

# **ECRE COMMENTS ON THE COMMISSION PROPOSAL FOR A RECAST RETURN DIRECTIVE COM(2018) 634**

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# SUMMARY OF VIEWS

ECRE submits the following key observations and recommendations on the Commission proposal recasting the Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals:

- » **Evidence base:** The evidence base for return policy is particularly weak. ECRE calls for evidence-based policy making in the field of returns, and deeply regrets the lack of an impact assessment for the recast of the Return Directive as well as the lack of an open and transparent reporting procedure to the European Parliament from the European Commission on the impact of return policies and practice on fundamental rights.
- » **Article 6:** A “risk of absconding” should not be presumed nor should criteria for judging this risk be so wide that any person could be seen as a potential absconder. ECRE recommends deleting the overly broad criteria and replacing them with a forward-looking risk assessment of the individual’s likely future conduct or stated intention not to comply.
- » **Article 7:** ECRE recommends deleting the obligation to cooperate because it is extremely difficult for individuals to demonstrate and burdensome for Member States to both assess and to provide redress.
- » **Article 9:** Voluntary departure is key. Opportunities for third-country nationals to leave humanely and with dignity should be expanded rather than reduced. ECRE recommends a minimum time limit of 30 days to prepare for voluntary departure.
- » **Article 13:** Entry bans should not be issued without a return decision upon exit.
- » **Article 14:** There should be additional provisions to strengthen data protection guarantees in the Return Directive and there should be an explicit prohibition of exchange of information with alleged actors of persecution or serious harm regarding the fact that a third-country national has applied for asylum.
- » **Article 16:** As it is key to ensuring full respect for the principle of *non-refoulement*, applicants’ access to an appeal with automatic suspensive effect must be reinforced rather than restricted. There must be reasonable periods for appeal for individuals and Member States, rather than the unreasonable 5 days (for regular procedures) suggested.
- » **Article 18:** Detention grounds should not be expanded, and particularly not to incorporate the extremely broad criteria currently proposed to assess the “risk of absconding”. Detention should always be for the shortest period possible. Under no circumstances should the already excessive maximum period of detention laid down in the current Directive be further expanded.
- » **Article 22:** ECRE recommends deleting the border procedure. If it is kept, then ECRE recommends amending Article 22 to ensure that for those under a border procedure a reasonable time for appeal is included that ensures full procedural guarantees, that alternatives to detention are prioritised, that detention does not become automatic, and that vulnerable groups including unaccompanied minors are excluded from the border procedure.

# INTRODUCTION

The 2008 Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (“Return Directive”) sets out common standards and procedures for returning irregularly staying third-country nationals from the European Union (EU). In its initial evaluation of the Return Directive of 2014,<sup>1</sup> the European Commission (“the Commission”) considered that the flexibility and implementation of the Return Directive had “positively influenced the situation regarding voluntary departure and forced return monitoring, and had contributed to achieving more convergence on detention, for example”.<sup>2</sup> However, in 2015 there was an increase in the number of people seeking international protection in Europe. Since then so-called low “return rates”<sup>3</sup> have become an urgent problem for the Commission and Member States which see them as a “pull-factor” for irregular migration, although there is no evidence supporting this assumption. Increasing the “effectiveness of return” is seen as key to “re-taking control” of migration in Europe. This has led to a number of policy guidelines and recommendations including an Action Plan on Return,<sup>4</sup> covering both home affairs and external policies, the Return Handbook,<sup>5</sup> and the 2017 Recommendation on making returns more effective when implementing the Return Directive.<sup>6</sup> The 2017 Recommendation on Return, in particular, urged Member States to harmonise their approaches, including through increasing detention and reducing safeguards.

There has been no published evaluation of how these recent policies and recommendations have affected the return rate, or the fundamental rights of returnees. Nor has there been an impact assessment to examine whether there is a need for additional EU action in the field of return. The Commission nevertheless announced a “targeted review” of the Return Directive in September 2018, along with further amendments to the European Border and Coast Guard’s mandate in the area of returns,<sup>7</sup> based upon the fact that return rates fell in 2017 compared to 2016.

