



## Analysis

# The revised Returns Directive: a dangerous attempt to step up deportations by restricting rights

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### Summary

*The revised Returns Directive is supposed to “speed up return procedures, prevent absconding and secondary movements, and increase the overall EU return rate, in full respect of fundamental rights.” This final point, however, is extremely doubtful. As this analysis makes clear, the key aim of the changes is to restrict individual rights in the name of improving the functioning of the EU’s deportation system. EU lawmakers should discard the proposal and focus on alternative measures that would be less harmful to individuals.*

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## 1. Background: a decade of changes

In 2008 the EU's 'Returns Directive' came into force, setting out "common standards and procedures to be applied in Member States for returning illegally staying third-country nationals".<sup>1</sup> Its introduction was extremely controversial, given fears amongst migrants' rights advocates that it would introduce dangerously low standards governing the conduct of forced removals. A campaign against the Directive was launched in November 2008, eventually gathering signatures from over 600 NGOs from across Europe endorsement from the Council of the African Union and UNASUR (Union of South American Nations) due to the Directive's contravention of "commitments adopted in the framework of human rights conventions".<sup>2</sup> The campaign statement highlighted the limits of the protections offered by the Directive and argued that it "opens the way for making a policy for the internment of migrants commonplace".<sup>3</sup> While some of these fears were realised,<sup>4</sup> judicial interpretation of the law has been more lenient than expected.<sup>5</sup> The European Commission has also previously encouraged a generous application of the Directive<sup>6</sup> - but with EU institutions and member states set on increasing the number of deportations they carry out, recent years have seen a turn to more stringent measures.

The first clear sign of this approach came in September 2017, with a Commission Recommendation that called for the strictest-possible interpretation of the 2008 Directive. It provided no evidence to back up its claims that the harsher measures it proposed would be effective, nor does there appear to have been any evaluation of whether its proposals would have had the desired effect.<sup>7</sup> The Recommendation was condemned by over 90 civil society

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<sup>1</sup> Article 1, 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, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115>

<sup>2</sup> 'No to the outrageous Directive!', <http://www.statewatch.org/news/2007/dec/eu-returns-ngo-compilation.pdf>; EU/Africa/South America: Alliance against EU Returns Directive, *Statewatch News Online*, July 2008, <http://database.statewatch.org/article.asp?aid=29075>

<sup>3</sup> 'No to the outrageous Directive!', <http://www.statewatch.org/news/2007/dec/eu-returns-ngo-compilation.pdf>

<sup>4</sup> One clear negative outcome was a general increase of the maximum time limits for detention across EU member states.

<sup>5</sup> Steve Peers, a Professor of Law at the University of Essex, has remarked: "The case law has been sufficiently liberal that in light of the perceived refugee 'crisis' of the last three years, it's the EU Commission and Member States who are now concerned about the law, because in their view it is not stringent enough." See: 'Lock 'em up: the proposal to amend the EU's Returns Directive', *EU Law Analysis*, 12 September 2018, <https://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html>. Professor Peers has examined a number of rulings on the Directive in detail in 'Irregular Migrants: Can Humane Treatment be Balanced against Efficient Removal?', *European Journal of Migration and Law*, 17(4), pp.289-304, [https://www.researchgate.net/publication/284879298\\_Irregular\\_Migrants\\_Can\\_Humane\\_Treatment\\_be\\_Balanced\\_against\\_Efficient\\_Removal](https://www.researchgate.net/publication/284879298_Irregular_Migrants_Can_Humane_Treatment_be_Balanced_against_Efficient_Removal)

<sup>6</sup> European Commission, Communication on EU Return Policy, COM(2014) 199 final, 28 March 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0199>

<sup>7</sup> For example, while detention is widely-recognised to be inherently harmful to individuals' physical and mental well-being, the 2017 Recommendation describes it as "an essential element for enhancing the effectiveness of the Union's return system". Without referring to even a shred of evidence, the paper claimed that the maximum duration of detention set out in the Directive (18 months) "is needed to complete the return procedure successfully... short periods of detention are precluding effective removals". See: Commission Recommendation

organisations (including *Statewatch*), who accused the Commission of “encouraging member states to interpret the directive in a way that would allow for the lowest possible safeguards to be applied, abandoning positive advances made by a number of member states.” A year later, the Commission proposed a new (‘recast’) Returns Directive that seeks to turn these evidence-free recommendations into law. Negotiations within the Parliament and the Council on the proposal are due to resume shortly, with negotiations between the two institutions to follow.

The Commission’s proposal is part of a wider shift in policy-making that seeks to increase the number of people expelled from the EU. Some such initiatives have been more-or-less informal: ‘agreements’ such as the EU-Turkey Statement (2016),<sup>8</sup> the ‘Joint Way Forward on migration issues’ between Afghanistan and the EU (2016),<sup>9</sup> or the 2016 Memorandum of Understanding between the police and public security departments of Italy and Sudan.<sup>10</sup> Elsewhere, changes are being written into law – for example, the recently-revised EU Visa Code allows EU states to suspend visas for third-country nationals if that country does not comply with EU requirements on migration management.<sup>11</sup>

## 2. The new Returns Directive: enforcement versus rights

The purpose of the proposed recast is to address “difficulties and obstacles in return procedures”, such as “inconsistent definitions and interpretations of the risk of absconding and of the use of detention,” lack of cooperation by deportees and problems with exchanging information between authorities. To deal with these problems, the Commission sees a need to “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.”<sup>12</sup>

The proposal was not preceded by any public consultation concerning the existing legislation and potential changes to it, nor was it accompanied by an impact assessment looking at the different policy options and their likely effects. The European Parliament’s civil liberties committee (LIBE) subsequently commissioned a substitute impact assessment, which drew five conclusions:

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

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on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600, <https://www.statewatch.org/news/2017/mar/eu-com-returns-recommendations.pdf>

<sup>8</sup> ‘EU-TURKEY DEAL: “On the edge of international law” - or against it?’, *Statewatch News Online*, March 2016, <http://database.statewatch.org/article.asp?aid=36229>

<sup>9</sup> ‘Joint Way Forward on migration issues between Afghanistan and the EU’, <http://statewatch.org/news/2016/oct/eu-afghanistan-refugee-deal-prel.pdf>

