

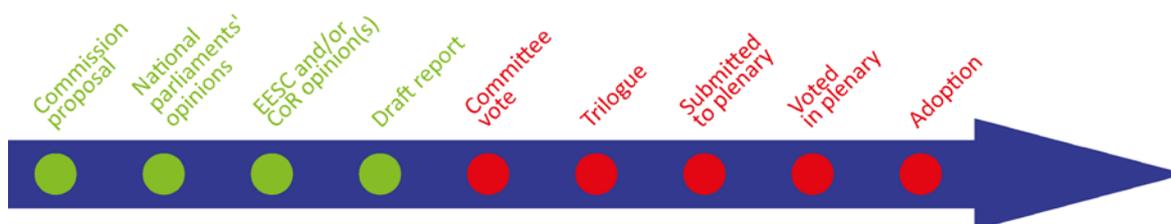
Recasting the Return Directive

OVERVIEW

The Civil Liberties, Justice and Home Affairs Committee of the European Parliament is considering the 654 amendments, tabled in February 2019, to the European Commission's September 2018 proposal to recast the Return Directive. The Directive is the main piece of EU legislation governing the procedures and criteria to be applied by Member States when returning irregularly staying third-country nationals, and a cornerstone of the EU return policy.

Taking into account the decrease in the EU return rate (45.8 % in 2016 and 36.6 % in 2017), and following European Council and Council calls to review the 2008 legal text to enhance the effectiveness of the EU return policy, the Commission has 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'.

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 final 12.9.2018
<i>Rapporteur:</i>	Judith Sargentini (Greens/EFA, The Netherlands)	2018/0329 (COD)
<i>Shadow rapporteurs:</i>	Anna Maria Corazza Bildt (EPP, Sweden) Sylvie Guillaume (S&D, France) Jussi Halla-aho (ECR, Finland) Sophia in 't Veld (ALDE, The Netherlands) Barbara Spinelli (GUE/NGL, Italy) Laura Ferrara (EFDD, Italy) Giancarlo Scottà (ENF, Italy)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Vote in committee	



Introduction

Ensuring returns of illegally staying third-country nationals take place effectively, and stepping up the European Union's (EU) return rate has been a political priority in recent years, especially since the 2015 [peak](#) in arrivals of asylum-seekers and irregular migrants. Following prior policy statements, the European Commission identified the effectiveness of EU return policy as a key element in reducing the incentives for irregular migration in its [European agenda on migration \(2015\)](#). Although the Commission has put several initiatives in the area of return forward since the adoption of the agenda, none seem to have had a clear impact on the EU return rate, which decreased from 45.8 % in 2016 to 36.6 % in 2017. Aiming to improve those figures, the Commission presented a [proposal](#) for a targeted revision of the [EU Return Directive](#), the main piece of legislation establishing harmonised standards and procedures to be used by Member States for returning third-country nationals staying irregularly on their territory.

Existing situation

The European Commission has constantly stressed the importance of the EU return policy to tackling irregular migration and building up a robust and comprehensive migration and asylum policy.¹ EU action in return policy has mainly focused on fostering cooperation among Member States,² on providing EU funding for return-related activities,³ and on cooperation on readmission with countries of origin and transit.⁴ According to the [Commission](#), the Return Directive is linked to the first goal: harmonising standards and procedures on adopting return decisions would help to build mutual trust among Member States, facilitate the recognition of return decisions and increase cooperation. To achieve this aim, 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,⁵ the text was [adopted](#) by Parliament and Council in 2008, through the former co-decision procedure.

The scope of application of the current directive is broad.⁶ It applies to any third-country national staying irregularly on the territory of a Member State (excluding Denmark, Ireland and the United Kingdom) or the four Schengen-associated states,⁷ independently of the reasons for irregular stay (Article 2). In the [Arslan](#) case, the EU Court of Justice (ECJ) clarified that the Directive did not apply to asylum-seekers until a first instance decision on their application for asylum was taken. Neither does the Directive apply to persons enjoying the right of free movement under Union law, and 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 the [Abdelaziz Arib](#) case); and b) when they are subject to an extradition procedure or to criminal sanction other than those related to illegal entry or stay (as pointed out by the ECJ in the [Achughbavian](#) case).

