

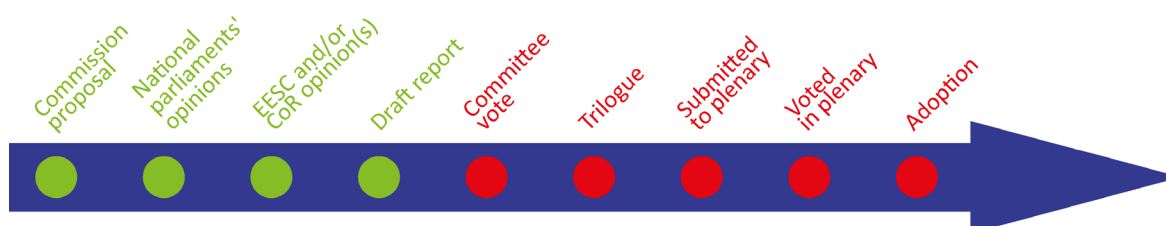
Recasting the Return Directive

OVERVIEW

The Return Directive is the main piece of EU (European Union) legislation governing the procedures and criteria to be applied by Member States when returning irregularly staying third-country nationals, and a cornerstone of EU return policy. Taking into account the decrease in the EU return rate (from 45.8 % in 2016 to 29 % in 2019) and following European Council and Council calls to review the 2008 legal text to enhance the effectiveness of EU return policy, in September 2018 the Commission proposed a targeted recast of the directive aiming 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'.

In the 2014-2019 parliamentary term, whereas the Council reached a partial general approach on the proposal, the European Parliament did not reach a position. A draft report was presented to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) but was not adopted. After the 2019 elections, Parliament decided to resume work on the proposal. A new draft report was published on 21 February 2020, but it was not presented in the LIBE committee until 10 September 2020 on account of delays caused by the Covid-19 pandemic. The deadline for tabling amendments expired on 23 September 2020 and the LIBE committee is currently considering the 754 amendments tabled.

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)		
<i>Committee responsible:</i>	Civil Liberties, Justice and Home Affairs (LIBE)	COM(2018) 634 12.9.2018
<i>Rapporteur:</i>	Tineke Strik (Greens/EFA, The Netherlands)	2018/0329(COD)
<i>Shadow rapporteurs:</i>	Nadine Morano (EPP, France) Sylvie Guillaume (S&D, France) Sophia in 't Veld (Renew, The Netherlands) Nicolas Bay (ID, France) Beata Kempa (ECR, Poland) Anne-Sophie Pelletier (The Left, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Committee vote on draft report	



Introduction

Ensuring that returns of irregularly staying third-country nationals take place effectively and stepping up the EU's return rate has been a political priority in recent years, especially since the [2015](#) peak in arrivals of asylum-seekers and irregular migrants. However, none of the proposals put forward by the Commission in the area of return in the last decade seem to have had a clear impact on the [EU's return rate](#), which decreased from 45.8 % in 2016 to 31.9 % in 2018 and 28.9 % in 2019. Aiming to improve those figures, in 2018 the Commission presented a [proposal](#) for a targeted revision of the [EU Return Directive](#). Two years later, the Commission's [new pact on migration and asylum](#) (2020) and its recent [communication](#) on return and readmission (2021) stress the importance of a swift adoption of the proposal by co-legislators, while at the same time presenting other initiatives aimed at shaping an effective EU system for returns despite the new layer of complexity added by the travel restrictions imposed owing to the pandemic. In this vein, the Commission is proposing to supplement the adoption of the proposal with enhanced operational support for Member States in the area of return; stronger cooperation among Member States, including through the appointment of a return coordinator; improved cooperation with third countries on return and readmission; further promotion of voluntary return programmes under the forthcoming strategy on voluntary return; and a fairer sharing of responsibilities among Member States through a new [solidarity mechanism](#) that would include 'return sponsorships'.

Existing situation

The European Commission has constantly stressed the importance of EU return policy when it comes to tackling irregular migration and building up a robust and comprehensive migration and asylum policy.¹ EU action on return policy has focused mainly on fostering cooperation among Member States,² providing [EU funding for return-related activities](#), boosting [cooperation on readmission](#) with countries of origin and transit, and providing Member States with operational support in the area of [return and readmission](#). According to the [Commission](#), the Return Directive is linked to the first goal: harmonising standards and procedures for the adoption of return decisions would help build mutual trust among Member States, facilitate the recognition of return decisions, and increase cooperation. To achieve this goal, the Commission first presented a [proposal](#) to adopt the Return Directive currently in force in 2005, following several [European Council](#) and [Council](#) calls to establish common minimum rules on return. After some [politically difficult negotiations](#), the text was [adopted](#) by Parliament and Council in 2008, under the former co-decision procedure.

The **scope of application** of the current directive is broad.³ It applies to any third-country national staying irregularly on the territory of a Member State (excluding Denmark and Ireland) or the four [Schengen-associated states](#), independently of the reasons for irregular stay (Article 2). In the [Arslan](#) case, the Court of Justice of the European Union (ECJ) clarified that the directive did not apply to asylum-seekers until a decision on their application for international protection had been taken. Member States are free to decide whether they apply the directive to third-country nationals in two situations: a) when they are at an external border, or have been apprehended 'in connection' with the irregular crossing of an external border (interceptions at the very time of the irregular crossing of an internal border or near the border are not included in this provision, even if the Member State has temporarily reintroduced internal border controls, as the ECJ clarified in [Abdelaziz Arib](#)); and b) when they are subject to an extradition procedure or to a criminal sanction other than those related to irregular entry or stay (as pointed out by the ECJ in [Achughbadian](#)).