<sup>10</sup> ‘Memorandum of Understanding between Italy and Sudan: a legal analysis’, *Human Rights and Migration Law Clinic of the University of Turin*, <https://www.asgi.it/wp-content/uploads/2017/10/Report-Memorandum-of-Understanding-Sudan-Italy-SL-Clinic-UniTO.pdf>

<sup>11</sup> Steve Peers, ‘The revised EU visa code: controlling EU borders from a distance’, *EU Law Analysis*, 17 April 2019, <http://eulawanalysis.blogspot.com/2019/04/the-revised-eu-visa-code-controlling-eu.html>

<sup>12</sup> 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), COM(2018) 634 final, 12 September 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634>

- The Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns.
- The Commission’s proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights.
- The Commission proposal would generate substantial costs for Member States and the EU.
- The Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending [such as measures that are part of the Common European Asylum System].<sup>13</sup>

The proposal places a clear emphasis on coercion at the cost of cooperation, despite a lack of evidence for the effectiveness of forced removals in increasing the overall number of returns and clear evidence of the harms to health and wellbeing caused by forced removals, especially with regard to the use of detention.<sup>14</sup> The approach adopted by the Commission wilfully ignores research and guidance, for example from the Council of Europe (CoE), that using engagement, rather than enforcement, would lessen the harms caused by deportation procedures *and* improve their effectiveness.<sup>15</sup>

In the LIBE committee, the Green MEP Judith Sargentini was appointed *rapporteur* for the file and was clearly unimpressed with the Commission’s proposal.<sup>16</sup> The statement accompanying her draft report says that “a comprehensive reform of the return *acquis* should only pursue the goal of increased effectiveness if it can, at the same time, ensure that the steps taken in that direction are accompanied by unambiguous and enforceable fundamental rights safeguards.”<sup>17</sup> She called for more measures to ensure that the proposal better guarantees rights and freedoms – both by attempting to improve the wording and the spirit of the proposal<sup>18</sup> and with concrete provisions, as outlined below. Sargentini is no longer an MEP and has been replaced as *rapporteur* for the proposal by another Green MEP, Tineke Strik.<sup>19</sup>

The Council’s response has been more mixed, broadly maintaining the Commission’s position but sometimes going beyond it, especially with regard to assessing the risk of absconding, the obligation to cooperate, so-called voluntary departure, entry bans and detention. While the

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<sup>13</sup> European Parliamentary Research Service, ‘The proposed Return Directive (recast) – Substitute Impact Assessment’, February 2019, pp.18-19,

[http://europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](http://europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf)

<sup>14</sup> ‘Recast Return Directive Foresees More Immigration Detention’, *International Detention Coalition*, 9 October 2018, <https://idcoalition.org/news/recast-return-directive-foresees-more-immigration-detention/>

<sup>15</sup> ‘Trust and support key to effective alternatives to detention’, *International Detention Coalition*, 23 April 2018, <https://idcoalition.org/news/trust-and-support-key-to-effective-alternatives-to-detention/>

<sup>16</sup> European Parliament Legislative Observatory, ‘Returning illegally staying third-country nationals. Recast’, 2018/0329(COD),

[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0329\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0329(COD)&l=en)

<sup>17</sup> Judith Sargentini, Draft report 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, 16 January 2019, [http://www.europarl.europa.eu/doceo/document/LIBE-PR-632950\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/LIBE-PR-632950_EN.pdf)

<sup>18</sup> For example, with a reference to “a dignified, humane, fair and effective return policy” rather than simply an “effective and fair return policy” in recital 2; an increased emphasis on fundamental rights throughout the preamble; and reference to the Council of Europe’s ‘Twenty guidelines on forced return’.

<sup>19</sup> ‘Tineke Strik’, European Parliament, [https://www.europarl.europa.eu/meps/en/197772/TINEKE\\_STRIK/home](https://www.europarl.europa.eu/meps/en/197772/TINEKE_STRIK/home)

Council has increased references to proportionality and safeguards, it also adds concepts such as individual returnees having to pay for the returns procedure themselves, increases the potential length of entry bans, and in general would maintain the Commission’s coercion-based approach but with some tweaks.

Frontex has also sought some input into negotiations in the Council, submitting a ‘non-paper’ in January 2019.<sup>20</sup> The non-paper responds positively to the proposal while maintaining a technical tone, noting how certain provisions will or might contribute to the Agency’s tasks. However, it approaches the Directive from a clear position that coercion, rather than cooperation, is the preferable route to ensure more effective returns. The legislation governing Frontex does not give the agency a role in commenting on legislation under discussion,<sup>21</sup> although the non-paper notes that the recast is “closely connected” to the new Frontex Regulation passed in 2019.

The sections that follow highlight key aspects of the proposal, the positions of the LIBE committee’s previous *rapporteur*, the “partial general approach” of the Council (i.e. a partial negotiating position) and, where relevant, comments submitted to the Council by Frontex.

### 3. Key changes in the proposal

#### 3.1. Overview

Article	Content	Comparison with Directive 2008/115/EC
6	The risk of absconding	New article focussed purely on the risk of absconding, laying out 16 “objective criteria” that states must use to establish such a risk, including four criteria that states are obliged to interpret as implying a risk of absconding.
7	The obligation to cooperate	New article obliging states to impose an obligation on third-country nationals to cooperate with authorities at all stages of return procedures. This includes the duty to provide all evidence deemed necessary for identification, information on countries of transit and the duty to request travel documents from their country of return.
9	Voluntary departure	Previously Article 7 in the 2008 Directive, the minimum seven-day period for voluntary departure is erased. Now only a 30-day maximum is specified. Furthermore, <i>permission</i> for States to refrain from granting a period of voluntary departure is changed to an <i>obligation</i> in cases where risk of absconding is identified, an application for legal stay has been found manifestly unfounded or fraudulent, or where the third country national is found to pose a risk to public policy, public security or national security.