The key principle that inspires all the relevant provisions of the Directive is set out in Article 6(1): Member States are obliged to issue a return decision to any third-country national staying irregularly on their territory. Although some exceptions to this general rule are permitted (Article 6(2-5)), the Return Directive is based on the principle that Member States shall issue return decisions to irregularly staying third-country nationals and provide for the enforcement of those decisions when needed ([C-38/14](#)).

The Directive prioritises voluntary 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. To 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. the [Achughbabian](#) case). 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.⁸

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.⁹ As the provision grants Member States a wide margin of discretion, national authorities have [opted](#) for very different systems. However, in the [Filev and Osmani](#) case, 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. When a returnee does not voluntarily leave the territory of the Member States, removal may become impossible even if national authorities take all necessary measures to enforce a return decision, for example due 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. 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 nor forbids Member States 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.¹⁰

Procedural and substantive safeguards to be respected within return procedures play a primary role in the Directive. From the outset, the Directive makes it clear that Member States' implementation measures shall respect fundamental rights and international law (Article 1). Article 5 of the Directive 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 decisions infringing those rights and principles ([C-562/13](#); [C-82/16](#)). In relation to children's rights, the Directive regulates 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, although imposes 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, only applicable 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 the [Kadzoev](#) case.

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,¹¹ except if the removal operation lasts longer due 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 twelve 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, Estonian, or Cypriot 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 regulated in 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 shall issue return decisions in writing and must give the reasons justifying the decision and information concerning possible remedies (Article 12(1)). Translation shall 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](#) cases).

In addition, Articles 13(1) and (2) of the Directive provide that returnees shall 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 the [Abdida](#) and [Gnandi](#) cases, that a judicial remedy shall be granted and that it cannot be considered effective if it has no automatic suspensive effects when there are substantial grounds to believe that removal would infringe the principle of *non-refoulement*. To the contrary, the ECJ clarified, in the [X](#) and in [X and Y](#) cases, 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 shall 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.¹² 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.¹³

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 would ultimately spawn a huge industry of smuggling and trafficking.¹⁴ According

to this logic, return policies attempt to solve a problem that states have created themselves, and that might be better confronted through enlarging the possibilities for legal migration or/and increasing the flexibility of visa requirements. However, the EU Return Directive neither focuses on these possibilities, nor on the external aspects of EU return policy, but only deals with some internal elements of that policy.

Parliament's starting position

Taking the EU return rate into account, Parliament has agreed on the need to improve the [effectiveness](#) of the EU return policy. However, it has frequently stressed that returning migrants must be carried out [safely and in full compliance](#) with the principle of *non-refoulement* and fundamental rights. In relation to [migrant children](#), Parliament has stressed that they should only be returned when it is in their best interests, in a safe, assisted and voluntary manner, and offering long-term support for reintegration. Parliament has also severely criticised migrant '[push backs](#)' as practices that do not ensure migrants' rights, and has called on Member States to do away with rules [criminalising](#) irregular migration. It has also reiterated that [voluntary](#) return should be prioritised over forced return, and underlined the need to [strengthen](#) EU reintegration programmes for returning migrants.

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 a year later, by 24 December 2011. Considering this deadline, the Commission submitted a first implementation report on 28 March 2014. The report was accompanied by a [communication](#) to the Council and Parliament on EU return policy, describing the state of play and possible future developments for that policy. 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 mere irregular stay. At the same time, it 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's communication was followed by the adoption of an [EU action plan on return](#) (2015) and a [renewed action plan on return](#) (2017). Together with the 2015 action plan, the Commission adopted a [return handbook](#), providing Member States with guidelines to correctly implement the Return Directive and carry out returns in an effective and humane manner. The renewed action plan was followed by a Commission [recommendation](#) and an [updated return handbook](#), focusing more clearly on the consistent transposition of the Directive in all Member States, to increase the EU return rate. Although acknowledging the need for better implementation of the Directive, the Commission expressly affirmed that it stood ready to propose a revision of the Directive in its 2017 renewed action plan on return.