The key principle behind the relevant provisions of the directive is set out in Article 6(1): although some exceptions are permitted (Article 6(2-5)), Member States are obliged to issue a return decision to any third-country national staying irregularly on their territory and provide for the enforcement of those decisions when needed ([C-38/14](#), [C-568/19](#)). The directive also prioritises **voluntary return** over forced return, as it obliges Member States to grant returnees a period for voluntary departure ranging from 7 to 30 days (Article 7). If necessary, Member States shall extend that period to take

account of the specific circumstances of the case, such as the existence of children attending school or other family or social ties. On the contrary, according to Article 7(4), there is no obligation to grant a period of voluntary departure, or it can be shortened, when: there is a risk of an individual absconding ([C-146/14 PPU](#)); when an application for legal stay has been dismissed as manifestly unfounded or fraudulent; or when an individual poses a risk to public policy, public security or national security, as defined by the ECJ ([C-554/13](#); [C-240/17](#)).

If these exceptions are applied and no period of voluntary departure is granted, or if a period was granted but the person concerned did not comply with the return decision, the Member States shall take all necessary measures to remove the person, including the possible use of coercive measures, provided that they are proportionate and respect fundamental rights (Article 8). However, the ECJ has highlighted in several decisions that the coercive measures adopted by Member States must lead to the return of the person concerned (e.g. [Achughbadian](#)). Therefore, **coercive measures** aiming to deter irregular migration, but postponing the adoption or enforcement of a return decision (e.g. the imposition of a criminal sanction for staying irregularly in a Member State when the sanction includes a term of imprisonment) may contradict the directive.⁴

The directive also obliges Member States to issue **entry bans** on individuals, i.e. decisions prohibiting entry to and stay on the territory of all the Member States for a certain period of time (Article 11), when adopting return decisions. As a general rule, an entry ban with a maximum length of five years running from the day in which the person concerned has effectively left the territory of Member States ([C-225/16](#)), shall be issued when no voluntary departure period is granted or when the returnee has not voluntarily complied with the obligation to return. In other situations, Member States may impose an entry ban but are not obliged to do so. Nevertheless, the provision regulating entry bans in the directive is particularly complex as it allows for various specific exceptions concerning the length of the entry ban and the situations in which it can be imposed, withdrawn or suspended.⁵ As the provision grants Member States a wide margin of discretion, national authorities have [opted](#) for very different systems. However, in [Filev and Osmani](#), the ECJ restrained their discretion, pointing out that entry bans cannot be unlimited and their length must be determined with due regard to all relevant circumstances of the individual case.

The directive does not expressly deal with a common situation in return procedures: **removal may become impossible** even if national authorities take all necessary measures to enforce a return decision, for example owing to the unwillingness of third countries or of the returnees themselves to cooperate in the procedure. Articles 9 and 14 of the directive provide for the possible postponement of removal and impose some safeguards to be respected while return is pending, including that those affected by the postponement have their family unity preserved, have access to emergency health care and basic education if they are minors and, in certain cases, are provided for their basic needs if they lack the means to make such provision for themselves ([Abdida](#) and [LM](#)). From a different perspective, Article 6(4) allows Member States to grant authorisation to stay to any third-country national irregularly staying on their territory for compassionate, humanitarian or other reasons. However, the directive neither obliges Member States to nor forbids them from regularising those third-country nationals whose return decisions cannot be enforced ([C-146/14 PPU](#)), leaving Member States a margin of discretion to adopt such decisions, or opt for the indefinite postponement of removals, a decision with severe consequences for the individuals concerned.⁶

Procedural and substantive safeguards play a primary role in the directive. From the outset, the directive makes clear that Member States' implementation measures must respect **fundamental rights** and international law (Article 1). Article 5 refers explicitly to the **principle of non-refoulement**, the principle of the best interest of the child, family life, and the state of health of returnees, thus precluding the adoption of any decision infringing those rights ([C-562/13](#); [C-82/16](#)). In relation to **children's rights**, the directive governs the return and removal of unaccompanied minors separately, imposing an obligation on Member States to provide them with 'assistance by appropriate bodies' and to verify that the child is returned to a family member, a nominated

guardian or adequate reception facilities (Article 10). The directive allows Member States to detain unaccompanied minors and families, while imposing some specific constraints (Article 17).

Apart from minors and families, the directive also provides for the possible **detention** of third-country nationals for return purposes when there is a risk of absconding or when the person concerned hampers the preparation of the return or the removal process, and only if no other sufficient but less coercive measure can be applied (Article 15(1)). The directive is based on the principle that detention shall be a measure of last resort, applicable only when necessary, for the shortest possible period and for as long as removal arrangements are in progress and executed with due diligence. Detention cannot therefore be justified if there is no reasonable prospect of removal, as the ECJ emphasised in *Kadzoev* and *FMS*.