<sup>20</sup> Frontex, ‘Non-Paper: Recast proposal of the Return Directive’, 8 January 2019,

<http://www.statewatch.org/news/2019/sep/eu-frontex-returns-directive-non-paper-1-19.pdf>

<sup>21</sup> See Article 8, ‘Tasks’, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1624>

Article	Content	Comparison with Directive 2008/115/EC
13	Entry bans	Previously Article 11, the proposal adds the option for member states to impose entry bans even where no return decision has been issued, in cases of individuals “whose illegal stay is detected in connection with border checks carried out at exit... where justified on the basis of specific circumstances of the individual case and taking into account the principle of proportionality”.
14	Return Management	New article requiring states to “set up, operate, maintain and further develop a national return management system” for processing information on the management of individual cases and return-related procedures. The systems must be technically compatible with a central system to be set up by Frontex.
16	Remedies and appeals	Amends Article 13 of the 2008 Directive by limiting the right to appeal a return decision through shorter time limits and only allowing suspension of the decision by a first instance appeal. Where the first instance appeal is lodged within a set time period, return decisions will be suspended while the appeal is examined, if there is a risk of <i>refoulement</i> .
18	Detention	Previously Article 15, it adds “the third-country national concerned poses a risk to public policy, public security or national security” as a third justification for detention in addition to the two existing grounds of hampering the preparation of the removal process and the risk of absconding, which now refers directly to Article 6. It also requires states to lay down these grounds for detention in national law and removes the option for maximum periods of detention of less than three months under national law.
22	Border procedure	New article establishing return procedures following negative decisions on applications for international protection at a member state's borders. It does not allow for a period of voluntary departure except in cases with a valid travel document, which must be handed to authorities. A maximum of 48 hours is permitted to launch an appeal against a decision rejecting an application for asylum, which will have a suspensive effect where there is a risk of <i>refoulement</i> and if the appeal brings to light new elements or findings, or if the asylum decision was not subject to judicial review. It allows a maximum of four months of detention at borders to facilitate returns, although this period may be extended.

### 3.2. Further legitimization of detention

The proposal places great emphasis on the introduction of new possibilities for detaining people. As Steve Peers has remarked: “This proposal is entirely concerned with facilitating the expulsion of irregular migrants, and detaining them to that end – in addition to imposing entry bans to make sure they do not return.”<sup>22</sup>

The existing Returns Directive provides that (emphasis added):

*“Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may **only** keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*

*there is a risk of absconding or*

*the third-country national concerned avoids or hampers the preparation of return or the removal process.”<sup>23</sup>*

The proposal would remove “only” from the first paragraph and add a new sub-paragraph that also offers a series of possible legitimations for detaining an individual:

*“(c) the third-country national concerned poses a risk to public policy, public security or national security.”<sup>24</sup>*

The possibility for a broad application of these terms appears to have been confirmed by a recent CJEU judgment. In July 2019 the court ruled that, in interpreting the provisions of the Schengen Borders Code concerning the entry conditions of third-country nationals and the possibility of a threat to public policy, internal security, public health or international relations, states enjoy a wide margin of discretion to interpret those terms, with no need for an individual assessment to establish the existence of a threat.<sup>25</sup>

The amendments proposed by the previous *rappporteur* for the file in the Parliament, Judith Sargentini, include reinserting the word “only”, in order to reserve deprivation of liberty as a measure of last resort. The rapporteur also advocated the removal of the provisions on “public policy, public security of national security”, arguing on the basis of previous CJEU case law that exceptions on these grounds in EU asylum and immigration law “must be interpreted narrowly.”<sup>26</sup> The report suggested that detention of non-EU nationals who pose a risk to public

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<sup>22</sup> ‘Lock ‘em up: the proposal to amend the EU’s Returns Directive’, *EU Law Analysis*, 12 September 2018, <https://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html>

<sup>23</sup> Article 15(1), Directive 2008/115/EC

<sup>24</sup> Proposed Article 18(1)

<sup>25</sup> Conclusiones del Abogado General Sr. Giovanni Pitruzella, Case C-380/18, para. 48, <https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:62018CC0380&from=EN>

<sup>26</sup> Sargentini report, *op. cit.*, Amendment 108. See also: Steve Peers, ‘Detention of asylum-seekers: the first CJEU judgment’, *EU Law Analysis*, 9 March 2016, <https://eulawanalysis.blogspot.com/2016/03/detention-of-asylum-seekers-first-cjeu.html>

policy or security “should be addressed by using already available criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons.”<sup>27</sup>

The Commission’s proposal also extends the maximum period of detention permitted in certain member states. While the upper limit remains unchanged (18 months, made up of a six-month period that can be extended by up to 12 months), the Commission’s text would prevent member states from setting a national maximum period of detention of less than three months.<sup>28</sup> This would oblige Spain and Portugal to increase their time limits on detention, which currently stand at 60 days.<sup>29</sup> However, there is no evidence to suggest that shorter detention periods hinder removals. In 2017, Spain had a return rate of 37.2%. States using the maximum permissible detention period had return rates either far lower or only marginally higher than this: the Czech Republic had a return rate of 11.2%, Belgium of 18.2%, Greece of 39.5% and Germany of 46.3%.<sup>30</sup>

In its ‘non-paper’ responding to the proposal, Frontex endorsed changes to Article 18, expecting them to “result in a more harmonised system, a more successful rate of identification as well as in a higher number of returnees per operation”.<sup>31</sup> Sargentini tabled amendments to reverse the Commission’s proposal of a mandatory minimum of three months, reinstating it as the *maximum* period permissible and emphasising: “Available data does not support that lengthy periods of detention would be necessary to stimulate effective returns”. In contrast, the Council’s partial general approach (a part-complete position for negotiations with the Parliament) makes few changes to Article 18.<sup>32</sup> The Council would also prefer that detention were “generally” in specialised facilities, rather than “as a rule” in the Commission’s proposal.<sup>33</sup>

### 3.3. The risk of absconding

The risk of absconding is, as noted above, one of the grounds that national authorities may use to justify detention (both in the current Directive and in the proposed recast). A new, separate article in the proposal offers an extensive (and non-exhaustive) list of grounds that member states should use to assess such a risk. It must now be determined in consideration of, at least, the 16 reasons set out in Article 6, four of which must be considered by national

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<sup>27</sup> Sargentini report, *op. cit.*, Amendment 108

<sup>28</sup> Proposed Article 18(5): “Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a maximum period of detention of not less than three months and not more than six months.”