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 due to 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 enhance 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 to adopt certain return decisions (Article 22).

The proposal would bring a major change relating to the **detention** of returnees (Article 18). In relation to 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 that is not included in the current legal text and was required by the ECJ in the [Al Chodor](#) case. To the contrary, 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 – through deletion of 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 settle 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, in 2017, Spain (60 days maximum detention period) had a return rate of 37.2 %, ¹⁵ and France (45 days, although a change was introduced in [2018](#)), of 15 %. Among Member States with maximum periods of detention matching the maximum permitted by the Directive (6 months plus 12 months), for example, the Czech Republic had a return rate of 11.2 %, Belgium of 18.2 %, Greece of 39.5 %, and Germany of 46.3 %. Although [data](#) 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, at least without any further explanation.

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 settled in the 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 *iuris tantum* presumption (rebuttable) of the existence of a risk of absconding when four of the criteria settled in Article 6 would be 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 when there would be a risk of absconding.

The fundamental right to liberty and security, entrenched in [Article 6](#) of the Charter of Fundamental Rights of the EU (EU Charter), can only be restricted when provided by law, if the limitation respects the essence of the right and is proportionate (Article 52(1) of the 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 not only dependant 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. Taking into account the broad formulation of several of the criteria proposed to assess the risk of absconding, as already highlighted by the [EU Agency for Fundamental Rights](#) and the targeted [substitute impact assessment of the proposed return directive \(recast\)](#), developed by the European Parliament Research Service, the proposed Article 6 might not attain the level of precision and foreseeability required by the case-law of both European Courts.

The proposal would 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 [Council Regulation \(EC\) No 539/2001](#) (now repealed by [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 proposal only specifies that 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 [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. Although the Commission has never published the data justifying these statements, the Council followed a similar approach, endorsing the [guidelines](#) on the use of assisted voluntary return and reintegration programmes to align national practices and prevent these risks.

A second change related to voluntary departure that the proposal would introduce 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 this area, 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 7 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 return 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 [2018](#), 50 % in [2017](#) and 52 % in [2016](#). However, the legislative changes proposed might lower those figures by allowing Member States to grant short 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 introduce an **obligation to cooperate** on third-country nationals subject to return procedures. Article 7 as proposed shapes the content of that obligation, determining that it shall include at least a duty: a) to provide all elements necessary to establish and verify the 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 Article 7 would include the obligation to request travel documents from the country of origin, and return decisions would be issued immediately following adoption of a decision rejecting international protection (see proposed Article 8(3)), 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 would also introduce relevant changes in relation to **remedies** against return decisions. Article 16(1) would compel Member States to provide for judicial review of those decisions, although limiting that review to a single level of jurisdiction when the return decision is adopted after the rejection of an application for international protection that has itself been subject

to effective judicial review. According to Article 16(3), 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. However, these rules on suspension of enforcement would not apply if the return decision were to be taken after a decision ending a legal stay (based on the revised [Asylum Procedure Regulation](#), a proposal being discussed in parallel), the reasons for temporary suspension had been assessed and subject to judicial review under that regulation, and no new element had arisen or been presented by the returnee. New rules are also proposed in relation to the time limits for bringing appeals against return decisions. Proposed Article 16(4) imposes a general obligation on Member States to establish 'reasonable' time limits. In relation to appeals lodged against return decisions adopted as a consequence of a decision rejecting an application for international protection, Member States would have to establish a time limit for lodging an appeal of a maximum of five days, but would be free to fix a shorter period.

