

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

1. General observations

The Meijers Committee observes that the recast proposal is not based on an evaluation of the existing Returns Directive or accompanied by an Impact Assessment. Despite the Commission's earlier commitment to recast the directive only after a thorough implementation evaluation,¹ the present proposal is primarily based on "technical consultations with the Member States" (Explanatory Memorandum, p. 6). This makes it difficult to verify the proposal's effectiveness, necessity and proportionality.

Despite the proposal widening the grounds for detention of illegally staying third-country nationals and tightening procedural guarantees, the Explanatory Memorandum does not meaningfully engage with human rights. It merely declares that the proposal respects fundamental rights (p. 6).

In this comment, the Meijers Committee highlights a number of problematic human rights aspects of the proposal, especially relating to the right to liberty and the right to an effective remedy. The Committee also makes observations on the coherence between the proposal and other EU instruments, including the proposal for an Asylum Procedures Regulation. The proposed procedures against return decisions in asylum cases, whether in a border procedure or not, risk to cause unacceptable legal and conceptive confusion at the cost of the rights of asylum applicants, whereas the complicated relationship between the material decision to refuse international protection and the return decision is insufficiently reflected upon. The Meijers Committee fears that very restrictive procedural provisions on return decisions will turn out to set a very low standard for asylum procedures, especially where the negotiations about the border procedure under the Draft Procedures Regulation show that an agreement is difficult to obtain.²

2. Risk of absconding and detention (Art. 6 and 18)

The Meijers Committee appreciates the formulation of objective criteria for determining the risk of absconding, in view of the CJEU judgment in Case C-528/15 that any limitation on the exercise of the right to liberty on the basis of a risk of absconding requires clear and objective criteria for assessing that risk in national law. The Meijers Committee has doubts however, about the legal construction of Article 6.

¹ See annex to the Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - a renewed action plan, COM(2017) 200 final.

² See the Presidency Note of 23 October to SCIFA on Border Procedures, 1337/18.

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First, there is little guidance on how the overall assessment of the criteria mentioned in Art. 6(2) should be made. It can therefore be questioned whether the mere listing of criteria makes detention sufficiently predictable so as to guarantee against arbitrary application as required by the CJEU.³

Second, it is neither evident nor reasoned in the Explanatory Memorandum why some of the criteria indicate the risk of absconding, such as a lack of identity documents and a lack of financial resources. The list of indicators differs, without explanation, from the shorter list in the 2017 Commission Recommendation on the implementation of the Returns Directive.⁴ As the criteria are proposed as possible grounds for detention, the Meijers Committee recommends the Union legislator to only include them on the basis of studies or evidence confirming that these criteria are suitable indicators for a risk of absconding.

Further, the proposal only mentions criteria that positively indicate a risk of absconding and no criteria that may point to the absence of such risk (such as having a social network, family members or a long period of stay). The Meijers Committee advises to not only formulate positive indicators for the risk of absconding but a list of open criteria as that may point to either the presence or the absence of such risk (i.e. “whether the third-country nationals has residence, a fixed abode or reliable address”; “whether there are ongoing criminal investigations”, “whether family members are present”, “the length of stay”, etc). This may prevent a practice whereby authorities use the list of criteria as a checkbox instead of making an overall assessment of all relevant individual circumstances in accordance with paragraph 2.

Third, the Meijers Committee finds the proposed second sentence of the second paragraph of Article 6(2), vesting a presumption of a risk of absconding if one specific criterion is met, unnecessarily onerous for the individual. Onerous, because the burden of proof is unilaterally shifted towards the individual. Unnecessary, because an overall assessment as mentioned in the first sentence will normally lead to the same result.

Therefore, the Meijers Committee proposes to delete the last sentence of Article 6(2).

Fourth, the Meijers Committee wonders why the type of measures which may avoid a risk of absconding are explicitly mentioned in connection with the period of voluntary departure (Article 9(3)) and as alternative to detention in Article 8(4) of the Reception Conditions Directive⁵ but not in proposed Article 18. Article 18(1) contains the rule that Member States must consider whether alternatives to detention can suffice, but does not specify the sort of measures that must be considered. The Meijers Committee recommends to add a paragraph to Article 18, which would be similar in wording and have the same effect as Article 8(4) of the Reception Conditions Directive:

Article 18 paragraph 2 new: Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, submission of documents or an obligation to stay at an assigned place, are laid down in national law.