<sup>29</sup> Report of the fact-finding mission by Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018, 3 September 2018, <http://www.statewatch.org/news/2018/sep/coe-sr-migration-report-on-spain-mission-3-18.pdf>; ‘Portugal Immigration Detention Profile’, *Global Detention Project*, <https://www.globaldetentionproject.org/countries/europe/portugal>

<sup>30</sup> Maria Diaz Crego, ‘Recasting the Return Directive’, *European Parliament Briefing*, June 2019, p.6, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS\\_BRI\(2019\)637901\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf)

<sup>31</sup> Frontex, ‘Non-Paper: Recast proposal of the Return Directive’, *op. cit.*

<sup>32</sup> Council of the EU, 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) – Partial general approach, document 10144/19, 13 June 2019, <https://data.consilium.europa.eu/doc/document/ST-10144-2019-INIT/en/pdf>

<sup>33</sup> Council partial general approach, proposed Article 19(1)

authorities as definitively indicating a risk of absconding.<sup>34</sup> These criteria will make it easier for states to justify detention (see above) and to refuse the option of so-called voluntary return (Article 9, see below). Combined with proposed changes to Article 13 on the issuance of entry bans (see below), it will also result in more such bans being issued.

Identification of any of four of the 16 criteria must automatically lead to a presumption of risk of absconding:

- using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;
- opposing violently or fraudulently the return procedures;
- not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3); and
- not complying with an existing entry ban.

While this provides some form of certainty, there are question marks over the legal quality of the proposal with regard to the list introduced by Article 6. For detention to be compliant with international law it must be provided for in national legislation, carried out in good faith and closely connected to the aim pursued. It must take place in an appropriate location, conditions and for a length of time that does not exceed “that which is reasonably required for the purpose pursued,” including a “realistic prospect of removal”.<sup>35</sup> The new requirement in Article 18 that

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<sup>34</sup> The objective criteria used by member states to determine a risk of absconding must include at least the following (bold highlights: the criteria that must be considered as implying a risk of absconding):

- (a) lack of documentation proving the identity;
- (b) lack of residence, fixed abode or reliable address;
- (c) lack of financial resources;
- (d) illegal entry into the territory of the Member States;
- (e) unauthorised movement to the territory of another Member State;
- (f) explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;
- (g) being subject of a return decision issued by another Member State;
- (h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;
- (i) non-compliance with the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;
- (j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;
- (k) existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;
- (l) ongoing criminal investigations and proceedings;
- (m) **using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;**
- (n) **opposing violently or fraudulently the return procedures;**
- (o) **not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);**
- (p) **not complying with an existing entry ban.**

<sup>35</sup> Steering Committee for Human Rights, ‘Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration’, *Council of Europe*, CDDH(2017)R88add2, 26 January 2018, <https://rm.coe.int/steering-committee-for-human-rights-cddh-analysis-of-the-legal-and-pra/1680780997>

all grounds for detention “be laid down in national law” implements the first of these requirements. However, the *quality* of the law must also be considered, with requirements of accessibility, precision, and foreseeable application to avoid arbitrariness.<sup>36</sup> The connection between Articles 6 and 18 is crucial in this regard, as the broad and non-exhaustive list provided by Article 6 may not be adequately precise or foreseeable in terms of application.<sup>37</sup>

Sargentini’s report emphasises that reasons to suspect a “risk of absconding” by individuals must not only be based on objective criteria but must be proven, specific and strictly defined. She proposed the complete removal of the article in favour of individualised risk assessments. The report argues that:

*“the assessment of the risk of absconding as proposed by the Commission may result in extended and automatic use of detention or deprive large numbers of third country nationals from a period of voluntary departure, thereby undermining key principles of proportionality and necessity”.*<sup>38</sup>

The Council’s partial general approach adds a requirement for risk assessment to “be determined on the basis of an overall assessment of the specific circumstances of the case,” but nevertheless maintains and extends a number of the criteria included in the proposal.<sup>39</sup> It also includes a possibility for member states to use “additional objective criteria in their national legislation”.<sup>40</sup> Meanwhile, Frontex believes the list “may” streamline the voluntary departure procedure, and that increasing the possibility to justify detention will lead to an increase in the number of successful identifications, and thus an increase in the number of “those taking part in return operations”.<sup>41</sup>

### **3.4. A new “obligation to cooperate”**

Article 7 of the proposal introduces a new requirement – an obligation for individuals to cooperate with the return procedures being enacted against them:

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<sup>36</sup> European Court of Human Rights, *Khlaifia and others v. Italy*, application no. 16483/12, paras. 91-92, <http://hudoc.echr.coe.int/eng?i=001-157277>; CJEU, *Al Chodor*, C-528/15, 15 March 2017, para. 38, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJ0528>

<sup>37</sup> Maria Diaz Crego, ‘Recasting the Return Directive’, *op. cit.*; Fundamental Rights Agency, ‘The recast Return Directive and its fundamental rights implications’, 10 January 2019, <https://fra.europa.eu/en/opinion/2019/returns-recast>; European Parliamentary Research Service, ‘The proposed Return Directive (recast) – Substitute Impact Assessment’, *op. cit.*

<sup>38</sup> Sargentini report, Amendment 42

<sup>39</sup> The Council proposes deleting a number of the Commission’s proposed criteria, such as lack of documentation, residence or financial resources. However, other criteria are extended, for example through the addition of “apprehension or interception in connection with irregular crossing of a Member State’s external borders” to “illegal entry into the territory of the Member States”; or “unauthorised movement to the territory of another Member State” being bolstered by “including following a transit through a third country or the attempts to do so.”

<sup>40</sup> Council partial general approach, proposed Article 6(1)

<sup>41</sup> Frontex, ‘Non-Paper’

*“1. Member States shall impose on third-country nationals the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures. That obligation shall include the following in particular:*

*(a) the duty to provide all the elements that are necessary for establishing or verifying identity;*

*(b) the duty to provide information on the third countries transited;*

*(c) the duty to remain present and available throughout the procedures;*

*(d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document.”*

The text goes on to state that “Member States shall inform the third-country nationals about the consequences of not complying with the obligation,” but does not further specify what those consequences might be. Article 6, however, lists a failure to cooperate as a criterion to be considered when assessing the risk of absconding (meaning that lack of compliance might mean detention); while Article 14 notes that the provision by national authorities of “reintegration assistance” is dependent on compliance with the obligation to cooperate.

The proposed obligation further amplifies the legitimacy of detention as it does not include the possibility of using any productive measures to facilitate “compliance”. The Sargentini report proposes removing this obligation, to be replaced with measures to facilitate cooperation.