However, the directive allows Member States a margin of discretion to decide on less stringent measures, as well as on the maximum detention period allowed in return procedures. In relation to the latter, the directive imposes an obligation to establish a **maximum detention period** that cannot exceed six months,⁷ except if the removal operation lasts longer owing to a returnee's lack of cooperation, or to delays in obtaining the documents required. In these cases, detention can be extended for a further period of 12 months (*C-146/14 PPU*). Taking the wide margin afforded to Member States into account, the maximum detention period *differs* notably, from the 60 days currently permitted under Spanish law, to the 18 months permitted under German, Belgian or Greek law, for example. Some procedural guarantees to be respected when ordering detention, including judicial review of the lawfulness of the detention, as well as material conditions of detention, are also governed by Articles 15 and 16 of the directive.

Finally, the directive also imposes some **procedural obligations** on Member States in relation to the adoption of return decisions. Member States must issue return decisions in writing and must give the reasons justifying the decision and information concerning possible remedies (Article 12(1)). Translation must be available upon request (Article 12(2)). Although no reference is made in the directive to any other guarantee to be respected within the return procedure, the ECJ has affirmed that the right to be heard and to be assisted by a legal adviser must be respected, as these derive from the rights of the defence (*Boudjlida* and *Mukarubega*).

In addition, Articles 13(1) and (2) of the directive provide that returnees must be afforded an **effective remedy** to appeal return decisions before either a judicial authority or another independent body competent to review the decision and suspend its enforcement. Judicial review and automatic suspension of the enforcement of the return decision is not explicitly required by the current directive. However, the ECJ clarified in *Abdida*, *Gnandi*, *LM, B*, and *FMS* that a remedy before a judicial authority or an independent authority that can be regarded as a court must be granted and that such a remedy cannot be considered effective if it has no automatic suspensive effects when there are substantial grounds to believe that the person would be subject to death penalty, torture or inhuman or degrading treatments if removed (*Article 19.2* of the Charter of Fundamental Rights of the EU (EU Charter)). On the contrary, the ECJ clarified, in *X* and *X and Y*, that the directive does not compel Member States to set up a second level of jurisdiction, nor to confer automatic suspensory effect on that case. In the appeal proceedings, returnees must be granted access to legal advice, representation and linguistic assistance (Article 13(3) and (4)). If requested, access must be granted free of charge in accordance with national law (*C-249/13*).

From its inception, the Return Directive was widely criticised by academics, non-governmental organisations and third-country leaders for its punitive approach to irregular migration, its shortcomings in the area of fundamental rights, and for the wide margin of discretion afforded to Member States in many fields, making it impossible to guarantee the equal treatment of returnees throughout the EU.⁸ In addition, its adoption does not seem to have had a major impact on EU return rates, although multiple factors could explain that lack of effectiveness. As the Commission has *acknowledged*, an efficient return policy relies heavily on the cooperation of returnees and of their countries of origin: contradictory statements relating to nationality; lost papers; returnees

absconding; third-country unwillingness to readmit their nationals or to issue travel documents; are all cited by Member States as the main challenges they face when dealing with removal.⁹

From a broader perspective, some authors take the argument further: conceptualising irregular migration as a 'product' of legal migration and citizenship policies, they suggest that the lack of legal channels for migration, together with demand for labour in certain economic sectors, fuels irregular migration, and that stronger policies aiming to control it through visa requirements and border control measures ultimately spawn a huge industry of smuggling and trafficking.¹⁰ According to this logic, return policies attempt to solve a problem that states have created themselves, and that might be better confronted by enlarging the possibilities for legal migration or/and increasing the flexibility of visa requirements.

Parliament's starting position

In a series of resolutions, Parliament has agreed on the need to improve the [effectiveness](#) of the EU's return policy, highlighting that it should be linked not only to the EU's return rate, but also to the sustainability of returns and respect for fundamental rights. It has also underlined the need to [strengthen](#) EU reintegration programmes: voluntary return should be prioritised over forced return; and [migrant children](#) should be returned only when it is in their best interests, in a safe, assisted and voluntary manner, and offering long-term support for reintegration. In addition, Parliament has [stressed](#) that detention of children in the context of migration is never in their best interest and should be replaced by community-based alternatives to detention.

Preparation of the proposal

Member States had to comply with the Return Directive by 24 December 2010, except for the provision on legal assistance (Article 13(4)), which had to be implemented by 24 December 2011. The Commission submitted a first implementation report on 28 March 2014, accompanied by a [communication](#) on EU return policy, describing the state of play and possible future developments. The Commission highlighted that the directive had influenced national law and practices positively in relation to voluntary return, return monitoring, implementation of alternatives to detention, and criminalisation of irregular stay. It also acknowledged that EU return rates had remained substantially unchanged and that improvements were needed to ensure respect for fundamental rights of returnees in some areas.

The Commission communication was followed by the adoption, in 2015, of an [EU action plan on return](#) and a common [return handbook](#), providing Member States with guidelines on correct implementation of the Return Directive and carrying out returns in an effective and humane manner. Two years later came a [renewed action plan on return](#), a Commission [recommendation](#) and an [updated return handbook](#), focusing more clearly on consistent transposition of the directive in all Member States. In addition, the Commission affirmed that it stood ready to propose a revision of the directive, although it acknowledged the need for better implementation.

