	1,108,944	46,029,060	61,253,010

Note: In the case of the Czech Republic and Germany, detainees must pay for their detention, but the extent to which they do could not be determined from the desk research. The calculation assumes that the extent of their contribution is limited.

In addition to these costs, Member States would also face the **cost of constructing new detention centres to accommodate detainees**. The status quo assessment found evidence of substantial overcrowding in all four Member States, with a need already evident for new facilities. Many countries are developing new centres. In Italy, the government is spending EUR 13 million to build 11 new detention centres with 1,100 additional places[79]. Once completed, detention capacity will be four times larger than currently. In addition, the law provides for EUR 35.5 million to manage the facilities during the 2017-2019 period[80]. Belgium also took steps to expand the capacity of its detention facilities. In 2017, the government embarked on plans to refurbish a reception centre and

[75] Global Detention Project country reports.

[76] 2016 figures (Eurostat variable: migr_eiord) were used to increase comparability with pre-removal detention figures.

[77] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017. Figures for pre-removal detention are 2016 figures from EMN national reports.

[78] *Ibid.*

[79] These costs are specifically for Centri di Permanenza per i Rimpatri (CPR) or Return Detention Centres.

[80] Global Detention Project, Country Report on Italy.

build two additional detention centres, which would almost double the number of places, from 585 to 1,066[81]. Capacity in detention centres fell in Germany during 2014 and 2015, while a legislative amendment in 2017 allowed for it to increase in the coming years[82].

The additional costs are substantial, although they may be merited if they increase the effectiveness of returns in terms of the number of people returning to their source country. However, **the proposal for the recast of the Return Directive does not cite any evidence indicating that detention can lower the risk of absconding or increase the effectiveness of returns.** An evaluation of the application of the Return Directive investigated neither this issue nor the criterion of effectiveness, but, rather, focused on the extent to which Member States met the conditions set out in the Directive[83].

While detention might be essential in ensuring that a third country national does not abscond and a successful return is prepared, no evidence is put forward by the European Commission in the Recast Proposal to back this. On the other hand, some evidence was found to suggest that **detention does not affect the return rate**. ECRE notes that increasing the duration of detention is not likely to boost the number of irregular migrants who return to their countries of origin[84].

It is worth noting the UK[85] experience here, as it has the highest number of TCNs in detention (24,197 in 2016)[86], as well as a high return rate (71% in 2017)[87]. The director of an NGO that provides support to migrants in detention attributes the UK's high return rate to 'having put greater energy into negotiating returns with third countries, rather than its greater use of detention'[88].

Of the four Member States examined, the average length of detention is greater than 30 days in Belgium and the Czech Republic and less than 30 days in Germany and Italy. The evidence suggests that a minimum length of detention of one month may yield greater effectiveness in returns. **A minimum period that is longer than one month would not be expected to generate an increase in returns.**

4.2. Forced and voluntary returns

The revisions proposed in the recast of the Return Directive place **less emphasis on voluntary returns while paying greater attention to forced returns**. The shift towards forced return runs contrary to practitioners' experiences. For example, the UN High Commissioner for Refugees (UNHCR) reports the following:

> *'Voluntary return is generally more cost-effective and administratively less cumbersome than forced return for the returning country. Countries of origin also prefer voluntary return*

[81] Global Detention Project, Country Report on Belgium.

[82] Global Detention Project, Country Report on Germany.

[83] European Commission, Evaluation on the application of the Return Directive (2008/115/EC), 2013.

[84] European Council for Refugees and Exiles, ECRE Comments on the Commission Proposal for Recast Return Directive COM(2018) 634, 2018. The report provides examples from Italy and France. In the case of the former, it notes that most returns happen within the first 30 or 60 days of detention.

[85] The UK has opted-out of the Return Directive.

[86] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report, Brussels: European Migration Network, 2017.

[87] Eurostat asylum statistics. The figure includes all returns, not just TCNs.

[88] Phelps, J., Will More and Longer Detention Solve the 'Migration Crisis'?, 2017.

because it helps to ensure that the rights of their nationals are respected and avoids the stigma of forced returns'[89].

The assessment identified revisions that promote forced returns and restrict voluntary return in four articles (9, 13, 16 and 22). Table 16 presents an overview of the findings. The table highlights the changes that might be expected in terms of the level of return, the type of return and the effectiveness of return with respect to each article. A higher level of voluntary return may contribute to the overall sustainability of returns.