³ Case C-528/15, par. 41.

⁴ C(2017) 1600 final, point 15.

⁵ Directive 2013/33/EU.

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3. Detention: risk to public policy, public security or national security (Art. 18(1)(c))

The Meijers Committee questions the proposal to include the risk to public policy and security as grounds for detention, as was done earlier in the Reception Conditions Directive. The necessity of adding this ground is poorly motivated as the Explanatory Memorandum vaguely alludes to “new risks [that] have emerged in recent years, which make it necessary that illegally staying third-country nationals who pose a threat to public order or national security can be detained.”⁶ What new risks, and why is the criminal law framework, which is the normal avenue for protecting society from such risks, deemed insufficient to deal with them? Article 5 ECHR, which protects against arbitrary detention, distinguishes between detention grounded in criminal law (a conviction for a criminal offence, a suspicion of a criminal offence or the prevention of a criminal offence) and the detention of aliens (to prevent illegal entry or to effectuate expulsion). Article 5 ECHR does not recognise a risk to public policy or national security as a ground for detention. To include it in the Returns Directive would blur the distinction between criminal and aliens detention. This may result in criminal law guarantees being circumvented. Further, it results in aliens without legal residence being more susceptible to detention for presenting a risk to public order than other persons.

The similar provision in the Reception Conditions Directive has caused much confusion in national case law on the relationship between detention based on the Directive and the permissible grounds for detention under Article 5 ECHR. The CJEU found that this ground must be interpreted as only allowing for detention if the conditions for aliens detention are also fulfilled (i.e. detention is justified only for as long as deportation proceedings are in progress).⁷ The Meijers Committee regrets that this judgment and its consequences are not mentioned in the Explanatory Memorandum. It also observes an overlap between the risk to public order and the risk of absconding as ground for detention, as the latter is informed by *inter alia* the “existence of a criminal conviction” and “ongoing criminal investigations and proceedings” (proposed Art. 6 (1)(k) and (l)).

For these reasons, the Meijers Committee recommends to delete Article 18(1)(c).

4. Risk to public policy, public security or national security: Definition

If it is decided to retain risk to public policy, public security or national security as ground for detention, it is important to clarify the meaning of “public policy”, “public security” and “national security”. In its judgment in Case C-528/15, the CJEU held that “detention of applicants, constituting a serious interference with those applicants’ right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.” As the case concerned detention to avoid a risk to absconding, the Court found that national law must define which circumstances amount to a risk of absconding.

As public policy, public security or national security are, like the risk to absconding, quite open concepts and susceptible to different interpretations, they can only form a ground for detention if national law defines the precise conditions under which detention is allowed. In the J.N. Judgment, Case C-601/15 PPU, cited above, the Court stated that “the strict circumscription of the power of the competent

⁶ Explanatory Memorandum, p. 8.

⁷ CJEU 15 Feb. 2016, C-601/15, J.N.

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national authorities to detain [...] is also secured by the interpretation which the case-law of the Court of Justice gives to the concepts of 'national security' and 'public order' found in other directives [...]. The Court has thus held that the concept of 'public order' entails, in any event, the existence — in addition to the disturbance of the social order which any infringement of the law involves — of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.

The Meijers Committee recommends the EU legislator to clarify the meaning of public policy, public security or national security as ground for detention on the basis of existing case law of the CJEU on those concepts (see eg CJEU 24 June 2015, H.T., C-373/13; CJEU 15 February 2016, J.N., C-601/15 PPU; CJEU 23 November 2010, Tsakouridis, C-145/09; CJEU 22 May 2012, I., C-348/09).

5. Term of departure

The Meijers Committee finds the strict legal obligation to deny a period for voluntary return in some enumerated cases, as is proposed in Article 9(4), incompatible with the principle of point 6 of the preamble according to which decisions under this Directive shall be taken on a case-by-case basis, a principle which is also central in the case-law of the Court of Justice. Further, two of the grounds for denying a term of departure: the risk of absconding and the risk to public policy, must be assessed on a case-by-case basis themselves in the same return procedure as the term for departure, and can therefore not as such be a ground for automatic denial of a term of departure.