In its [28 June 2018 conclusions](#), the European Council welcomed the Commission's intention to propose legislative changes aiming to achieve a more effective and coherent European return policy. Two and a half months later, the Commission President, Jean-Claude Juncker, announced the presentation of the proposal to recast the Return Directive in his [2018 state of the Union letter of intent](#). The proposal was not accompanied by an impact assessment, as the Commission did not deem it necessary on account of the urgency of the legislative changes needed and the prior evaluations carried out within the [Schengen evaluation and monitoring mechanism](#), the [Return Expert Group](#) of the European Migration Network, and the Commission's [Contact Group on Return](#).

The changes the proposal would bring

Aiming to boost the effectiveness of EU return policy, the Commission proposes to amend several provisions of the directive relating mainly to voluntary departure (Article 9), entry bans (Article 13),

remedies (Article 16) and detention of returnees (Article 18). It also proposes to introduce new provisions defining the risk of absconding (Article 6), imposing an obligation to cooperate on returnees (Article 7), imposing an obligation to create a return management system on Member States (Article 14) and creating a border procedure (Article 22). Some of these proposals have been substantially modified through the amended proposal to adopt an [Asylum Procedure Regulation, discussed](#) in parallel and modified as part of the Commission's [new pact on asylum and migration](#).

The proposal to recast the Return Directive would bring a major change on the **detention** of returnees (Article 18). Regarding the circumstances under which a returnee might be detained, the proposal would impose an obligation on Member States to lay down all possible grounds for detention in national law, a guarantee not included in the current legal text but required by the ECJ in the [Al Chodor](#) case. In addition, the proposal would increase the grounds for detaining a person subject to a return procedure, as it would establish a non-exhaustive list of grounds for detention – by deleting the word 'only' in the proposed article 18 – and would introduce new possible grounds for detention unrelated to the return procedure and linked to security concerns, namely when the returnee poses a risk to public policy, public security or national security. The proposal would also oblige some Member States to prolong the detention period established in national law, as it requires a maximum detention period of three to six months, whereas the text currently in force allows Member States to set a maximum detention period of less than three months.

According to the Commission's explanatory memorandum accompanying the proposal, several Member States have established maximum periods of detention substantially shorter than those permitted by the directive and that fact is preventing effective removals. However, an [implementation assessment](#) of the directive conducted by EPRS in 2020 concludes that there is no evidence that lengthy detention periods increase return rates. In this vein, for example, among the Member States with the shortest maximum periods of detention, Spain (60 days) had a return rate of 30.4 % in 2019,¹¹ and France (90 days), of 12.6 %. Among Member States with maximum periods of detention matching the maximum permitted by the directive (6 months plus 12 months), the Netherlands had a return rate of 43.4 %, Belgium of 17.9 %, Greece of 12.2 %, and Germany of 52.8 % in 2019, to provide just a few examples. Although data (see also information dating back to [2013](#)) on the average period of detention pending removal is not available for every EU country and, therefore, clear conclusions cannot be drawn, the comparison between the Member States' return rates does not seem to support the Commission's statement.

In a similar vein, the proposal would oblige Member States to assess the **risk of absconding**, the first ground authorising the detention of returnees, taking into account a list of 16 criteria set out in proposed article 6. The criteria would be similar to those already suggested in the Commission's [2017 return handbook](#), and range from lack of documentation, residence, or financial resources, to irregular entry, criminal convictions or ongoing criminal investigations and proceedings. Member States would remain free to extend the list of criteria, but not to reduce it. In addition, the proposal would oblige Member States to establish a *ius tantum* presumption (rebuttable) of the existence of a risk of absconding if four of the criteria set out in Article 6 were met (using false or forged documents, violently opposing return procedures, non-compliance with an entry ban or with an obligation imposed to avoid the risk of absconding). This modification would be relevant not only from the point of view of detention, but also in relation to voluntary departure and the imposition of entry bans, as Member States would not be allowed to grant a period of voluntary departure and they would be obliged to issue entry-bans if there were a risk of absconding.

The fundamental right to liberty and security, entrenched in [Article 6](#) of the EU Charter, can be restricted only when provided by law, if the limitation respects the essence of the right and is proportionate (Article 52(1) EU Charter). According to the ECJ (e.g. in [Al Chodor](#)) and the European Court of Human Rights (ECtHR) (e.g. [Khlaifia and others v Italy](#)), the lawfulness of a deprivation of liberty is dependant not only on the existence of a legal basis in national law, but also concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application, to avoid all risk of arbitrariness. Considering the broad formulation of several of the criteria proposed to assess the risk of absconding, as highlighted by the [EU Agency for Fundamental Rights](#) and the EPRS targeted [substitute impact assessment of the proposed Return Directive \(recast\)](#), proposed article 6 might not attain the level of precision and foreseeability required by the case law of both European Courts.

The proposal would also introduce several major changes in the area of **voluntary return**. First, Article 14(3) would oblige Member States to establish voluntary return programmes, 'providing logistical, financial and other material or in-kind assistance', for returnees required to have a visa to cross the external border of Member States because of their nationality, as provided for in [Regulation \(EU\) 2018/1806](#). The obligation would not apply to visa-exempt third-country nationals, although Member States seem to remain free to extend their programmes to them. Similarly, Member States would enjoy a wide margin of appreciation to determine the conditions under which a returnee would qualify to benefit from those programmes, as well as to decide on the type of assistance they would provide, as they would not even be obliged to include reintegration support. The granting of such assistance would be subject to the returnee's cooperation during the procedure.