Article 9 may lead to individuals having to apply for and being denied voluntary departure. At present, all TCNs who receive a return order in Belgium and Germany automatically have a period for voluntary return. The level of voluntary returns among persons with a return order can be expected to decline in these two countries as a result, leading to a lower effectiveness in returns. Voluntary returns may also decline in Member States that do not bolster their capacity to process returns within a more constrained timeframe. Furthermore, voluntary return will be denied due to the broad parameters of Article 6 in the case of risk of absconding.

Revisions to **Article 13** would primarily impact TCNs staying irregularly in the EU. The number of these individuals is not known although they are likely to be present in all countries. These individuals may be reluctant to leave the Schengen area, knowing that they would be unable to re-enter. The imposition of an entry ban on this group may therefore, work against its intended objective to reduce the number of irregular migrants in the Schengen area. As a result, the costs associated with the shadow economy, organised crime and human trafficking identified in the status quo assessment would be unlikely to abate. **Article 14** mandates the establishment of voluntary return programmes, which most Member States (including the four selected countries) have in place. The recast would not require the provision of reintegration assistance, which could promote the sustainability of voluntary returns. Efficient and effective reintegration of returnees enhances return sustainability and decreases the risks of re-migration. Recent analysis of Afghan returnees indicates that being the prospect of reintegration is very low, it is not ensured that returnees stay returned which in turn, increases the possibility that they make their way back to Europe.[90] This ultimately defeats the effectiveness of the EU's return policy. At present only Germany and Belgium offer this assistance[91].

Revisions to **Article 16** on remedies and appeals may have an indirect impact on the type of return. The limited timeframe to appeal (five days) may prevent some individuals from exercising their right to appeal. Those individuals who feel that their fundamental rights were infringed may be less willing to engage with the government to plan a voluntary return. Actors involved in the return of these persons may be less willing to execute return decisions as a result. For example, in a well-known case in Germany, for example, civil society protested the return of rejected asylum seekers to Afghanistan and pilots refused to operate the planes[92].

Lastly, **Article 22** would clearly elevate the level of forced returns as the proposal foresees no period of voluntary return in this case. While the measures have the potential to be effective, consideration should be given to the substantial costs for Member States to put these measures in place (see

[89] UNHCR, Return arrangements for non-refugees and alternative migration options, Chapter 9, 2010.

[90] ECRE, Return: No safety in numbers, ECRE's analysis of recent devekioments in EU policy on return of migrants, 2017.

[91] European Migration Network, Overview: Incentives to return to a third country and support provided to migrants for their reintegration, 2016.

[92] DW, German pilots refuse to carry out deportations, 2017.

Chapter 3). The revisions may therefore not be justified from a cost-effectiveness point of view. Insights into the potential effectiveness of an expansion in border procedures may be gained from research into 'hotspots'. A recent study from the European Court of Auditors (ECA) found that **while hotspots were effective in identifying and registering individuals, there were several bottlenecks, one being a low implementation of return decisions**, e.g. less than 20% in Italy[93]. This finding suggests that more utilisation of border procedures may not increase the rate of return.

Table 16: Impact on the effectiveness of returns

Article		Member States affected	Level of returns	Type of return	Effectiveness in returns
9	Voluntary departure	BE, DE and others where a period for voluntary return is automatically granted at present	Lower	Voluntary	Lower
13	Entry ban	All			
14	Return management system	All	No change		No change
16	Remedies and appeals	All except EL and SI	Possibly lower		Likely lower
22	Border procedure	All	Higher	Forced	Higher

It is difficult to predict the extent to which voluntary returns may decline while forced returns increase. Nevertheless, a quantitative assessment of the shift from forced to voluntary returns was made to shed light on the potential impacts on costs. The estimate for forced returns assumes that Frontex will carry out the same number of returns under the proposed changes to simplify the calculation as the costs for a Frontex JRO return differs from the cost for a Member State return (see Table 8). This assumption was considered reasonable as an estimated 1-4% of all forced returns in the four Member States were carried out by Frontex. The estimation was carried out for three scenarios which were defined as the percentage shift of returns that were carried out via voluntary programmes in the status quo that would be potentially be carried out via a forced approach. The results suggest that the shift would not be substantial – in those countries (e.g. CZ) where the cost of forced return is sizeably greater than voluntary return, the number of returns is generally low. In countries with a high level of returns (e.g. DE), voluntary returns are comparatively more expensive. The scenario of a 20% shift was used for the summary assessment.