Frontex considers this provision essential to “make returnees more responsible”, adding that “it might increase the overall efficiency of return”.<sup>42</sup> However, the agency admits that it is far from certain that these provisions will have the intended effect – it has noted that the new obligation “*might* increase the overall efficiency of return, including results in activities organized and/or supported by the Agency” (emphasis added).<sup>43</sup>

The Council, meanwhile, maintains the obligation and adds further requirements: individuals must provide biometric data, a reliable address, “all information and statements necessary” for obtaining a valid travel document, and they must appear in person when requested. The Council’s text also clarifies that any penalties for failing to cooperate must be set out in national law “consistent with the rule of law principles.”<sup>44</sup>

### **3.5. Linking asylum more closely to expulsion**

Article 8(6) of the proposal requires that return decisions be issued immediately following negative asylum decisions through the inclusion of new text:

*“Member States shall issue a return decision immediately after the adoption of a decision ending a legal stay of the third country national, including a decision not*

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Council partial general approach, proposed Article 7(3)

*granting a third-country national refugee status or subsidiary protection status in accordance with... [the Asylum Qualification Regulation].*<sup>45</sup>

Sargentini's report erases the entire paragraph for being "disproportionate and counterproductive", on the grounds that:

*"A clear distinction should be maintained between the legal regime governing the status of asylum seekers and the legal regime governing the situation of persons subject to a return decision... Under the asylum acquis applicants for international protection are entitled to remain on the territory during the time period for lodging an appeal or pending an appeal procedure with suspensive effect. However, the issuance of a return decision confirms the irregular status of the individual concerned and therefore creates confusion over the person's right to remain on the territory both for the individual concerned and national and local authorities who may come into contact with the third country national without being familiar with asylum and migration law."*<sup>46</sup>

The Council would change the wording of the paragraph, amending it to include the requirement that member states shall issue return decisions "as provided for in their national legislation". However, in the Council's version, returns decisions are still to be issued "in the same act with a decision ending legal stay... or as soon as possible and without undue delay after the decision ending a legal stay", including negative refugee status decisions.

When combined with the text of the 2019 Frontex Regulation,<sup>47</sup> allowing the agency to cooperate with third states to acquire travel documents, though without disclosing whether an application for international protection has been made, the temporal proximity of these procedures means that even where an individual appeals a negative decision, their country of origin might receive their personal data from an EU member state, via Frontex. This may jeopardise asylum procedures and would contradict UNHCR advice on sharing data, which maintains that even where personal data is anonymised, this can facilitate the mapping of movements and locations of 'at risk' groups. The UN body has "consistently warned against the consequences of sharing information with their [asylum-seekers'] countries of origin".<sup>48</sup>

ECRE has noted that the risks of bringing asylum and deportation policy closer together include "the immediate channelling of certain nationality groups into different procedures," which in combination with detention policies would have an impact on "access to legal assistance, to the asylum procedure and to effective remedy and procedural safeguards", undermining the right to individual assessments in all cases.<sup>49</sup> This is particularly dangerous in areas with inadequate complaints mechanisms to address wrongful identification and

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<sup>45</sup> Commission proposal, proposed Article 8(6)

<sup>46</sup> Sargentini report, Amendment 62

<sup>47</sup> Article 29(1)(ii), Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1624>

<sup>48</sup> UNHCR, 'Guidance on the protection of personal data of persons of concern to UNHCR', August 2018, p.10, <https://www.refworld.org/pdfid/5b360f4d4.pdf>; European Parliamentary Research Service, *op. cit.*, p.7

<sup>49</sup> Danish Refugee Council, 'Rights at risk: implications of a closer nexus between asylum and return procedures', April 2019, [https://drc.ngo/media/5251031/rights-at-risk\\_drc-policy-brief2019.pdf](https://drc.ngo/media/5251031/rights-at-risk_drc-policy-brief2019.pdf)

registration, such as the ‘hotspots’<sup>50</sup> established by the EU and national authorities in Greece and Italy in recent years.

The Greek Ombudsman has highlighted that neither interpreters nor adequate information about returns procedures are provided to detainees in the Greek island hotspots, reducing the possibility to challenge negative decisions leading to a return order.<sup>51</sup> National procedures in Italy, supported by Frontex, to determine whether an individual is processed through the asylum or returns procedures are particularly arbitrary, lacking in adequate communication and interpretation of procedures and rights to individuals, according to the Fundamental Rights Agency.<sup>52</sup> The lack of adequate access to asylum procedures, information and legal assistance in the hotspots (and elsewhere), along with the expanded remit to detain individuals under the proposed recast Returns Directive, would contribute to a higher likelihood of *refoulement*.

### 3.6. “Voluntary” vs. forced return

The word “voluntary” implies the fulfilment of an individual’s wish to return to their country of origin. However, the Directive uses the phrase “voluntary return” to refer to compliance with the returns procedure it prescribes, which is often a last resort to avoid detention. “Voluntary” is therefore a somewhat misleading term, but the procedures associated with it are preferable to detention and forced return.<sup>53</sup> Article 9 of the Commission’s proposal limits states to a maximum of 30 days to allow for voluntary departure, while the current Directive’s requirement for a minimum of at least seven days is removed, thus allowing member states to determine any minimum length of time. This could lead to a limit of a single day, or in any case too little time to feasibly arrange for voluntary departure.

Article 9 also limits Member States’ discretion in granting any voluntary departure period at all. Currently, states *may* grant a period of less than seven days or refrain from granting any voluntary period if there is a risk of absconding, an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person in question poses a risk to

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<sup>50</sup> A ‘hotspot’ is a location where the “hotspot approach” is applied. This “approach” is defined by the Commission as “where the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), Europol and Eurojust work on the ground with the authorities of frontline EU Member States which are facing disproportionate migratory pressures at the EU’s external borders to help to fulfil their obligations under EU law and swiftly identify, register and fingerprint incoming migrants.” See: ‘Hotspot Approach’, European Commission, [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/hotspot-approach\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/hotspot-approach_en)

<sup>51</sup> Danish Refugee Council, *op. cit.*

<sup>52</sup> Fundamental Rights Agency, ‘Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy’, 4 March 2019, p.36, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-opinion-hotspots-update-03-2019\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf)

<sup>53</sup> It might be argued that both “voluntary” and “return” are euphemisms – “voluntary”, in the context of expulsion proceedings, does not necessarily retain its true meaning. The word “return”, meanwhile, has been described as “a euphemism for the violence inherent in expulsion,” because “it erases the complexity of migration journeys in which expulsion is rarely synonymous with return, and it ‘naturalises’ return as an inherent part of migration.” See: Clara Lecadet, ‘Deportation, nation state, capital: Between legitimisation and violence’, *Radical Philosophy*, December 2018, <https://www.radicalphilosophy.com/article/deportation-nation-state-capital>

public policy, public security or national security.<sup>54</sup> Under the proposal, member states would be prohibited from granting any period of voluntary departure when faced with the existence of any of these three grounds – which are, of course, to be identified in accordance with the broad criteria described in section 3.3 of this analysis.