Meanwhile, although there has been considerable progress on some areas of the Common European Asylum System (CEAS) reforms, the fate of the reforms is uncertain due to persisting disagreement in the Council and on the reform of the Dublin system in particular.<sup>8</sup> This is important because the issues of asylum and return have been so closely linked in the recast Return Directive,<sup>9</sup> including through direct references to several provisions of the (not finalised) text of the Asylum Procedures Regulation.

This Comments paper discusses the main changes proposed in the recast Return Directive and outlines ECRE’s main concerns. Many of ECRE’s comments focus on the recast’s implications for asylum seekers whose applications have been rejected, because of ECRE’s mandate but also because of the focus given to this group in the Commission proposal. As it concerns a recast proposal ECRE has limited its analysis to those provisions the European Commission proposes to amend,<sup>10</sup> including the risk of absconding; the obligation to cooperate; voluntary departure; procedures and remedies; detention; return management systems; and the proposed border procedure. However, before entering into the substantive analysis of the proposal, the lack of an evidence base for the proposed changes is addressed. This is part of a worrying trend in EU legislative processes in the field of asylum, migration and border management overall.

1. Communication from the Commission to the Council and the European Parliament on EU Return Policy / \*COM/2014/0199 final\*/: <https://bit.ly/2TOUQAf>
2. See European Commission webpage on Return and Readmission: <https://bit.ly/2thDUfe>
3. The number of people who leave compared to the number of return decisions issued. For a discussion on return rates, see for example, Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – a renewed action plan, COM(2017) 200 final, page 2. <https://bit.ly/2mi5oRR>
4. Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – a renewed action plan, COM(2017) 200 final. <https://bit.ly/2mi5oRR>
5. Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks, C/2017/6505, OJ L 339, 19 December 2017 (hereinafter ‘the Return Handbook’): <https://bit.ly/2DNTnws>
6. Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council C(2017) 1600 final (hereinafter the 2017 Recommendation on Returns) : <https://bit.ly/2llGlxW>
7. See the State of the Union [webpage](#) for the full list of legislative proposals concerning migration:
8. See [www.ecre.org](http://www.ecre.org) for regular updates on the Common European Asylum System reforms, for example ECRE policy paper, *Asylum at the European Council 2018: Outsourcing or Reform?*, August 2018: <https://bit.ly/2nmhAR5>
9. For example, see *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM (2018) 634 final, page 2 where it states that the recast of the Return Directive should ‘ensure coherence and synergies with asylum procedures’. <https://bit.ly/2RgRKv7>
10. For ECRE’s other concerns on the Directive see Information Note on the Return Directive. January 2009: <https://bit.ly/2Aqr2J3>

## Evidence Base

In its first assessment of the application of the Return Directive, of March 2014 the European Commission had a generally positive view of progress on transposition and implementation by Member States.<sup>11</sup> Despite some problems, it reported that the Directive had positively influenced national law and practice regarding voluntary departure and forced return monitoring. It had contributed to achieving more convergence of detention periods for irregular migrants and to an overall reduction in detention periods with a wider implementation of alternatives to detention across the EU. It had limited Member States' ability to criminalise irregular stay and increased legal security for returnees. Member States' concerns that protective provisions would undermine the efficiency of return procedures had not materialised and the Directive had allowed for "determined action" in the field of returns.<sup>12</sup> According to the Commission, the main reasons for non-return related to practical problems in the identification of returnees and in obtaining documentation from non-EU authorities, as well as non-compliance by individuals.<sup>13</sup>

However, in the European Agenda on Migration published a year later those who had unsuccessfully claimed asylum and "migrants living in a permanent state of irregularity" were seen as corroding confidence in the system with "ineffective" return an incentive for irregular migration and smuggling. The argument then developed that increasing the number of returns was key to Europe's response to the political crisis on migration. The Commission generally refers to "effective" return and increasing the effectiveness of return, meaning either increasing the absolute number of returns or the percentage of those actually returned of those issued a return order (termed the "return rate").