Table 17: Assessment of the costs of shift from voluntary to forced returns

	BE	CZ	DE	IT
Number of forced returns carried out by MS[a]	2,327	221	18,521	4,837

[93] European Court of Auditors, EU response to the refugee crisis: the 'hotspot' approach, 2017.

Cost per forced return (EUR)[b]	2,000			
Number of voluntary returns[a]	3,445	446	20,994	2,110
Cost per voluntary return (EUR)[c]	1,650	40	3,200	975
Total cost of returns for MS (EUR)	10,338,250	459,840	104,222,800	9,879,725
Scenarios – shift from voluntary to forced returns				
Additional cost (EUR) due to 10% shift	120,750	88,200	-2,518,800	216,275
Additional cost (EUR) due to 20% shift	241,150	174,440	-5,038,800	432,550
Additional cost (EUR) due to 30% shift	361,900	262,640	-7,136,600	648,825

Notes: [a] Eurostat statistics; [b] Evaluation of the Dublin III Regulation conducted for the European Commission; [c] See Table 7 in Section 2.2.

4.3. Decrease in length of return procedure

Three of the articles may lead to a reduction in the length of the return procedure. Article 8 foresees the issuance of a return order immediately following a decision to terminate the legal stay of a TCN. This practice is already evident in the four selected Member States, except Belgium, where the Immigration Office typically issues a return order within one week of a negative decision by the CGRS[94]. The time for a return procedure may decrease by up to one week in Belgium. **A shorter timeframe for a return procedure implies lower reception costs for the Member State**. Assuming that all TCNs who left Belgium following an order to leave spent an average of 3.5 days less on the territory, this would lead to annual savings of EUR 1 million[95].

Articles 16 and 22 put forward short timeframes to launch an appeal of a return decision. Article 16 proposes a time limit of five days while Article 22 proposes 48 hours for individuals in a detention centre. These time limits strongly contrast with the limits currently in place in the four case study countries, which range from 15 days in the Czech Republic to 30 days in Belgium and Italy. **A shorter timeframe to launch an appeal could possibly decrease the quantity and quality of appeal applications** resulting in two economic effects – lower reception costs due to fewer asylum seekers with a rejected application extending their stay and higher costs related to processing poorly prepared appeal applications.

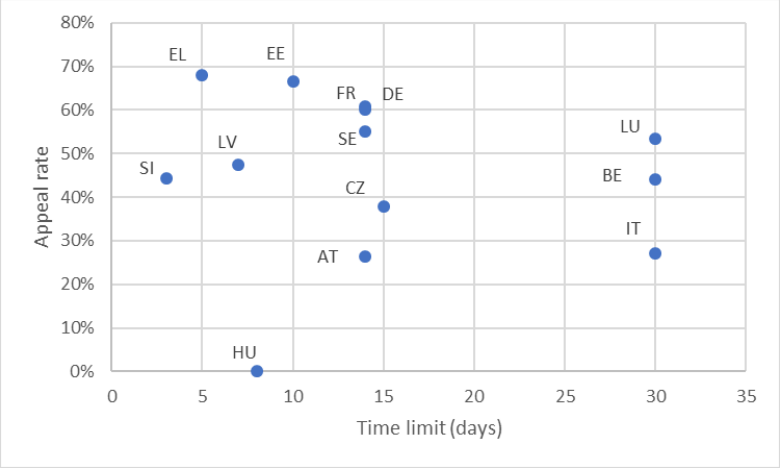
However, the **overall effect on the quantity of appeals is difficult to forecast**. An investigation of the relationship between the rate of appeal and existing time limits across countries did not uncover a clear relationship where a lower time limit was associated with a lower rate of appeal (see figure

[94] European Migration Network, Returning rejected asylum seekers: Challenges and good practices in Belgium, Study of the Belgium Contact Point of the European Migration Network, 2016.

[95] The cost of reception in Belgium was estimated to be EUR 51/day. Multiplying this figure by 3.5 days and by 5880 (number of persons who left following an order to leave in 2017) yielded a figure of EUR 1,049,580.

4). In fact, as pointed out, there might be a **counteracting effect on the quantity of appeals** as a **reduction in the time limit, in some cases, could possibly lead to an increase of appeals** due to the short time for preparation resulting in appeals filed so that the deadline is not missed.

Figure 4: Relationship between rate of appeal and time limits to lodge an appeal



Source: Appeal rate from Eurostat asylum statistics; time limits from the Asylum Information System Database (AIDA).

