

# Non-Paper

## Recast proposal of the Return Directive

### 1. Purpose of the Non-Paper

This Non-Paper aims to provide comments for LIBE on the Commission's recast proposal on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive; recast) (2018/0329 (COD) - COM(2018)634). It has been prepared at the request of the rapporteur and shadow rapporteurs whom the Frontex Director of Operational Response Division met on 28 November 2018.

### 2. Key challenges in the field of return and state of play of return assistance

#### 2.1. Key challenges

Returns is a key component of the EU migration policy and as such it remains high in priority in the EU migration policy. While the number of migrants entering into the EU is decreasing over the years since the migration crisis of 2015, the number of irregular migrants issued an individual return decision effectively returned to their country of origin is still falling behind. There is an urgent need to significantly step up the effective return of migrants irregularly staying in the EU.

From the results produced in the field of return after the ten-year implementation of the Return Directive, some key challenges are enlisted below:

- The different transposition of the Return Directive in MS' national legislations and overall lack of common/harmonised return system among MS, also due to the wide margins given by the EU legislator for setting national rules and procedures (e.g. on conditions for detention, which has hugely increased EU-wide the “risk of absconding”);
- Lack or inefficient national procedures for the management of (subsequent) last minute asylum applications during ongoing return procedures - including the relevant appeals - that directly affects the implementation of effective returns<sup>1</sup>;
- The time-wise gap between the end of the (negative) asylum procedure and the start of the return process;

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<sup>1</sup> *Mainly because absconded or due to subsequent last minute asylum applications, in 2017 around the 59% of returnees who were supposed to be returned in the Agency supported return operations were finally not returned on planned operations.*

- **Secondary movements within the Schengen area (aiming among others at avoiding return) and the lack of interoperability/interconnection between national IT systems and the EU's large scale IT systems**, which does not allow a smooth and fast sharing of relevant information among MS that would enable a more easy return of individuals moving in different MS;
- In combination with the above mentioned element, **the lack of an end-to-end digitalisation of the return process in many MS**, which does not allow an efficient management of the entire return processes and availability of on-time accurate statistical data at national and EU-level<sup>2</sup>;
- The number of unidentified and/or undocumented returnees due to **lack of cooperation of both the returnee, at all stages of the return process, and the relevant non-EU country** (representations in the MS) in the identification process;
- **Lack of MS return national central offices**, which would prevent challenges in internal communications/coordination among different national responsible entities.

## 2.2. Return assistance - state of play

Already various supporting activities by the Agency are in place to support MS dealing with these key challenges. The Agency supports activities both in the pre-return and the return operations phase; varying from improving or assisting MS in setting up national return case management systems, deploying experts from the return pools (forced-return escorts, return specialists and monitors) to cooperation with non-EU countries and supporting return operations.

With the establishment of the European Centre for Returns (ECRet)<sup>3</sup> in January 2018, the Agency has increased its capacity both in terms of support activities as well as staff. While still some tools are underused by MS, the Agency is currently developing more initiative in the field of return, including the take-over of IRMA, the IT platform on return, and the transfer of some activities of existing EU-funded programs on return (Eurint, EURLO, ERRIN) for the full implementation of which ECRet budget and staff will require some adaptation in relation to the foreseen growth.

## 3. Operational impact analysis

This chapter aims to line up the key changes of the recast, and provides an operational impact analysis of the changes that might affect the return-related activities supported by the Agency.

### 3.1. Risk of absconding (Article 6)

**Overview:** *A non-exhaustive, objective list of criteria on the risk of absconding (16 in total) has been proposed to be included in the Directive that may streamline the conditions for voluntary departure, and correspondingly increase the possibilities for Member States to justify detention. The Member States will have to apply these criteria on a case-by-case basis.*

<sup>2</sup> The Agency's RECAMAS Summary Report of 20 September 2017: Summary of the results of the mapping exercise with regards to Return Case Management Systems (RECAMAS) in accordance with COM(2017)200.

<sup>3</sup> Before the "Return Support Unit"

**Operational impact:** The Agency has no legal basis to enter into the merits of the decision-making in applying the criteria to concretely define the risk of absconding. Nevertheless the correct transposition of this provision in MS national legislations will affect a number of activities in the area of identification of returnees as well as in the implementation of return operations, including those supported by the Agency.

In general, the increased number of conditions to identify the risk of absconding is assumed to lead to a higher number of detention cases. This would subsequently increase both the number of returnees identified and those taking part in return operations, provided that they would remain at the disposal of the competent authorities until the often lengthy documentation process are concluded by the non-EU countries concerned, until the day of their return operation.