The ECJ (e.g. in [Abdida](#)) and the ECtHR (e.g. in [M.S.S. v Belgium and Greece](#) or [Souza Ribeiro v France](#)) have consistently held 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. However, the protection afforded by these two provisions seems to go further than the protection afforded under the EU asylum system, as e.g. a person persecuted for any of the reasons stated under Article 10 of the [Qualification Directive](#) would be excluded from being a refugee in certain cases (see Article 12 of the Qualification Directive), but would still be protected under Article 3 of the ECHR.¹⁶ In those cases, Article 16 of the proposal might fall short of the requirements set by both Courts in the case where the returnee had applied for international protection, as their appeal against the return decision would not be granted automatic suspensive effect.

Another major change proposed by the Commission is the establishment of a **border procedure** applicable in cases where the obligation to return follows a decision rejecting an application for international protection that was also adopted through a border procedure (Article 22). Although Article 41 of the [Asylum Procedure Regulation](#) is still under discussion, the Commission has proposed a border procedure for international protection cases that would oblige Member States to decide either on the admission or on the merits of an application within a period of no longer than four weeks. According to the proposal, the procedure would also be applied to unaccompanied minors under certain circumstances. When that procedure applies, the border procedure would also apply in the return phase, obliging Member States to issue return decisions by means of standard forms, to deny voluntary departure except if the returnee holds a travel document and cooperates, and to establish a time limit for bringing an appeal not exceeding 48 hours.

[Article 19\(1\) of the EU Charter](#) and Article 4 of Protocol 4 to the ECHR prohibit collective expulsions of third-country nationals, i.e., measures compelling non-nationals to leave a country as a group, except if their personal circumstances are individually assessed and they are able to put forward their arguments against expulsion (e.g., ECtHR, [Khlaifia and others v Italy](#)). To comply with these requirements, Member States must assess the particular circumstances of each case and grant returnees a possibility to intervene in the procedure, even if proposed Article 22 obliges them to issue 'standardised' return decisions.

In addition, Article 22 of the proposal would provide for specific rules concerning detention and suspension of enforcement of the return decision in border procedures. In relation to detention, Article 22(7) would allow Member States to extend detention measures imposed on applicants for international protection in the context of a border procedure for as long as removal arrangements are ongoing and executed with due diligence. In principle, the detention would not last for more than four months, but if the return decision cannot be enforced in that time frame, the returnee's detention could continue under the general rules (Article 18). Therefore, detention under border procedures could last longer than in other cases, as detention under the international protection regime could be further extended for up to four months, subsequently for up to six months, and finally for up to twelve months. In relation to suspension of enforcement of the return decision,

automatic suspension would be provided for only at first instance, when there is a risk of breach of the principle of *non-refoulement* and there are new elements concerning the case or the decision rejecting the application for international protection was not subject to judicial review.

In migration-related cases, the ECJ (e.g. [Samba Diouf](#)) and the ECtHR (e.g. [I.M. v. France](#)) have stressed that Articles 47 of the EU Charter and 13 of the ECHR guarantee the right to an effective remedy. According to both Courts, a remedy will not be considered effective if it does not allow the national authorities to review the merits of the case and to grant appropriate relief. The ECtHR has also linked the effectiveness of a remedy to its availability in practice as well as in law, thus considering whether its exercise has been hindered by the acts or omissions of national authorities. In that vein, the overall circumstances of the case, together with time-limits for lodging appeals, access to translation or to legal aid, would be considered. Proposed Article 22 might not fully respect those requirements, particularly if we take into account the tight time-limits for lodging appeals, as well as the difficulties returnees might face in exercising their rights whilst in detention.

Finally, the proposal would introduce some changes in relation to **entry bans** (Article 13) and **return management** (Article 14). If entry bans are clearly linked to the adoption of return decisions in the current 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 taking the individual circumstances of the case into account. Although no other changes are expressly introduced in relation to entry bans, the current Directive does impose an obligation on Member States to issue an entry ban 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 in the area of return.

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, and feared 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.

Stakeholders' views

The European Council of Refugees and Exiles ([ECRE](#)) and the [Meijers Committee](#) begin their assessment of the proposal regretting the **absence of an impact assessment** and highlighting the lack of comprehensive data sustaining the policy choices made.