The level of discretion left to Member States in relation to voluntary return programmes is surprising, considering that the Commission has [warned](#) against disparities in Member States' programmes causing 'assisted-voluntary return shopping', or leading countries of origin to favour returns from Member States with more generous reintegration packages. These consequences may explain why the Commission has already [announced](#) the adoption of a voluntary return and integration strategy, aiming to develop a common framework for voluntary returns and reintegration.

A second change the proposal would introduce in this area is linked to the **length of the period granted to returnees to voluntarily leave** the territory of Member States. More flexibility would be granted to Member States in relation to this question, as the proposal would impose a maximum period of voluntary departure of 30 days (extendable under some circumstances), but leaves Member States free to determine the minimum period, in contrast with the present requirement imposing a minimum of seven days (Article 9(1)). Thirdly, in contrast to the current provisions allowing Member States to refrain from granting a period of voluntary departure in certain cases, the proposal would impose an obligation not to grant that period when there is a risk of absconding, an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or the person concerned poses a risk to public policy, public security or national security (Article 9(4)).

Commission communications frequently point out the need to prioritise voluntary against forced return as a more humane and cost-effective measure. According to Frontex, voluntary return represented 49 % of effective returns in the EU in [2019](#) and [2018](#), 50 % in [2017](#) and 52 % in [2016](#). However, the legislative changes proposed might lower those figures by allowing Member States to grant shorter voluntary departure periods (less than seven days), and by limiting their ability to grant periods of voluntary departure in certain cases.

The proposal also aims to impose an **obligation to cooperate** on third-country nationals subject to return procedures. Proposed article 7 shapes the content of that obligation, determining that it must include at least a duty: a) to provide all elements necessary to establish and verify identity; b) to provide information on third countries of transit; c) to remain available during the procedure; and d) to request a valid travel document when necessary. Member States remain free to introduce new obligations in their national laws. As for the sanctions in cases of lack of cooperation, Article 6(1)(j) identifies lack of cooperation as one of the criteria possibly leading to the detention of the returnee, but the proposed directive does not provide for other sanctions, granting Member States discretion to establish their own sanctioning regime.

Confidentiality of data provided by asylum-seekers is an essential requirement of asylum procedures and the United Nations High Commissioner for Refugees ([UNHCR](#)) has consistently warned against the consequences of sharing information with their countries of origin. As the obligation to cooperate under proposed article 7 would include the obligation to request travel documents from the country of origin, and return decisions would be issued at the same time as decisions rejecting international protection (see article 35a of the proposed [Asylum Procedure Regulation](#)), confidentiality might not be respected if the asylum-seeker appeals the decision rejecting their asylum application and a return decision is nevertheless adopted, imposing the obligation to cooperate on the individual concerned.

The proposal, read together with the amended proposal for an Asylum Procedure Regulation, would also introduce relevant changes in relation to **remedies** against return decisions. Article 16(1) of the proposed Recast Return Directive and article 53 of the proposed Asylum Procedure Regulation would compel Member States to provide for judicial review of return decisions and to do it before

the same tribunals and within the same judicial proceedings and time-limits as decisions rejecting an application for international protection, at least when they are adopted together with those decisions. According to article 16(3) of the proposed Recast Return Directive, **automatic suspension of the enforcement of return decisions** would be granted at first appeal if there is a risk of breaching the principle of *non-refoulement*. In any other case (second or subsequent appeals, or 'no risk' cases), suspension would be decided by a competent national judge, with the decision generally taken within 48 hours. If the return decision is taken together with a decision rejecting an application for international protection, Article 54(2) of the proposed Asylum Procedure Regulation also provides for the automatic suspension of the enforcement of the return decision at first appeal except for the cases listed in paragraph 3. In those cases and in subsequent appeals, suspension is not automatic, but can be granted by a competent national judge and the applicant should have a time limit of at least five days to request such a suspension. New rules are also proposed in relation to the **time limits for bringing appeals** against return decisions. Article 16(4) of the proposed Recast Return Directive imposes a general obligation on Member States to establish 'reasonable' time limits. As for return decisions issued together with decisions rejecting an application for international protection, Article 53(7) of the proposed Asylum Procedure Regulation seems to apply, setting a general time limit of between two weeks and two months for bringing the appeal. That time limit can be shortened to one week (at least) for appeals brought against applications for international protection rejected as inadmissible, unfounded or implicitly withdrawn if the circumstances allowing application of the accelerated procedure apply.

The ECJ (e.g. in [Abdida](#)) and the ECtHR (e.g. in [M.S.S. v Belgium and Greece](#) or [Hirsi Jamaa and Others v Italy](#)) have affirmed that the right to an effective remedy requires the automatic suspension of enforcement of a measure authorising removal when there are substantial grounds for believing that the returnee will be exposed to a real risk of ill-treatment, contrary to Article 3 of the European Convention on Human Rights (ECHR) or to [Article 19 \(2\)](#) of the EU Charter. As Articles 16 of the proposed Recast Return Directive and 54 of the proposed Asylum Procedure Regulation exclude the automatic suspensive effect of appeals against return decisions in certain cases, the proposals may fall short of the requirements set by those courts.