A calculation for the estimated savings in reception costs was calculated, assuming that the rate of appeal would decrease to some extent with the decrease in the time limit. Considering a decrease in the appeal rate of 20%, the reception costs were estimated to fall by EUR 1.7 million in the Czech Republic to EUR 13 million in Belgium (see table below). The 20% reduction was used for the summary assessment.

Table 18: Estimated reduction in reception costs due to shortened time limit for appeal

	BE	CZ	DE	IT
Time limit to appeal (days)[a]	30	15	14	30
Rate of appeal of asylum decisions[a]	44%	38%	60%	27%
Duration of appeal	Three months[96]	Six months[97]	3 months[98]	5 months[99]

[96] Asylum Information System Database, Belgium Country Report.

[97] In the absence of information, the average figure for a length of appeal was taken from Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

[98] The BAMF website notes that the time limit has been reduced to 3 months and that compliance is noted. This finding appears to be compatible with a 2017 report (BAMF, 2017, Das Bundesamt in Zahlen) found that the average time of an asylum application including appeals was 13.2 months. Thus, the estimate of 3 months was used for the assessment.

[99] The report notes that the duration of appeals ranged between 1.5 and 8 months in Rome in 2014. After 2015 the duration may have increased, but the courts in Rome are more congested and these figures can be understood as an upper bound. The average value was used for the assessment. Roma Tre Universita Degli Stude, Analisi dei Procedimenti di Opposizione al Decreto di Espulsione nella Sede di Roma. 2014.

	BE	CZ	DE	IT
Share of final decisions that are positive	6%	2%[100]	40%	26%
Estimated reduction in reception costs				
Hypothetical lower appeal rate (10% less)	6,528,052	833,112	18,191,037	4,990,248
Hypothetical lower appeal rate (20% less)	13,056,103	1,666,224	36,382,074	9,980,496

[a] Asylum Information System Database (AIDA); [b] Eurostat asylum statistics

Under the proposed changes, it is likely that appeals that are submitted within the time line will be less well prepared and screened by the legal personnel themselves, thus implying a lower effectiveness of the procedure. These additional costs can mitigate the expected decline in costs due to lower utilisation of reception during the appeals period.

A previous study has suggested that an underlying reason for the high rate of appeals is the lack of harmonisation in the qualification of asylum decisions[101]. As noted in the status quo assessment in Chapter 2, concerns have also been raised as to the quality of return orders issued. **Reducing the time limit for appeals is unlikely to tackle this underlying driver of the high rate of appeals and would rather limit the exercise of procedural rights. Reducing the time limit for appeals would not address this root problem nor would it discriminate between persons with a valid claim for appeal and those without any such claim.** It may also lead to another unintended cost, which is the costs to Member States to handle cases presented to the ECtHR on the adequacy of measures to protect procedural rights. The costs of compensation and the court handling fees can be understood as an economic cost.

[100] 2016 statistics used to calculate this (2017 figures were not available from Eurostat).

[101] Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

5. Conclusions

The table below summarises the findings of the key costs and benefits that may result from the Commission's proposal to recast the Return Directive. The analysis has several limitations and caveats. With respect to the quantitative estimations, the analysis draws on data from 2017. The situation in that year (in terms of policies and the number of asylum applications and returns) may not be representative of future years. The assessment considers the scenario where Member States comply with the proposed changes of the Directive. In practice, however, it is likely that Member States will face challenges to meet the new conditions, particularly given the challenges identified in the status quo.

Table 19: Summary of economic assessment of the impacts of the proposed changes to the Returns Directive

		Articles	BE	CZ	DE	IT
Costs	Operating and staffing changes to return procedures		All articles would imply new costs for the Member States and the EU, while four articles would imply substantial costs for Member States (see Chapter 3)			
	Pre-removal detention	6	Substantial increase (***)	Minor increase (*)	Very substantial increase (****)	Substantial increase (***)
	Forced returns	6, 7, 18, 22	Expected to increase due to higher utilisation of detention			
	Voluntary returns	9	Expected to decline due to reduced time limit (which is below current time limits in all countries) and the higher utilisation of detention			
	Costs connected to the failure to respect the right to appeal	16	The cost per handling an appeal is expected to increase due to the lower expected quality of appeal application files. Other costs may include compensation costs awarded by courts for failure to respect right to appeal.			
Benefits	Reduced reception needs for appeals	16	Moderate decrease (**)	Minor decrease (*)	Moderate decrease (**)	Minor decrease (*)
	Irregular migrants leaving the EU...	Increased opportunities for returns, in particular forced returns. However, the extent to which they can be implemented depends on the status of readmission agreements and arrangements with third countries				
	... subsequent lower risk of them falling into the shadow economy	No robust evidence linking irregular migrants and the shadow economy, which is also driven by EU nationals. The extent to which the shadow economy would reduce is uncertain				

Note: * <EUR 10 million, ** EUR 10-100 million, *** >EUR 100 million, **** >EUR 500 million.