The 2015 EU Action Plan on Return provided an ambitious set of measures to increase the number of returns, including: promoting best practice on voluntary returns; making voluntary return packages more alike across the EU; a uniform EU Travel Document to facilitate returns; amendment of data systems including Eurodac and the Schengen Information System (SIS II); an EU Entry-Exit mechanism; and the Integrated Return Management Application (IRMA) to improve cooperation between Member States.<sup>14</sup> The 2016 Migration Partnership Framework aimed to increase cooperation with third countries on return.<sup>15</sup> Frontex was also given a broader mandate to implement joint actions as well as more resources and responsibilities for return operations, including initiating joint flights and managing pools of technical experts on returns at the disposal of Member States.<sup>16</sup>

The 2017 Commission Recommendation on making returns more effective when implementing the Return Directive encouraged Member States to increase returns and tackle obstacles to the implementation of return decisions that could act as "pull factors".<sup>17</sup> It promoted predominantly punitive measures to reduce perceived abuse by individuals to avoid return, including urging Member States to increase detention, lower safeguards, and limit the examination of risks of refoulement. It also suggested limiting access to voluntary departure and reintegration support where they hinder return. Detention was not ruled out for children or families. Health problems were seen as a potential abuse of the system. The justification was primarily the need to increase numbers.

As these efforts were deemed insufficient and the Commission released new proposals on border control and migration reform to coincide with President Juncker's State of the Union address on 12 September 2018.<sup>18</sup> Announced as the "last elements needed for compromise on migration and border reform", they include a

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11. Communication from the Commission to the Council and the European Parliament on EU Return Policy /\* COM/2014/0199 final \*/, page 30.

12. Ibid, page page 30.

13. Ibid, page 2.

14. Communication from the Commission to the European Parliament and to the Parliament, EU Action Plan on Return, COM(2015) 453 final, Brussels, 9 September 2015.

15. European Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, Strasbourg, 7 June 2016.

16. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2014 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (hereafter "EBCG Regulation"), OJ 2016 L 251/1: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1624&from=EN>

17. Idem the 2017 Recommendation on returns.

18. For the package of background papers and legislative proposals see [here](#).

proposal for a recast<sup>19</sup> of the Return Directive<sup>20</sup> as well as a proposal for a Regulation on the European Border and Coast Guard increasing its role on returns.<sup>21</sup>

The Commission describes the recast Directive as a “targeted review” intended to speed up return procedures, make more links between asylum and return procedures, and reduce the risk of absconding, whilst protecting individuals’ fundamental rights. The proposed changes are supposed to increase the effectiveness (the number) of returns. The evidence base for return policy is limited and sources of evidence are not transparent, however.<sup>22</sup> No impact assessment was carried out prior to recast proposal on the Return Directive and the main evidence cited by the Commission justifying its revision is the decrease in the EU return rate from 2016 to 2017.

Much of the evidence for recent recommendations at EU level to “enhance” returns comes from Schengen evaluation missions, a peer review tool which includes classified reports and which is not designed to assess return policies more broadly.<sup>23</sup> Research from the European Migration Network (EMN) is also cited but the original research findings are often more nuanced than the recommendations that follow.

An example is the information collected on the risk of absconding, central to this recast, in a 2016 EMN report on return of rejected asylum seekers.<sup>24</sup> There it states that:

“[T]he focus and rationale behind policies and measures vary quite significantly and without evaluative evidence it is difficult to draw conclusions as to which practices are more effective. However, the practice of drastically removing rights following a rejection and/or return decision may increase the likelihood of absconding, or at least of rejected asylum seekers falling out of contact with the authorities thus affecting the feasibility and effectiveness of return operations. It may also be likely to increase the likelihood of destitution.”<sup>25</sup>

Again, when looking at fostering links with migration procedures, there is some evidence from UNHCR research that, first, people are predisposed to cooperate with refugee status determination and other immigration procedures, and, second, that providing legal advice and information and alternatives to detention can create, foster and support this cooperative disposition.<sup>26</sup> There is no recognition of these factors in the 2017 Recommendation on returns or indeed this recast proposal.

This is also the case for assumptions on the practice and extent of “shopping for return packages”, a factor underlying several of the Commission’s Recommendations, and for the aim that the recast Return Directive should serve “as a deterrent to irregular migration”.<sup>27</sup> As there is no clear evidence that return policy acts as a deterrent to migration, irregular or otherwise, it seems presumptuous to make this an aim of EU return policy.