Another major change proposed by the Commission is the establishment of a **border procedure for carrying out returns** that would apply when the return decision is adopted together with a decision rejecting an application for international protection also adopted under the border procedure (Article 22 of the proposed Recast Return Directive and Articles 41 and 41a of the proposed Asylum Procedure Regulation). According to the proposals, the border procedure for international protection applications would apply only to applicants who have not been authorised to enter and do not fulfil the conditions for entry into the territory of the Member States, provided that the application is made at an external border crossing point or a transit zone, after apprehension in connection with an authorised entry, following disembarkation in the territory of the Member States or following relocation under proposed [Regulation on Asylum and Migration Management](#). The procedure would also be generally applied to minors above the age of 12, including unaccompanied minors and their families under certain circumstances. As a general rule, if the border procedure is applied, **applicants for international protection would not be allowed to enter the territory of the Member States**, being kept at or near the external borders or transit zones; their applications would be decided within 12 weeks; and judicial review would be limited to a single level of jurisdiction (Articles 41 and 53(9) of the proposed Asylum Procedure Regulation). If those applications are rejected and the person is subject to a return or a refusal of entry decision, the border procedure would also apply in the return phase, except if the Member State has decided not to apply the Return Directive for those subject to an entry refusal or apprehended in connection with an irregular border crossing at an external border (Article 2(2)(a) of the proposed Recast Return Directive). The proposed border return procedure would allow Member States to keep returnees for an extra period not exceeding 12 weeks in locations at or near the external borders or in transit zones and detain them for the same period of 12 weeks under certain circumstances (Article 41a of the proposed Asylum Procedure Regulation). That detention period will have to be included in the maximum period of detention (6 plus 12 months) allowed by the Return Directive (article 41a (7)

proposed Asylum Procedure Regulation). In addition, and departing from the general rules, a maximum period of 15 days for voluntary departure may be granted to returnees when the border procedure applies (Article 41a (4) of the proposed Asylum Procedure Regulation).

According to the ECJ (e.g. [FMS](#)) and the ECtHR (e.g. [Ilias and Ahmed v Hungary](#) or [Khlaifia and others v Italy](#)) stays in transit zones or controlled zones near or at the border can be considered a deprivation of liberty depending on the circumstances of the person concerned, and the type, duration, effects and manner of implementation of the measure. If the measure is considered a detention, all the safeguards provided for under Articles 6 of the EU Charter and Article 5 ECHR apply.¹² In addition, the ECJ (e.g. [Jawo](#)) and the ECtHR (e.g. [S.D. v Greece](#), or [Popov v France](#)) have both developed a consistent case law concerning the conditions of detention or the living conditions of those fully dependent on the national authorities. As those subject to border procedures could be in transit zones or locations in the proximity of the external borders for up to 24 weeks under the current proposals, their stay in those areas would be subject to the requirements indicated by both European courts if it was considered a deprivation of liberty or if the persons affected were completely dependent on national authorities to cover their basic needs as it is often the case in those areas.

Finally, the proposal would introduce changes in relation to **entry bans** (Article 13) and **return management** (Article 14). Whereas entry bans are linked to the adoption of return decisions in the current Return Directive, the proposal would allow Member States to impose an isolated entry ban, not accompanied by a corresponding return decision, if the irregularity of a stay is detected when the third-country national is exiting the territory of a Member State. The adoption of such a measure presupposes the existence of exit checks, and cannot be imposed on a general basis, as it must be proportionate and adopted considering the individual circumstances of the case. Although no other changes are expressly introduced in relation to entry bans, the current directive imposes an obligation on Member States to issue entry bans if no period of voluntary departure is granted. The changes the proposal would introduce in the area of voluntary departure would therefore also have a mirror effect on entry bans. Article 14 would also compel Member States to establish a national return management system compatible with the central system, to be managed by the European Border and Coast Guard Agency, a measure aimed at fostering cooperation among Member States.

Advisory committees

The European Economic and Social Committee (EESC) delivered an [opinion](#) on the proposal on the 23 January 2019 (Rapporteur: José Antonio Moreno Díaz (Workers – Group II/Spain)). The EESC generally welcomed the stated intention of the proposal, but questioned the effectiveness of the changes, fearing that they could make the situation tougher and more punitive.

National parliaments

The [deadline](#) for the submission of reasoned opinions on the grounds of subsidiarity was 12 December 2018. None of the 22 parliamentary chambers from the 19 Member States that [examined](#) the proposal raised any objections on the grounds of subsidiarity.

Stakeholder views

On the **detention regime for returnees**, [Amnesty International](#), the [Meijers Committee](#), [Statewatch](#) and the European Council of Refugees and Exiles ([ECRE](#)) criticise the extension of the grounds for detaining returnees. Amnesty International and ECRE highlight that the inclusion of grounds for detention related to security adds to the criminalisation of irregular migrants and, at the same time, allows Member States to circumvent criminal law safeguards through the use of administrative detention. They criticise the proposed list of criteria determining a **risk of absconding** for being too broad and vague. Against the extension of the maximum period of detention, they point out that there is no evidence of such an extension having a beneficial impact on return rates. The [International Detention Coalition](#) adds that immigration detention is an extremely costly policy that hardly ever fulfils its objectives. The [Platform for International Cooperation on Undocumented Migrants](#), ECRE and Amnesty International all advocate the prohibition of detention of children.