Sargentini advocates setting 30 days as the standard, rather than the maximum, departure period, and is emphatic that member states should be able to decide whether or not to grant a period of voluntary departure or not, even in cases where a risk of absconding is identified in an individual assessment.<sup>55</sup>

The Council, on the other hand, broadly maintains the Commission’s text, albeit with the obligation to refuse voluntary departure where “an application for a legal stay has been dismissed as manifestly unfounded, fraudulent or inadmissible” turned into an option. The Council also adds the option to refrain from refusing voluntary departure to minors and families with children.<sup>56</sup>

Frontex’s non-paper on the proposals observes that the withdrawal of the seven-day minimum for voluntary departure, along with the withdrawal of such an option in more cases, may lead to more forced returns, resulting in “a higher number of coordinated (forced) return operations and/or an increased number of returnees from Member States per operation”.

### **3.7. Mandatory entry bans**

Under the current Directive, member states are obliged to issue entry bans alongside return decisions if no period for voluntary departure has been granted, or if an individual has not complied with the obligation to return. Article 13 of the proposal maintains these requirements and would also allow member states to issue an entry ban even when “illegal stay is detected in connection with border checks carried out at exit” – that is to say, when an individual is leaving their territory.

Under new rules governing the Schengen Information System, entry bans handed down in accordance with the Returns Directive must be accompanied by an alert on refusal of entry or stay in the system.<sup>57</sup> While the CJEU has set out in *Filev and Osmani* that entry bans cannot be indefinite and that individual circumstances must be acknowledged to determine their length,<sup>58</sup> the introduction of these new provisions would significantly expand the possibilities for issuing entry bans. One issue of particular concern is the automatic issuance of entry bans to individuals whose asylum applications have been rejected. Because the proposal does not

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<sup>54</sup> Article 7(4)

<sup>55</sup> Sargentini report, Amendment 66

<sup>56</sup> Council partial general approach, proposed Article 9(4)

<sup>57</sup> Article 24(1)(b), Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1860>

<sup>58</sup> CJEU, *Filev and Osmani*, Case C-297/12, 19 September 2013, para. 45, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0297>

allow for the consideration of future changes of circumstances in the country of return, the ability to claim asylum may be compromised.<sup>59</sup>

The amendments proposed in Sargentini's report would maintain an optional approach. The imposition of entry bans on those departing voluntarily is seen to undermine the objective of enhancing the effectiveness of returns, as the perceived benefits of cooperating with a voluntary return procedure will be diminished if that procedure is accompanied by an entry ban. This point has also been raised by *ECRE* and *Amnesty International* – the imposition of entry bans even when an individual is leaving EU territory will make voluntary return procedures less appealing as they are nonetheless accompanied by sanctions.<sup>60</sup> Sargentini's proposed amendments also include the proviso that children shall not be subject to entry bans.

The most important change in the Council's preferred version of Article 13 is an increase in the maximum length of an entry ban to ten years (rather than five), with the possibility of bans longer than ten years "if the third-country national represents a serious threat to public order, public security or national security." The Council would also include an explicit statement that non-EU nationals who benefit from reintegration assistance may also have their return decision accompanied by an entry ban. Regarding the possibility of imposing entry bans when irregular stay is detected through exit checks, the Council wishes to avoid "as much as possible to postpone the departure of the third-country national concerned." The partial general approach also states that national authorities "may make the withdrawal or suspension of entry ban subject to the payment by a third-country national concerned of the costs" associated with removal, including detention<sup>61</sup> - which seem to place wealthier deportees in a significantly more advantageous position than those with little money.

### **3.8. Connecting to the central returns database**

Article 14 of the proposal establishes an obligation for states to set up national return management systems to "process all the necessary information for implementing this Directive". These systems "shall be set up in a way which ensures technical compatibility" with a central system operated by Frontex.<sup>62</sup> Sargentini's report would remove provisions for the overlapping of these systems and would require that national systems be adequate to support individual case management and reintegration. Based on the texts, it appears that the Commission and Sargentini have opposed understandings of "case management" – the former sees this as a technical procedure that allows bureaucracy to function smoothly (aside from the brief mention of reintegration in the proposed Article 14(3)), while the MEP sees it as an actual human interaction requiring care and support to an individual. While the

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<sup>59</sup> Maria Diaz Crego, *op. cit.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Council partial general approach, proposed Article 13(4)

<sup>62</sup> The systems operated by Frontex are: IRMA (Irregular Migration Management Application) is concerned with enhancing the ability of the EU and the member states to coordinate and conduct deportations through the provision of more general data; FAR (Frontex Application for Return) aims to rationalise and 'streamline' the implementation of return operations through the management of the authorities, personnel and deportees. Put more simply, IRMA is concerned with the big picture, and FAR with individual cases. The processing of personal data in FAR is subject to numerous exemptions that may prevent individuals accessing and correcting their data.

Commission's proposal relates to Frontex's new information systems, Sargentini's proposed amendments concern the personal aspects of case management.

### 3.9. Limiting appeal opportunities

Article 16 of the proposal limits applicants for international protection to one opportunity to appeal return decisions if they have already pursued judicial review within the asylum process. Appeals must be lodged within five days following a return decision. If they concern a potential risk of *refoulement*, they have a mandatory suspensive effect on removal proceedings, although this safeguard does not apply in cases where no fresh evidence is presented.