The Meijers committee proposes to amend the first line of Article 9(4) as:

“Member States may decide not to grant a period for voluntary departure in following cases:”

6. Return procedures versus procedures about legal residence

The Meijers Committee has the impression that the prevailing wish to control movement of asylum seekers has blinded the drafters for the fact that the Returns Directive functions at a junction of many connected EU instruments of various nature. A return decision normally coincides with a decision refusing or ending legal stay under one of the EU directives or regulations in force: the Qualification Directive, the Family Reunification Directive, the Directives on students and researchers, the Schengen Borders Code, etc. The relationship between a return decision and the underlying decision regarding a right to legal stay has insufficiently been analysed by the drafters of the proposal.

For instance, the procedural provisions for cases of rejected asylum applications in Article 16 and Article 22 neglect the situation referred to in the first sentence of the proposed Article 8(6): The Directive shall not prevent Member States from adopting a return decision together with a decision ending legal stay, removal or an entry ban in a single administrative act or judicial decision or act as provided for in national legislation. This is the system used in the Netherlands.

This option, framed as exceptional in the present draft, should according to the Meijers Committee, be the rule, as it is more efficient and logical. In the Netherlands, there is no distinction between an appeal procedure against a return decision and an underlying procedure as both the right to legal stay and the issues related to a returning obligation must be judged in one and the same appeal procedure. The evident advantage of the system is that it reduces the need for separate procedures. Further, it has the in-built guarantee that a return procedure can never be shorter or longer than the procedure

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on the material issues of a residence right. Moreover, there is no distinction as to the suspensive effect as all questions are decided in the same procedure.

The drafted provisions of Articles 16 and 22, which are basically aiming to shorten the return procedure, would have fatal consequences for such a combined system. It would be impossible to implement rules shortening the return procedure without either separating two procedures which were destined to be inseparable, or shortening the underlying procedure as well.

In the view of the Meijers Committee this is not merely a complication effecting one particular Member State (the Netherlands) which happened to choose applying the option of combining return decision and material decision. It is above all an illustration of the conceptual poverty of the present draft. By not prescribing that all Member States should always combine the return procedure with the material procedure, the drafters of the present proposal created an ambiguous and chaotic system which will be extremely difficult to implement in any Member State and will work to the detriment of individual rights.

Under the proposed option, allowing that a return decision is not adopted in the same administrative act as the material decision on legal stay, but separately – immediately after the material decision – many occasions will occur in which return procedures and material procedures will interfere with each other. For instance, if the returns procedure offers lesser possibilities to suspend removal than the material procedure, the difficult question may arise which of the two procedures prevails. Or, if the returns procedure is terminated earlier than the material procedure, the question will arise whether a favourable outcome of the material procedure can still influence a negative outcome of the finalised return decision.

The Meijers Committee suggests that the Dutch practice is used as an example of a best practice in and that, accordingly, the first sentence of Article 8(6) is deleted and the second (sole) sentence of paragraph 6 be rephrased as:

Article 6 paragraph 26: Member States shall issue a return decision, also containing the term for departure and, if such a term is not granted, a decision of removal or, where applicable, of an entry ban in one single administrative act together with a decision ending or refusing a legal stay of a third-country national. If a decision to remove or an entry ban was not issued together with the decision ending or refusing legal stay, it may be issued later in a separate decision.

This amendment implies that separate return procedures as provided for in Article 16 and 22 are no longer necessary. The length of the asylum procedures and the suspensive effect of asylum procedures should then exclusively be dealt with in the instrument to which they belong, that is in the Procedures Regulation, which is presently under negotiation.

Accordingly, the Meijers Committee suggests that the new second sentence of Article 16(1) and the new third and fourth paragraphs of Article 16 are deleted.