ECRE points out that the imposition of an **obligation to cooperate** on returnees might lead to arbitrary decisions, as little detail is provided for national authorities to determine the level of cooperation required of returnees. In addition, ECRE affirms that the obligation to lodge a request to obtain travel documents might undermine asylum seekers' rights, and have disproportionate effects on stateless people who might not be able to provide the information required.

ECRE, Amnesty International, and a [group of religious organisations](#) maintain that the proposal will undermine the primacy of **voluntary return** over forced return, as it will restrict the opportunities for voluntary departure. They therefore suggest extending the period of voluntary departure to a minimum of 30 days, and deleting the provision prohibiting Member States from granting a period of voluntary departure in certain cases. ECRE welcomes the obligation on Member States to create a **national return management system** and **voluntary return programmes**, but rejects the linkage between the cooperative attitude of the returnee and assistance under those programmes, and warns against the collection of returnees' data, especially in exchanges with third countries.

ECRE and Statewatch criticise the proposal for leading to systematic imposition of **entry bans** and focusing specifically on the imposition of entry bans on asylum seekers whose applications have been rejected. According to these organisations, the imposition of entry bans in their cases would have devastating effects on the right to seek asylum, as possible future changes in the country of origin could not be taken into account when imposing the entry-ban. Statewatch, ECRE and Amnesty International also reject the possibility of issuing entry bans when the person is already leaving EU territory: third-country nationals might be unwilling to leave EU territory voluntarily if they know they will be subject to sanctions, leading to a fall in voluntary departures.

Amnesty International welcomes the proposal to compel Member States to provide for **judicial review** of return decisions. However, both Amnesty International and ECRE criticise the proposal for establishing very short time limits for appeal in certain cases, for limiting judicial review to a single instance when the person has already applied for international protection, and for limiting the automatic suspensive effect of appeals in certain cases. Finally, the [Meijers Committee](#) is critical of the fact that the **border procedure for returns** does not apply to all asylum seekers whose applications were rejected in a border procedure, whereas [CEPS](#) criticises the procedure for greatly accelerating decisions concerning the right to international protection, establishing a clear link between the EU asylum and return systems, reducing procedural safeguards and providing for possible long and systemic detentions at the borders or in other locations near the external borders.

Legislative process

European Parliament

The Committee for Civil Liberties, Justice and Home Affairs (LIBE) was made responsible for the proposal, while the Committee on Legal Affairs gave an [opinion](#) on use of the recast technique. Judith Sargentini (Greens/EFA, The Netherlands) was initially appointed rapporteur at the LIBE committee and her [draft report](#) was published on 16 January 2019. It was not adopted by Parliament during the 2014-2019 term, however. After the 2019 European elections, Parliament [decided](#) to resume work on this proposal ([Rule 240 of Parliament's Rules of Procedure](#)) and the LIBE committee appointed a new rapporteur, Tineke Strik (Greens/EFA, The Netherlands), who published her [draft report](#) on 21 February 2020. As indicated in the explanatory statement, the draft report is informed by the opinions on the proposal given by the [EU Agency for Fundamental Rights](#) and the [European Data Protection Supervisor](#), as well as by the [targeted substitute impact assessment](#) of the proposal and the [implementation assessment](#) of the Return Directive drafted by EPRS.

The draft report proposes 119 amendments, including: a) extending the scope of application to third-country nationals being denied entry into the territory of the Member States under Article 14 of the [Schengen Borders Code](#); b) excluding informal arrangements on return from the definition of 'return'; c) a revised definition of the risk of absconding; d) the obligation for Member States to

provide returnees with information on the return procedure, the return decision and their rights and obligations in a language they understand and the deletion of most of the obligations imposed on returnees in the Commission's proposal; e) the deletion of the obligation imposed on Member States to issue a return decision together with a decision ending a legal stay or denying international protection; f) the extension of the time limit for voluntary departure to 30 days and the limitation of the circumstances under which Member States may refuse to grant that period; g) a provision allowing returnees to return voluntarily at any stage of the procedure; h) the obligation for Member States to create a forced-return monitoring system composed of independent monitors; i) the obligation to carry out an individual best interest assessment in relation to every minor before issuing a return decision, to ensure that return procedures are child-sensitive, to appoint an independent guardian to assist unaccompanied and separated minors and to ensure that they are returned to a first or second-degree relative or a legal guardian and that there is specific support for their reintegration process; j) reduced possibilities for Member States to impose entry-bans; k) an obligation to include reintegration support in national return systems; l) the deletion of the new grounds for detention of returnees proposed by the Commission, the limitation of the detention period of returnees to a maximum of three months (extendable to six in certain circumstances) and a provision indicating that alternatives to detention must always be given preference and detention may be applied only if, after a vulnerability test, it is found not to disproportionately harm the person concerned; m) a general ban on detention of children and families; n) the deletion of the proposed border procedure. The deadline for tabling amendments, originally scheduled for 16 April 2020, was postponed until the 23 September 2020. In total, 754 amendments have been presented and the LIBE committee first considered them at its meeting on 15 October 2020.