Sargentini emphasises that appeals against return decisions must always have suspensive effect (to ensure availability of an effective remedy) and that administrative procedures as foreseen by the proposal would not meet the standards necessary to qualify as an effective remedy. She proposed the deletion of the sections of the proposed Article 16(3) requiring a separate procedure to consider requests for suspension of return decisions during appeals, as "appeals against a return decision should always have a suspensive effect," and it would be "too burdensome on judicial systems to require an additional procedure to treat the question of suspensive effect". She also proposes deleting part of Article 16(4), which would set a time limit of five days for lodging an appeal against a return decision that has been handed down with decision rejecting an application for international protection, arguing that it contravenes CJEU case law which establishes that "anything above fifteen days" is "generally sufficient", but that the final decision should be up to national courts.<sup>63</sup>

The Council's preferred approach refers to the "right to appeal against return decisions before at least one level of jurisdiction". It also requires that appeal to be heard before a court of tribunal, rather than the Commission's proposal for "a competent judicial authority". The Council would extend the period for lodging an appeal to 14 days as a maximum, but require that "Member States shall take measures to ensure that the court or tribunal concludes examination of the appeal within the shortest possible period of time," which would appear to be an invitation to introduce accelerated procedures.<sup>64</sup>

Regarding the suspensive effect of appeals, the Council would introduce a whole new article on the issue. Article 16a of the partial general approach provides that member states must:

*"provide for either the automatic suspension of the enforcement of a return decision or for the power of a court or tribunal to suspend the enforcement of a return decision at the request of the third-country national concerned or ex officio, during the appeal proceedings at first instance."*

Furthermore, the enforcement of a return decision must be suspended if there is any potential risk of breaching the principle of non-*refoulement*. The Council would also offer member states the opportunity to decide to suspend the enforcement of return decisions in other cases arising during first instance appeal proceedings. At the same time, the partial general approach

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<sup>63</sup> Sargentini report, Amendment 10

<sup>64</sup> Council partial general approach, proposed Article 16(4)

requires that requests to suspend the enforcement of return proceedings must be lodged within “the shortest time limits” and cannot exceed the time limit set out in Article 16 – generally 14 days in the Council’s preferred version, although in certain situations member states may have recourse to limits laid down in national law.<sup>65</sup> A previous version of the Council’s text included a specific time limit for lodging an appeal of just two days.<sup>66</sup>

However, it also submits that this time limit shall be provided for in national legislation as “the shortest time limit...which in any case cannot exceed 2 days” and that this period begins as soon as the return decision is notified to the returnee. It also states that the “enforcement of a return decision shall not be suspended when the third-country national lodges a subsequent appeal”.

### **3.10. Border procedures**

In the attempt to link removal proceedings more closely to decision-making in asylum cases, the Commission’s proposal included new provisions for a “border procedure”, which would oblige member states to “establish return procedures applicable to illegally staying third-country nationals subject to an obligation to return following a decision following an application for international protection taken by virtue of Article 41” of the Asylum Procedures Regulation. That Regulation was proposed in July 2016 and the Council is still yet to reach a position on the text, with disputes over proposed “border procedures” for asylum applications one of the main sticking points.<sup>67</sup>

Under the Commission’s proposed procedure, return decisions handed down following rejection of an application for international protection examined through a “border procedure” would not be accompanied by a period for voluntary departure, unless the individual holds a valid travel document and complies with the obligation to cooperate. A 48-hour maximum period for lodging an appeal is proposed, which will only have a suspensive effect on the return decision if there is a risk of breaching the principle of non-*refoulement* and one of two other conditions are met: “new elements or findings have arisen or have been presented... which significantly modify the specific circumstances of the individual case,” or the decision to reject

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<sup>65</sup> According to Article 16(3) of the partial general approach, the “shortest time limit” may not exceed 14 days, except in two other situations: firstly, when “the return decision is based on or issued in the same act with a decision not granting a third-country national refugee status or subsidiary protection status in accordance with [the Qualification Regulation], in which case the limits will be those laid down in national law in accordance with the Asylum Procedures Regulation; secondly, when “the return decision is based on or issued in the same act with a decision ending or refusing legal stay, by way of derogation from the first subparagraph, the time limit to appeal the return decision may be those laid down in national law, but which shall not exceed 30 days.”

<sup>66</sup> Article 16a(2), 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) – Revised Presidency compromise text, document 15649/18, 20 December 2018,

<https://www.statewatch.org/news/2019/jan/eu-council-returns-directive-presidence-compromise-15649-18.pdf>

<sup>67</sup> Common European Asylum System: deadlock in the Council as “frontline” Member States oppose mandatory “border procedures”, *Statewatch News*, 30 April 2019, <http://www.statewatch.org/news/2019/apr/eu-asylum-procedures-deadlock.htm>; Common European Asylum System (CEAS): Asylum procedures at the border a sticking point for Member States, *Statewatch News*, 24 October 2018, <http://www.statewatch.org/news/2018/oct/eu-ceas-border-procedures.htm>

the application “was not subject to an effective judicial review” in accordance with Article 53 of that Regulation.

Sargentini’s report dismisses Article 22 in its entirety, on the grounds that the content and safeguards of the Asylum Procedures Regulation are as yet undecided, making it “impossible to fully assess the fundamental rights implications of the proposed return border procedure”. The report notes that the “merging of the two regimes [asylum and return] results in excessive detention periods and significantly reduced procedural safeguards”. The rapporteur further emphasises that the maximum time limit of 48 hours to lodge an appeal under the Commission’s proposal is:

*“unacceptable in light of the precarious situation of third country nationals subject to a return decision in border procedures and in detention. In such locations access to legal assistance and interpretation, key elements of an effective remedy, is often compromised whereas such access is indispensable in light of the complexity of Court proceedings.”<sup>68</sup>*

The Council, meanwhile, has adopted a negotiating text for Article 22, despite the ongoing failure to reach agreement on the rules to which it would relate in the Asylum Procedures Regulation. The Commission’s proposal for a mandatory period for voluntary departure for individuals with a valid travel document and complying with the obligation to cooperate is made optional,<sup>69</sup> while the Commission’s upper time limit of 48 hours for lodging an appeal against a return decision handed down in a border procedure is turned into a minimum, with “no longer than one week” the Council’s preferred maximum.<sup>70</sup> The Council also removes the Commission’s text on the suspensive effect of appeals and includes provisions stating that decisions on appeals should be taken “at the same time, or within the shortest possible period of time after the conclusion of the asylum appeal proceedings at first instance,” in accordance with the Asylum Procedures Regulation.<sup>71</sup> A maximum detention period of four months is maintained<sup>72</sup> and a new provision requires that individuals refused entry in accordance with the Schengen Borders Code, but to whom a member state decides not to apply the Returns Directive, must be afforded treatment equivalent to that required by paragraphs 3 to 8 of the Council’s preferred version of Article 22.<sup>73</sup>

It is unknown where negotiations within the Council on the Asylum Procedures Regulation stand, but the dispute between “frontline” member states (who do not wish to have to apply mandatory border procedures for asylum cases, in the hope of offloading their responsibility for those individuals) and member states in favour of mandatory border procedures (in order to limit the number of asylum applications they receive) was described as “the biggest

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<sup>68</sup> Sargentini report, Amendment 119

<sup>69</sup> Council partial general approach, proposed Article 22(4). The Council’s text says that member states “may however grant an appropriate period for voluntary departure”. The Commission proposes that member states “shall however grant an appropriate period for voluntary departure.”