In relation to **detention**, [Amnesty International](#), the Meijers Committee and ECRE criticise the proposal for extending 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. In relation to the list of criteria determining a **risk of absconding**, they criticise the Commission's proposal for being too broad and vague and for including criteria that cannot be considered as indicators of the individual's intention to abscond. In a similar vein, they reject the extension of the maximum period of detention, pointing out that

there is no evidence of such an extension having a beneficial impact on return rates. The [International Detention Coalition](#) further adds that immigration detention is an extremely costly policy that hardly ever fulfils its objectives. ECRE, Amnesty International and the [Platform for International Cooperation on Undocumented Migrants](#) advocate for prohibition of detention of children (and other vulnerable groups).

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, they affirm 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 to delete 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 possible impact of the wide collection of returnees' data under the EU central system for return on the right to data protection and on the safety of asylum-seekers, especially if information on their application for asylum is exchanged with third-countries.

ECRE criticises the proposal for leading to a systematic imposition of **entry-bans** and focuses specifically on the imposition of entry bans on asylum-seekers whose applications have been rejected. According to the organisation, 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. 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 voluntarily leave EU territory 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 asylum, and for limiting the automatic suspensive effect of appeals in certain cases. Finally, Amnesty International, the Meijers Committee, ECRE and a group of religious organisations also reject the proposed **border procedure** for its severe restriction on the general safeguards provided under the directive. All organisations are of the opinion that the proposed legislative changes will involve the systematic detention, for long periods, of returnees subject to the border procedure. They also criticise the tight time limits for bringing appeals in border procedures, the limits on the suspensive effects of those appeals for heightening the risk of *refoulement*, and the possible application of the border procedure on unaccompanied minors or other people in vulnerable situations.

Legislative process

European Parliament

The Civil Liberties, Justice and Home Affairs (LIBE) Committee was appointed as the lead committee 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 appointed as rapporteur. As the Commission's proposal was not accompanied by an impact assessment, the LIBE committee requested that the European Parliamentary Research Service (EPRS) provide a [targeted substitute impact assessment](#) of the proposal. The rapporteur also consulted the [EU Agency for Fundamental](#)

[Rights](#), the [European Data Protection Supervisor](#), Frontex, and several UN and other international organisations and NGOs before presenting her draft report.

The [draft report](#), published on 16 January 2019, proposes 120 amendments, including: a) a revised definition of the risk of absconding and the deletion of the criteria listed in the Commission's proposal on assessing whether such a risk exists; b) the introduction of an obligation for Member States to provide information to returnees on the return procedure, their rights and obligations and a substantive reframing of the obligations imposed on returnees in return procedures; c) the extension of the time limit for voluntary departure to 30 days, and the limitation of the circumstances under which Member States can shorten that time limit or can refuse to grant a period of voluntary departure to third-country nationals; d) measures aiming to strengthen fundamental rights safeguards in return decisions and operations (e.g. independent monitoring of return operations); e) a complete ban on detention of children and families, and several additional safeguards to be respected by Member States when deciding on the possible return of unaccompanied children and families with children; f) the compulsory inclusion of reintegration support in national programmes for voluntary return; g) measures granting automatic suspensive effect to appeals against return decisions; h) the deletion of the Commission's proposed five-day time limit for lodging appeals against return decisions when the person had already been denied international protection; i) the deletion of the new grounds for detention of returnees proposed by the Commission (risk to public policy, public security and national security) and the limitation of the detention period of returnees to a maximum of three months, which could be extended for six months under certain circumstances; and j) the deletion of the return border procedure. The deadline for tabling amendments expired on 7 February 2019 and [534 amendments](#) were tabled.

Council

Discussions on the proposal have been ongoing in the Council, either at ministerial level or at technical level, since September 2018. In its meeting of [12 October 2018](#), the Justice and Home Affairs configuration of the Council generally welcomed the proposal and focused the discussion on the border procedure provided for under proposed Article 22. In December 2018, the [Austrian Presidency](#) announced that an agreement could be reached in relation to the criteria indicating the risk of absconding; the obligation for third-country nationals to cooperate with national authorities as well as the consequences of non-cooperation; granting of voluntary departure; the possibility to issue the entry ban without issuing a return decision; the design of and modalities for the return management system; as well as national voluntary return and reintegration programmes. However, further discussions were still needed in relation to the possibility of returning migrants to a safe third-country other than the country of origin or transit (a possibility only provided for under the proposal if the returnee and the third-country agree); the mutual recognition of return decisions issued by other EU countries; remedies and the return border procedure.