Council

The Justice and Home Affairs configuration of the Council reached a [partial general approach](#) covering all aspects of the proposal, apart from those relating to the border procedure for returns, during its meeting of 6-7 June 2019. Council agreed on several amendments to the Commission's proposal, among which: a) the possibility to send back returnees not solely to countries of origin or transit but to countries where they have the right to enter and reside or to countries with which there is an EU or bilateral agreement; b) deleting of some of the criteria proposed by the Commission to determine the existence of a risk of absconding and the redefinition of the remaining ones; c) further obligations on returnees, including to provide a reliable address, to appear in person before the competent authorities if required and to provide biometric data if needed to verify identity; d) specific safeguards for children and families in relation to detention and voluntary departure; e) allowing Member States to grant assistance for return and re-integration to returnees who do not cooperate, while compelling them to deny such assistance to those who have already benefited from assistance from a Member State; f) extending the maximum duration of entry-bans from five to ten years; g) strengthened coordination between Member States for the purposes of issuing and implementing return decisions; h) allowing Member States to decide that costs associated with removal and detention of returnees are borne by the returnees themselves, and to link the prior payment of those costs to the possible withdrawal or suspension of an entry ban; and i) allowing Member States to provide for the judicial review of return decisions through different levels of jurisdiction and to decide whether the lodging of an appeal at first instance would have automatic suspensive effects or to grant the power to suspend the enforcement to a judicial authority.

EP SUPPORTING ANALYSIS

[The Return Directive 2008/115/EC](#), European Implementation Assessment, EPRS, European Parliament, June 2020.

[Substitute impact assessment on the proposed Return Directive \(recast\)](#), EPRS, European Parliament, February 2019.

OTHER SOURCES

European Migration Network, [The effectiveness of return in EU Member States](#), February 2018.

Matrix, [Evaluation on the application of the Return Directive \(2008/115/EC\), Final Report](#), October 2013.

Majcher I., [The European Union Returns Directive and its compatibility with international human rights law](#), *Immigration and Asylum Law and Policy in Europe*, Vol.: 45 Brill-Nijhoff, 2020.

[Returning illegally staying third-country nationals. Recast](#), Legislative Observatory (OEL), European Parliament.

ENDNOTES

- ¹ See already its first paper in 2002: [Green paper on a Community return policy on illegal residents](#), COM(2002) 175.
- ² Among the measures already adopted, see those: on [mutual recognition of return decisions](#) and [compensation of the financial imbalances](#) resulting from that recognition; establishing a [uniform European travel document for return](#); on the rules on the [organisation of joint flights for removals](#) and on mutual assistance between Member States [in cases of transit for removal by air](#); and on the creation of an [immigration liaison officers network](#).
- ³ See K. Hailbronner (ed.), *EU Immigration and Asylum Law- Commentary*, Beck, Hart and Nomos, 2016, p. 671.
- ⁴ See ECJ cases: [El Dridj](#); [Achughbabian](#); [Sagor](#); [Filev and Osmani](#); [Celaj](#); [Ouhrami](#); [Affum](#); and [JZ](#).
- ⁵ For further explanations, see S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk and V. Moreno-Lax, [EU Immigration and Asylum Law, Vol. II](#), Brill, 2015, pp. 498-499.
- ⁶ See S. Peers, [EU Justice and Home Affairs Law, Vol. I: EU Immigration and Asylum Law](#), Oxford University Press, 2016, pp. 507-508, 515-516.
- ⁷ However, the person can be further detained on the basis of national law relating to international protection ([Kadzoev](#)).
- ⁸ For a general overview of the criticism of the directive, see: [UNHCR position on the proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals](#); A. Baldaccini, 'The return and removal of irregular migrants under EU law: An analysis of the returns directive', *European Journal of Migration Law*, Vol. 11, 2009; D. Acosta Arcarazo, [Latin American reactions to the adoption of the returns directive](#), CEPS; S. Peers, '[Irregular migrants: Can humane treatment be balanced against efficient removal?](#)', *European Journal of Migration and Law*, Vol. 17, November 2015.
- ⁹ See European Migration Network, [The effectiveness of return in EU Member States](#), 2018; or the implementation report under Part IV of the Commission's [communication](#) on the EU return policy, COM (2014)199.
- ¹⁰ See C. Boswell, '[The politics of irregular migration](#)', in L. Azoulay and K. De Vries, *EU Migration Law. Legal Complexities and Political Rationales*, Oxford University Press, 2014; M. Samers, '[An emerging geopolitics of illegal immigration in the European Union](#)', *European Journal of Migration and Law*, Vol. 6, 2004. See also, W an Ballegooij and C. Navarra, [Humanitarian Visas. European added value assessment accompanying the European Parliament's legislative own-initiative report](#), EPRS, European Parliament, 2018.
- ¹¹ [Third country nationals ordered to leave; third country nationals returned following an order to leave](#), Eurostat.
- ¹² For an analysis of the protection afforded by these provisions, see: EU Agency for Fundamental Rights and Council of Europe, [Handbook on European law relating to asylum, borders and immigration](#), pp.141-169.

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