The proposed revisions to the Directive would introduce a number of new costs for the EU and its Member States. The utilisation of pre-removal detention would escalate, as would the prospect of

forced returns. The time limit placed on appeals would exacerbate a problem already evident, i.e. the limited harmonisation of qualification decisions across the Member States.

The assessment was limited by the lack of evidence in three areas – (1) the extent to which Member States have readmission agreements with source countries of irregular migrants; (2) the contribution of irregular migrants to the shadow economy in the EU; and (3) the determinants of return, in particular the relationship between detention and return. More research is urgently needed in these areas to support the development of effective, evidence-based policies.

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6. Annex 1: Country classification

EU Member States were classified into seven groups based on 2017 asylum statistics from Eurostat. Thresholds for rate of return, rate of forced return, and rate of appeal were based on a simple average of the Member States in 2017.

The table below presents the mapping. Countries that present a specific case were excluded from the selection. For example, the UK and Ireland are not bound by the Return Directive. Countries with high and very high orders to return are expected to face the greatest costs in implementing the Return Directive and would be the most affected by changes. Countries with a low rate of return would have the most to gain from changes that improve the effectiveness of returns. Thus, the selection focused on countries with high or very high orders to return and a low rate of return, while also considering geographical distribution.

Table 20: Country classification

Countries	Particular case[a]	Very high orders to return (>50,000)	High orders to return (>20,000)	Low rate of return (<41%)	High rate of forced return (>43%)	High rate of appeal of asylum decisions (>53%)
EL, PL, UK,	✓		✓			
BG, HU, IE	✓					
DE, ES, SE		✓				
FR, **IT**, **BE**, NL			✓	✓		
HU, PT				✓		
CZ, SI				✓	✓	
FI					✓	
SK, RO, MT						✓

[a] The situation of the country is unique, the country is not bound by the Return Directive and/or the country is not in the Schengen area.

7. Annex 2: Information database

7.1. Eurostat – return orders

This section presents the key variables from Eurostat on the enforcement of immigration legislation[102].

Number of asylum applicants (Eurostat varname: migr_asyappctza): Asylum seekers whose applications for protection are rejected are a major source of return orders. Eurostat provides information on the number of TCNs who submitted an application for international protection, or who are part of a family who submitted an application, by Member State. All applicants include individuals who have submitted an application in the past. The number of applicants may include persons subject to a Dublin procedure.

Orders to leave (Eurostat varname = migr_eiord): This variable is the number of TCNs who are subject to an administrative or judicial decision to leave the Member State due to their illegal presence. These figures do not include Dublin transfers. Each person is only counted once, even if he or she received more than one order to leave. TCNs are defined as individuals without the citizenship of an EU country.

TCNs returned following order to leave (Eurostat varname = migr_eirtn): This variable reflects the number of TCNs who have left the Member State following an order to leave. Some countries report a sub-category for returns to third countries only – this was the case for three of the selected countries (DE, CZ and BE), but not one (IT). This sample may include those who were subject to a decision in a previous year, as well as the current year. The figures do not include Dublin transfers. The figures include forced and assisted returns. Unassisted voluntary returns may also be included.

Type of return (Eurostat varname: migr_eirt_vol): This variable provides information on the type of return (forced, voluntary or other) for persons leaving the country each year. Voluntary return includes those persons that complied with the obligation and no enforcement procedure was needed. Forced returns include those persons for whom the obligation had to be enforced. Beneficiaries of assisted return programmes are typically voluntary returns but may also be forced returns. Other return refers to cases where the individual was presumably returned but whose type of return is not known. The figures from Eurostat are for all returns and are not limited to third countries. For this reason, the figures were adjusted, based on the assumption that the share of forced and assisted returns was the same for all returnees and returnees to third countries.