EP SUPPORTING ANALYSIS

Latek M., [Growing impact of EU migration policy on development cooperation](#), EPRS, European Parliament, November 2017.

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[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.

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

Peers S., [Lock 'em up: the proposal to amend the EU's Returns Directive](#), EU Law Analysis, 12 September 2018.

ENDNOTES

- ¹ The European Commission has followed this approach since its first papers on EU return policy. See [green paper](#) on a Community return policy on illegal residents, COM (2002) 175.
- ² Among the measures already adopted, see those providing for the [mutual recognition of return decisions](#) and for the [compensation of the financial imbalances](#) resulting from that recognition; establishing a [uniform European travel document for return](#); the rules on the [organisation of joint flights for removals](#) as well as on mutual assistance between Member States [in cases of transit for the purposes of removal by air](#); the creation of an [immigration liaison officers network](#) and the rules granting powers in the area of return to the [European border and coast guard](#).
- ³ The EU provides [financial support](#) for certain return activities.
- ⁴ The European Commission [provides](#) information on the EU re-admission agreements currently in force.
- ⁵ See Lutz F., *The Negotiations on the Return Directive*, Wolf Legal Publishers, 2010.
- ⁶ See Hailbronner K. (ed.), *EU Immigration and Asylum Law- Commentary*, Beck, Hart and Nomos, 2016, p. 671.
- ⁷ Iceland, Liechtenstein, Norway and Switzerland.
- ⁸ See all the ECJ cases concerning the criminalisation of irregular entry or irregular stay: *El Dridi*; *Achughbabian*; *Sagor*; *Filev and Osmani*; *Celaj*; *Ouhrami* and *Affum*.
- ⁹ For further explanations, see Peers S., Guild E., Acosta Arcarazo D., Groenendijk K. and Moreno-Lax V., *EU Immigration and Asylum Law, Volume II*, Brill, 2015, pp. 498-499.
- ¹⁰ See, Peers S., *EU Justice and Home Affairs Law*, Vol.I: EU Immigration and Asylum Law, Oxford University Press, 2016, pp. 507-508, 515-516.
- ¹¹ However, the person can be further detained on the basis of national law relating to international protection, as the ECJ pointed out in *Kadzoev*.
- ¹² 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](#); Baldaccini A., [The return and removal of irregular migrants under EU law: An analysis of the returns directive](#), European journal of migration law, Vol. 11, 2009; Acosta Arcarazo D., [Latin American reactions to the adoption of the returns directive](#), CEPS; Peers S., [Irregular migrants: Can humane treatment be balanced against efficient removal?](#), European journal of migration law, Vol 17, November 2015.
- ¹³ 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.
- ¹⁴ See Boswell C., [The politics of irregular migration](#), in Azoulay L. and De Vries K., *EU Migration Law. Legal Complexities and Political Rationales*, Oxford University Press, 2014; Samers M., [An Emerging Geopolitics of Illegal Immigration in the European Union](#), European journal of migration law, Vol. 6, 2004. See also, Van Ballegooij W. and Navarra C., [Humanitarian Visas, European Added Value Assessment accompanying the European Parliament's legislative own-initiative report](#), EPRS, European Parliament, 2018.
- ¹⁵ [Third country nationals ordered to leave](#) ; [third country nationals returned following an order to leave](#), Eurostat.
- ¹⁶ For a further analysis of the protection afforded by those provisions, see: EU Agency for Fundamental Rights and Council of Europe, [Handbook on European law relating to asylum, borders and immigration](#), pp. 64-85.

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eprs@ep.europa.eu (contact)

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