As an example, as the outcome of a number of identification missions<sup>4</sup> supported by the Agency in 2018, the **non-show-up rate on the day of the identification interviews of invited returnees not in detention varied between the 44 and 57%.**

### **3.2. The obligation to cooperate with the authorities of the Member States (Article 7)**

*Overview: The proposal introduces an explicit obligation for irregular third-country migrants to cooperate with the authorities at all stages of the return procedures, in particular in view of identification and obtaining an emergency travel document.*

**Operational impact:** The cooperation of returnees in the identification process as well as in the correct implementation of return operations is often very relevant to ensure effective returns.

For instance for some non-EU Countries, regardless the obligation to leave set by MS in the return decisions, the returnees' statement that they actually agree on going back in their own country is an essential condition to be issued the needed travel documents. Challenges are also regularly encountered during the pre-removal procedure in return operations by scheduled flights, when "non-cooperative" returnees are non-accepted/disembarked by the captains of the flights for security reasons.

While the Agency has no effective influence on the level of cooperation of the irregular migrants, a specific provision on their "obligation to cooperate" is considered essential to made the returnees more responsible and formally aware that in case of lack of cooperation/misbehaviours other subsequent measures might be legally applicable (e.g. detention, use of force, etc.). It might increase the overall efficiency of the return, including results in activities organised and/or supported by the Agency.

### **3.3. Issuance of return decisions (Article 8)**

*Overview: The proposal provides Member States with a new obligation to issue a return decision as soon as the migrant loses a right to a legal stay, or an asylum seeker's application is rejected at first instance, the enforcement of the return decision is suspended until the rejection becomes final, in accordance with case-law of the Court of Justice of the European Union.*

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<sup>4</sup> experts from TC central authorities visit one or more MS to identify their nationals to be returned and issue the necessary travel documents

**Operational impact:** The Agency has no legal basis to enter into the merits of the return decisions. The operational consequences for the Agency is thus limited.

Nevertheless, within the ongoing legal process for the adoption of the new EBCG Regulation, the Agency may be able to contribute to reduce operational gaps between the rejected asylum applications and the return process by facilitating the exchange of relevant information among different national authorities concerned, within specific projects and activities aiming at supporting an end-to-end digitalised return process in MS.

### 3.4. Voluntary departure (Article 9)

*Overview:* While the current Return Directive sets that the period for voluntary departure should be between 7 and 30 days, the new proposal **withdraws the 7-day minimum of time** for an irregular migrant to depart the territory of the Member State and allows MS to decide on shorter period. A second innovation in the proposal is that an irregular third-country national **shall not be granted** the option of voluntary departure in case of risk of absconding, risk to public security and fraudulent application for legal stay.

**Operational impact:** Given the fact that the criteria have been narrowed, more forced returns may be expected.

The Agency's support to MS in voluntary departures is technically more difficult to be ensured: unless the returnees request assistance to Member States' authorities to be able to leave within the deadline set in the return decisions, the Member States themselves (and Frontex) have no influence on their effective departures.

The proposal may result in a higher number of coordinated (forced) return operations and/or an increased number of returnees from Member States per operation.

### 3.5. Removal and measures to facilitate the confirmation of identity by third countries (Article 10)

*Overview:* A new obligation of the Member States is introduced to include all measures necessary to confirm the identity of undocumented irregular third-country nationals.

**Operational impact:** The Agency will continue to support Member States at operational level in the area of identification, documentation and removal procedures of returnees. In order to achieve a EU integrated approach with third countries in ensuring an efficient and effective implementation of return/readmission agreements and arrangements, the Agency already now organizes identification missions, consular workshops and ad hoc meetings with relevant third countries representatives, and supports the deployment of European Return Liaison Officers (EURLOs - currently as an Agency's pilot project).

### 3.6. Entry bans issued during border checks at exit (Article 13)

*Overview:* The proposal provides that Member States may impose, in certain circumstances, an entry ban on an irregular migrant without issuing a return decision, during border checks at exit, following a case-by-case assessment and taking into account the principle of proportionality.

**Operational impact analysis:** No direct consequences for the Agency’s support to Member States, as the Agency has currently no mandate to enter into the merits of these decisions.

### 3.7. Return management (Article 14)

*Overview:* The proposal<sup>5</sup> establishes the obligation to have national return management systems providing timely information on the identity and legal situation of the third-country nationals that are relevant for monitoring and following up individual cases. There is also notion in the text that these are to be linked to a central system established by the Agency in accordance with the proposal for the EBCG 2.0 Regulation.