Table 21: Orders to return, 2017

	BE	CZ	DE	IT	EU-28
From Eurostat:					
Asylum applicants *(migr_asyappctza)*					
Total	18,340	1,445	222,560	128,850	708,585

[102] The information presented in this section is paraphrased from the Eurostat website.

	BE	CZ	DE	IT	EU-28
First time	14,035	1,140	198,255	126,550	654,610
Orders to leave *(migr_eiord)*	32,235	6,090	97,165	36,240	516,115
Returns following order to leave *(migr_eirtn)*					
Total	6,315	805	47,240	7,045	214,150
Third countries only	5,880	680	44,960	7,045	189,545
Type of return *(migr_eirt_vol)*					
Assisted return	3,445[103]	122[104]	20,944[105]	1805	n.a.
Forced return	2,435	224	23,966[106]	4,935	
Other	0	334	0	305	
Calculated by authors					
Number of rejected asylum seekers	11,155	1,055	198,935	43,105	435,380
Return rate	18%	11%	46%	19%	37%
Rate of enforced return	41%	65%	53%	73%	n.a.

Source: Eurostat immigration statistics. *Not available from Eurostat.
Notes: The number of rejected asylum seekers was estimated using information on first and final asylum decisions available from Eurostat. The return rate was calculated as the total return to third countries divided by the total number of orders to leave the country. The rate of enforced return was calculated as the number of enforced returns divided by the sum of assisted and enforced returns. The number of voluntary return/other was calculated as the difference between the total returns and assisted, enforced and other returns.

7.2. Recognition rate by nationality

This section reviews the recognition rate by nationality in 2017 to support an investigation into the risk of refoulement. As Figure 3 shows, the EU overall recognition rate is highest for Syria, followed by Eritrea. The top six countries provided the basis for the investigation presented in Chapter 2.2 (see Table 4).

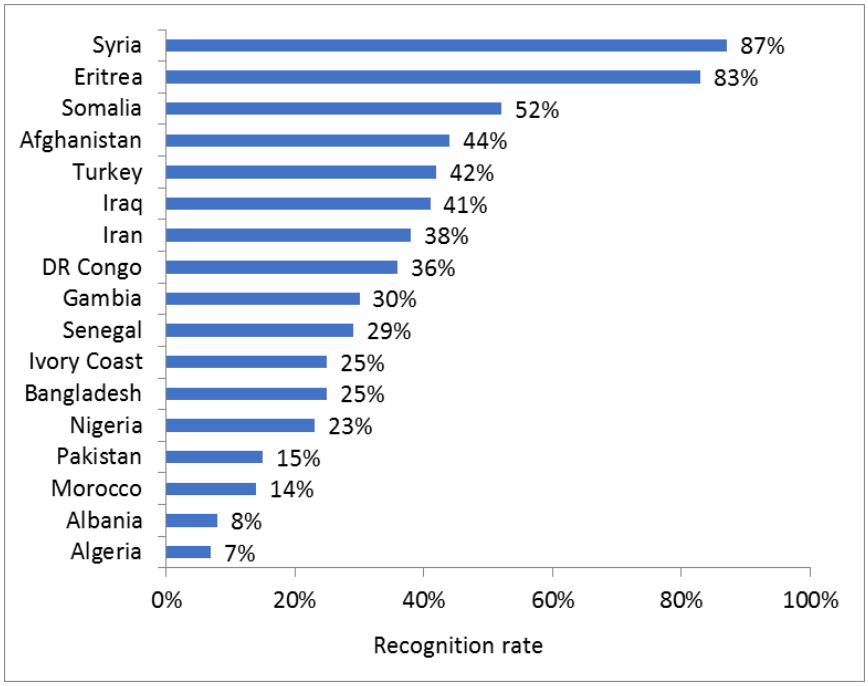
[103] Figures from Eurostat sum all returns, not just returns to third countries. The figures presented take the Eurostat figures and scale them to the number of returns to third countries. The Eurostat figures were: All assisted returns = 3,700; Enforced returns = 2,615.

[104] Figures from Eurostat sum all returns, not just returns to third countries. The figures presented take the Eurostat figures and scale them to the number of returns to third countries. The Eurostat figures were: All assisted returns = 145; Enforced returns = 265; Other = 395.

[105] Estimates based on the difference between returns and forced returns.