<sup>70</sup> Council partial general approach, proposed Article 22(5)

<sup>71</sup> Council partial general approach, proposed Article 22(6)

<sup>72</sup> Council partial general approach, proposed Article 22(8)

<sup>73</sup> Council partial general approach, proposed Article 22(9)

outstanding issue for most Member States” in October 2018<sup>74</sup> and was still heavily disputed six months later.<sup>75</sup> Although the Council also extends the scope of the proposed Article 22 so that it may cover individuals who do not make an application for international protection (but are, for example, refused entry at the border), it is noteworthy that it is possible for member states to reach agreement on rules concerning the swift removal of people from the EU, but not on measures intended to ensure protection for those that need it.

#### 4. Credible alternatives to “a purely security and policing-focussed vision”

In a 2014 report, the Commission praised the Returns Directive for having contributed to:

*“a convergence – and overall to a reduction – of maximum detention periods across the EU and there has also been a consistent movement towards a wider implementation of alternatives to detention across Member States”.*<sup>76</sup>

In the same communication the Commission acknowledged that concerns of member states that protective provisions in the Directive would undermine return procedures had not materialised, and that impediments to the implementation of return decisions are more likely to result from “practical problems in the identification of returnees and in obtaining the necessary documentation from non-EU authorities”.<sup>77</sup> This makes the hard-line proposal issued by the Commission (and the Council’s broad agreement with such an approach) all the more disturbing, given that alternatives to coercion exist and have indeed been demonstrated to be “more effective in terms of ensuring respect for human rights, compliance and cost efficiency”, in the words of the Council of Europe’s Steering Committee on Human Rights.<sup>78</sup>

The Steering Committee has detailed a series of measures that seek to “build trust in asylum and migration procedures”, “uphold individualized case management services”, “provide clear and precise information about rights, duties and consequences of non-compliance”, and “ensure access to legal assistance from the beginning and throughout the process”.<sup>79</sup> Their report cites examples such as temporary residence permits, case-worker support, family-based accommodation, open or semi-open centres or designated residence sites, regular reporting obligations, and return counselling among over 250 alternatives to detention identified from 60 countries.<sup>80</sup>

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<sup>74</sup> Common European Asylum System (CEAS): Asylum procedures at the border a sticking point for Member States, Statewatch News, 24 October 2018, <http://www.statewatch.org/news/2018/oct/eu-ceas-border-procedures.htm>

<sup>75</sup> Common European Asylum System: deadlock in the Council as “frontline” Member States oppose mandatory “border procedures”, Statewatch News, 30 April 2019, <http://www.statewatch.org/news/2019/apr/eu-asylum-procedures-deadlock.htm>

<sup>76</sup> European Commission, Communication on EU Return Policy, *op. cit.*

<sup>77</sup> *Ibid.*

<sup>78</sup> ‘Trust and support key to effective alternatives to detention’, *op. cit.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Steering Committee for Human Rights, *op. cit.*; ‘There Are Alternatives’, *International Detention Coalition*, <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>

Best practices identified to prevent people ending up in a “chronically irregular situation” include Spain’s granting of residence permits “on exceptional grounds of strong social, work, or family ties” and the German *Duldung* provision, a temporary ‘Tolerated Stay Permit’ legitimising the continued residence of someone obliged to leave Germany but unable to do so, for example due to severe illness or lack of identification papers.<sup>81</sup> Sargentini’s critical report on the proposal shows awareness of this body of research, throwing into sharp relief the enforcement-based (and seemingly evidence-free) approach of the Council and Commission.

The European Economic Social Committee (EESC) has also submitted comments on the Commission’s proposal and advocates for an alternative approach. The EESC criticises the proposal for lacking provisions to promote efficient voluntary returns. While such procedures play fast and loose with the word “voluntary”, they do at least entail fewer risks of fundamental rights violations than forced return operations. Voluntary returns and regularisation on an individual basis are identified as “more effective and less onerous” means of “restoring legality and making the carrying out of returns more effective”. Even where the EESC supports the Commission’s aims (e.g. to speed up decisions on returns and link them with the decision to terminate a legal stay or refuse asylum), it criticises the means for doing so (such as minimal time limits and accelerated procedures) as unrealistic, suggesting that an assessment “of the obstacles that could frustrate this intention” is missing. The EESC concluded that “the Commission should proceed in a consistent and measured way and not adopt a purely security and policing-focussed vision of migration as a criminal matter”. The report argues that emphasising returns without a common policy on legal migration and a cohesive approach to international protection and asylum risks “fuelling xenophobic and racist discourse that feeds into extreme right-wing positions.”<sup>82</sup>

## 5. Conclusion: reject the new Returns Directive

The entire aim of the Commission’s proposal is to lower fundamental rights standards in order to increase the number of deportations from the EU, yet there is no evidence that this would make the EU’s expulsion system any more effective. Even if this were the case, it would be difficult to argue that such harmful and destructive means – such as the massively-expanded use of detention – could justify the ends. It appears that the Commission and Council favour a recast version of the Returns Directive that would both degrade fundamental rights standards *and* be ineffective, ignoring potential alternatives and discarding the progress made by member states in implementing such alternatives in the framework of the existing rules.

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<sup>81</sup> European Economic and Social Committee, Opinion: Common standards and procedures in Member States for returning illegally staying third-country nationals (recast) SOC/608, September 2018

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/common-standards-and-procedures-member-states-returning-illegally-staying-third-country-nationals-recast>;  
<https://handbookgermany.de/en/rights-laws/asylum/duldung.html>

<sup>82</sup> European Economic and Social Committee, Opinion: Common standards and procedures in Member States for returning illegally staying third-country nationals (recast) SOC/608, September 2018

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/common-standards-and-procedures-member-states-returning-illegally-staying-third-country-nationals-recast> 3.7

The pursuit of this logic can only end in standards being lowered even further when new, harsher provisions fail to have their intended effect. If the EU wishes to maintain its increasingly-strained reputation for protecting fundamental rights, lawmakers in the Council and Parliament should discard the proposal when discussions resume in September.

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