**Operational impact:**

The lack of end-to-end digitalised return processes and lack of sufficient interoperability of the relevant return systems and applications proved to be essential challenges towards an efficient EU return system.

The Agency is currently conducting a project to develop a reference model for national “Return Case Management Systems” (RECAMAS) with the aim to setup or to improve the existing RECAMAS in different MS. The project has been initiated in AUT, BEL and GRC throughout 2018, and more Member States are interested in receiving support in this regard by the Agency in 2019.

In parallel, the Agency has just taken over from COM the “Integrated Return Management Application” (IRMA).

With regards to the possible connection between the national systems on return and a central system to be established by the Agency, as mentioned in the draft new EBCG regulation, reference should be made to the possible interlinkage of national RECAMAS and IRMA (which includes the ‘Frontex Application for return’ (FAR)), which may result in enhanced exchange of information, overall increased efficiency of the return process, as well as more accurate statistical reporting.

Furthermore, the Agency could support the implementation of art. 14 (1) by coordinating the financial support from the Union in this context, which could be taken into account in the proposed AMF-Regulation<sup>6</sup>.

### 3.8. Remedies (Article 16)

*Overview:* The proposal provides several changes to the rules of the remedies aiming to introduce time limits to lodge appeals, new rules on suspensions effects, to facilitate the timely start of the return process.

**Operation impact:** No direct consequences for the Agency’s support to Member States, as the Agency has currently no mandate to come into the merits of these decisions. Less last minute asylum requests and appeals during ongoing return procedures are anyway expected, thus increased number of effective returns.

### 3.9. Detention (Article 18)

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<sup>5</sup> Related to paragraphs (1) and (2).

<sup>6</sup> 2018/0248(COD).

**Overview:** *An additional ground for detention - ‘the third-country national concerned poses a risk to public policy, public security or national security’ - has been added to the proposal for recast of the Return Directive. Additionally, a change related to detention time limits has been introduced: maximum time for detention must not be less than three (3) months and not more than six (6) months.*

**Operational impact:** Under a practical point of view, very difficult and lengthy identification and documentation procedures established by different non-EU countries generally require that returnees to be identified remain available to the MS authorities to actively participate in a number of possible procedural steps (identification interviews, provide additional ad hoc information, etc.). Furthermore detention prior to the return operations does effectively prevent the risk of absconding.

Member States currently have very different terms for detention which provide a very heterogenic and overall inconsistent EU approach.

While the Agency does not enter into the merits of the decision-making on detention, including its duration, the proposed provision is expected to result in a more harmonized system (at least on the minimum term for detention), a more successful rate of identification as well as in a higher number of returnees per operation supported or organized by the Agency. This proposed amendments would also support the view that the return of those non-EU country nationals who pose a risk to internal security should be prioritized.

### 3.10. Border procedures (Article 22)

**Overview:** *Specific and simplified border procedures are proposed for rejected asylum seekers effectively derogating from some key standards in the current Return Directive. Lastly, detention is justified, with a four-month time limit, with the possibility of extension in case of need.*

**Operational impact:** No direct consequences for the Agency’s support to Member States, as the Agency has currently no mandate to come into the merits of the decision-making process of either the return decision or the asylum application.

## 4. Overall assessment of the Recast proposal

- The Agency welcomes the proposal of the recast of the Return Directive, which aims to enhance the effective control of the EU’s external borders and significantly stepping up the effectiveness of returns of irregular migrants in the Member States. The proposal overall facilitates a better integration of return as part of integrated border management in streamlining conditions and procedures at the start of the return process.
- The proposal for the recast of the Return Directive is closely connected to the proposal to amend the mandate of the European Border and Coast Guard Regulation.
- The Agency stands ready to assist the Member States in the implementation of the obligations of the recasted Return Directive, upon its adoption and transposition into national law, within the limits of its mandate. Please find below some examples of possible support that may be provided:

- Further support to Member States in building or improving their national return case management systems (RECAMAS project), also to ensure technical compatibility, allowing communications;
- Development of IRMA according to Member States' needs as the central system mentioned in the Recast and in the new European Border and Coast Guard Regulation, in order to ensure a more streamlined and sustainable information sharing on return and to better support all relevant operational activities;
- Enhancing the Frontex Application on Return (FAR) as part of IRMA to meet the expected higher volumes of returns by Return Operations by both charter and scheduled flights coordinated or organized by the Agency;
- Deployment of experts from the return pools to Member States that might experience new challenges in implementing an increased number of returns;
- Further support Member States in pre-return assistance activities, including through support in identification activities, and organization of activities aimed at ensuring a more effective third countries cooperation by facilitating the efficient implementation of national and EU arrangements and agreements.