[106] Number of deportations (Abschiebungen) - German Bundestag, Drucksache 19/800 (reply to a parliamentary request) https://www.bpb.de/gesellschaft/migration/flucht/218788/zahlen-zu-asyl-in-deutschland

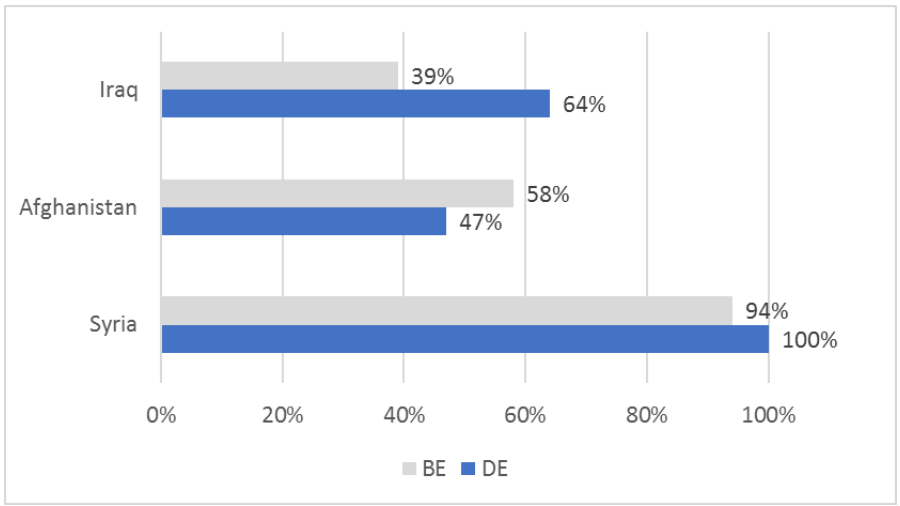
Figure 5: Recognition rate by nationality of asylum seekers



Source: Eurostat, Recognition rates by country of origin, 2018.

Recognition rates vary substantially between countries. Figure 6 below illustrates this issue, using Germany and Belgium as an example.

Figure 6: Recognition rate for three nationalities – Germany and Belgium



Source: Eurostat, Recognition rates by country of origin, 2018.

7.3. Member State policies on returns and pre-removal detention

Table 22: Member State policies on return decisions and pre-removal detention

	BE	CZ	DE	IT
Issues return decision together with decision to end legal stay	No	Yes	Yes	Yes
Specialised detention centres to return TCNs	Yes	No	Yes	Yes
Detention used...				
When individual resists return procedure	Yes	Yes	Yes	No
To ensure the return	No	No	No	No
Period for voluntary departure automatically issued with return decision	Yes	Needs to apply	Yes	Needs to apply
Flexible approach to duration of voluntary departure period	Yes - up to 30 days	No	Yes - up to 30 days	No
Detention used when period of voluntary return finishes	Yes	No	No	No
Appeals	Administrative authority	Administrative authority	Administrative authority[107]	Administrative authority
Entry ban automatically accompanies return decision	No – case by case basis	Yes	No – only when expelled	Yes

Source: European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017.

[107] Asylum Information System Database, Country Report on Germany.

Table 23: Pre-removal detention facilities

	BE	CZ	DE	IT
Capacity of facilities[108]	585 (609 by end of 2017)[109]	850	416	359
Persons in detention - overall	7,105 in 2017[110]	606 total in 2016[111]		
Persons in detention - forced return procedure[112]	4,965 men and 1141 women[113]	344 men and 100 women[114]	2,151[115]	1,968
Cost of detention (EUR)	289 per person/day[116]	8-9 per day for accomodation and meals – detainees pay these costs [117]	43/day in Bremen and 420/day in Hanover Langenhagen in 2014 - detainees pay these costs	N/A
Average number of days	34.6[118]	80 in 2014; 51 in 2013; 77 in 2012; 83 in 2011; 79 in 2010; 60 in 2009[119]	Max 10[120]	N/A
Period for voluntary return	Maximum 30 days[121]			

[108] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017.

[109] Myria, Retour, detention et eloignement des etrangers en Belgique. Droit de vivre en famille sous pression, 2018.

[110] *Ibid.*

[111] Global Detention Project, Country Report on the Czech Republic.

[112] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017.

[113] *Ibid.*

[114] *Ibid.*

[115] Extrapolated based on the 1,255 persons being placed in detention by the end of July 2016 (assumed that at the same rate (1,255 divided by (7/12)).