7. When does the border procedure start?

Alternatively, if appeals against a return decision and the underlying rejection of an asylum application remain separate procedures, the proposal should at least clarify whether the border procedure of Article 22 starts after the negative decision on the asylum application in the first instance or after the

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completion of possible asylum appeals (with or without suspensive effect). The reference in Article 22(1) to Article 41 of the Commission proposal for an Asylum Procedures Regulation (COM(2016) 467 final) suggests that the procedure starts after the rejection of the asylum application at first instance, as that provision deals with decisions made by the determining authority. However, Article 22(6)(b) mentions review procedures in accordance with Article 53 of the proposal for a Procedures Regulation, potentially implying that the border procedure of Art. 22 does not run parallel with asylum appeals procedures. It is important to have full clarity on the legal regime (Procedures Regulation and Reception Conditions Directive or Returns Directive) applicable to persons during appeal against an asylum decision. In the view of the Meijers Committee, appeals with suspensive effect forestall the start of the returns procedure.

The Meijers Committee recommends to clarify in Article 22(1) that the border procedure is not applicable as long as the time limit for bringing an appeal against a rejection of an asylum application has not expired and when appeal is brought with suspensive effect in accordance with the Asylum procedures regulation.

8. Entry ban

The entry ban is closely connected with the SIS-alert, thus the systems of the Returns Directive and the SIS II regulation should be coordinated. The Meijers Committee is of the opinion that the present recast of the Directive should be used to incorporate the proportionality assessment of Article 21 of the SIS II Regulation, which says 'Before issuing an alert, Member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II.' Likewise, it should in each case be determined whether the case is important enough to warrant an entry ban.

The Meijers Committee cannot find the mandatory issuing of an entry ban under 13(1) of the present proposal compatible with a case-by-case approach assessing the need of an entry ban on basis of the merits of each individual case. Instead, an entry ban should always be optional.

Especially in cases where there is no serious threat to public policy, public security or national security, the automatic issuing of an entry ban may be counter-productive. According to a research performed on request of the Dutch government in 2014, the obligation always to issue entry bans leads to complaints about unnecessary administrative burdening.⁸ Further, it was found that the mere threat of a possible future entry ban may be more effective in stimulating third country nationals to leave on their own account, than an automatically issued entry ban.

Therefore, the Meijers Committee suggests that Article 13(1) is rephrased as:

- 1. Return decisions may be accompanied by an entry ban:***
(a) if no period for voluntary departure has been granted, or
(b) if the obligation to return has not been complied with, or

⁸ Scientific Research and Documentation Center (WODC) of the Dutch Ministry of Justice and Security 'Het lot van het inreisverbod', 2014, <https://www.wodc.nl/onderzoeksdatabase/2414-uitvoeringspraktijk-en-werking-van-het-inreisverbod.aspx>.

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(c) in other appropriate cases, in particular if the personal behaviour of the third country national represents a serious and present threat to public policy, public security or national security. Before issuing an entry ban, Member States shall determine whether the case is adequate, relevant and important enough.

9. Border Procedure: detention

According to paragraph 7 of proposed Article 22, Member States may keep in detention rejected asylum-seekers who were detained in the context of a procedure to decide on the applicant's right to enter the territory (the asylum border procedure). The apparent purpose of this provision is to allow Member States to keep -seekers in detention at the border for the entire duration of the asylum and returns procedure. The Meijers Committee wishes to draw attention to recent judgments of the ECtHR finding violations on the part of several EU Member States for detaining asylum-seekers at the border without appropriate guarantees (ECtHR 15 Dec. 2016, *Klaifia v Italy*, no. 16483/12; ECtHR 14 March 2017, *Ilias and Ahmed v Hungary*, no. 47287/15 and ECtHR 25 January 2018, *J.R. a.o. v Greece*, no. 22696/16). In view of these judgments, the Meijers Committee recommends to formulate clear safeguards against arbitrary border detention. Paragraph 7 lays down a maximum period of detention and the rule that detention may only be maintained as long as removal is being prepared. But it does not prescribe other standards developed in ECtHR case law, including the obligations (i) to lay down in national law clear and accessible grounds for detention, (ii) to notify persons of detention orders promptly and in a language they understand, (iii) to give legal and factual reasons for detention, (iv) to inform about and provide remedies to obtain a judicial decision on the lawfulness of detention. Some of these guarantees are laid down in the general provision on detention, Article 18(2)-(4), but Article 22 does not refer to them.

The Meijers Committee recommends to insert a cross-reference to Article 18(2)-(4) in Article 22(7) and to strengthen the safeguards of Article 18 in accordance with the relevant case law of the ECtHR.