[116] This figure was calculated using information on the estimated costs of running closed centres (EUR 72 million in 2016 – EUR 43 million for staff and EUR 9 million for maintenance and investment costs) and the estimated number of detainees and the estimated duration of detention. EUR 289 = (72 million/(35*7105)). The cost of detention facilities was obtained from Global Detention Project, Country Report on Belgium.

[117] Global Detention Project, Country Report on the Czech Republic.

[118] Myria, Retour, detention et eloignement des etrangers en Belgique. Droit de vivre en famille sous pression., 2018, p.10.

[119] Global Detention Project, Country Report on the Czech Republic.

[120] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017. TCNs may be detained for a maximum of 10 days if they resist the procedure. This time limit was increased from four days in the 2017 reform.

[121] Global Detention Project, Country Report on Belgium.

	BE	CZ	DE	IT
Detention time limit	2-5 months for return procedure. Longer duration for enforced returns[122]	Maximum duration six months, with possibility to extend to 18 months[123]	Maximum duration six months, with possibility to extend to 18 months[124]	Maximum 90 days[125]

Source: European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017.

7.4. Member State reception costs

	Cost components	Estimated daily cost
BE	Daily living, medical costs and accommodation centres	EUR 25.84/day/asylum seeker or EUR 9,458/year/asylum seeker (2016)
	Daily living, medical cost and accommodation centres + staff costs and investments	EUR 51.14/day/asylum seeker or EUR 18,826/year/asylum seeker (2016)
CZ	Reception (without staff salaries)	about EUR 20/person/day
IT	Personnel, updating cost, integration, indirect costs, - SPRAR (Protection System for Asylum Seekers and Refugees) centres - average per person	2014: EUR 34.67/person/day (overall cost, broken down in categories listed below)
DE	No information available	

Source: European Migration Network, Ad-hoc query on average cost and average lenght of reception for asylum seekers, 2017.

7.1. Member State appeal costs

The assessment assumed that appeals to return decisions are equivalent to appeals to first instance asylum decisions. This assumption was considered to be reasonable given that return orders typically accompany a negative decision on an asylum application. At the same time, not all return orders may be attributed to rejected asylum seekers, but also economic migrants. As the statistics do not allow for this breakdown we cannot

The **estimated number of appeals** is the number of final decisions. The **appeal rate** is estimated as the number of final decisions as a share of rejected first instance decisions. The **time limit to file for appeals** was obtained from the Asylum Information Database. The actual **duration of appeals** was also estimated based on available information. The figures for the four Member States are presented in the table below.

[122] Global Detention Project, Country Report on Belgium. Reference to Aliens Act, Article 74(5) §3.

[123] Global Detention Project, Country Report on the Czech Republic.

[124] Asylum Information Database, Country Report on Germany.

[125] European Migration Network, The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report. Brussels: European Migration Network, 2017.

Table 24: Appeals in the four Member States

	BE	CZ	DE	IT
Estimated number of appeals, 2017	14,183	2,314	58,299	9,785
Appeal rate, 2017	44%	38%	60%	27%
Time limit to file for an appeals	30 days	15 days	14 days	30 days
Duration of appeal	At least three months[126]	Six months[127]	7.8 months[128]	18 months[129]
Cost of appeal[130]	9,000			

[126] Asylum Information System Database, Belgium Country Report.

[127] In the absence of information, the average figure for a length of appeal was taken from Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

[128] Asylum Information System Database, Belgium Country Report.

[129] European Council on Refugees and Exiles, The length of asylum procedures in Europe, 2016.

[130] Estimated figure provided in: Van Ballegooij, W., with Navarra, C., Cost of non-Europe in Asylum Policy, EPRS, European Parliament, 2018.

On 12 September 2018, the European Commission published a proposal for a recasting of the 2008 Return Directive, which stipulates common standards and procedures in Member States for returning irregular migrants who are non-EU nationals. Effectively returning irregular migrants is one of the key objectives of the European Union's migration policy. However, Member States currently face challenges: national practices implementing the EU rules vary and the overall return rates remain below expectations. The proposal was not accompanied by a Commission impact assessment.

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) therefore asked the European Parliamentary Research Service to provide a targeted substitute impact assessment of the proposed recast Return Directive. The assessment considers the main expected impacts of the key provisions of the Commission proposal, focusing on the social, human rights and financial impacts, as compared to the current situation (status quo).

This is a publication of the Ex-Ante Impact Assessment Unit
EPRS | European Parliamentary Research Service

PDF ISBN 978-92-846-3607-5 | doi:10.2861/187601 | QA-02-19-058-EN-N