For some proposals such as increasing detention to increase returns there is evidence to the contrary, with studies from Italy for example,<sup>28</sup> showing that there was no increase in the return rate when people were kept in detention having not returned within 30-60 days of detention. In France too it has been noted that the vast majority of people are returned in the first few days, meaning that extensions from 32 to 45, and now from 45

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19. European Commission, 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) A contribution from the European Commission to the Leaders’ meeting in Salzburg on 19-20 September 2018, COM(2018) 634 final, Brussels, 12 September 2018.

20. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter, “the Return Directive”), OJ L 348, 24 December 2008.

21. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/799/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council (hereafter “EBCG proposal”), COM(2018) 631 final, Brussels, 12 September 2018. For a critical analysis and recommendations, see ECRE, *Comments on the Commission proposal for a Regulation on the European Border and Coast Guard* (COM(2018) 631 final, November 2018).

22. See, ECRE’s Policy Note *Return: No Safety in Numbers*: <https://bit.ly/2zEEMhK>

23. There are some technical reports released that have little on return policy, for example: Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2016 evaluation of France on the application of the Schengen acquis in the field of management of the external border.

24. EMN Synthesis Report for EMN Focussed Study 2016, *The Return of Rejected Asylum Seekers, Challenges and Good Practice*.

25. EMN Synthesis Report for EMN Focussed Study 2016, *The Return of Rejected Asylum Seekers, Challenges and Good Practice*, 3 November 2016, p. 4: <https://bit.ly/2ByloW2>

26. Costello C and Kaytaz E *Building Empirical Research into Alternatives to Detention: Perception of Asylum Seekers and Refugees in Toronto and Geneva*, UNHCR Legal and Protection Policy Research series. June 2013 in *Forced Migration Review*, Issue 44 from September 2013.

27. Recital Para 4.

28. *Rapporto Sui Centri Di Identificazione ed Espulsione in Italia* (July 2014), see: <https://bit.ly/2Q2esus>

to 90 days, will have little impact on return (while having other negative impact).<sup>29</sup>

Data on returns is generally weak, including in Eurostat, something that the Commission is trying to address with proposals including the entry-exit system, extending SIS II to cover returns, and the updated Return Handbook. There is an overall lack of reliable and sufficiently detailed statistical data on return at EU level. In this regard, ECRE has also provided recommendations on the amendments to the Migration Statistics Regulation that return statistics should be published monthly, with more information on detention including for the purpose of removal, and more detailed disaggregation of data.<sup>30</sup>

Finally, monitoring of return processes is not adequate, meaning that the potential negative impact of increasing numbers, including harm to individuals, will often not be identified. The Return Directive obliges Member States to establish a system for monitoring forced return but does not define the scope, regularity or publicity that it should have. There is no specific monitoring framework to report on fundamental rights compliance by Member States that covers pre-return, the return process and follow-up in the country of return. Frontex' expanded mandate on return requires increased investment in monitoring fundamental rights compliance during its activities, including joint return operations and this should be put in place as a matter of priority. Once a person has been returned, however, there is little possibility for them to re-engage with Member States in case of difficulties and Member States generally do not monitor what happens to returnees in the country of return. As returns are being encouraged also to countries where there is ongoing conflict, such as Afghanistan, post-return monitoring becomes even more important to ensure States have complied with human rights obligations, and that people are safe. In this regard, ECRE welcomes the Commission's proposals to include return monitoring in its Reintegration Impact Assessment tool that is currently being developed as part of the EMN IT platform.<sup>31</sup> Monitoring, however, should not replace procedural safeguards, scrutiny or the suspensive effect of appeal procedures in Europe.

In summary, there is limited evidence behind the assumptions that underlie plans to increase return.<sup>32</sup>

#### Recommendations:

ECRE calls for more evidence-based policy making in the area of returns at EU level.

ECRE is deeply concerned that the European Commission did not complete any impact assessment before proposing the recast Return Directive and recalls the obligation under Article 19 of the Return Directive to publish an evaluation report every three years: the latest was due in December 2016.

## ANALYSIS OF KEY PROVISIONS

### I. ARTICLE 6: RISK OF ABSCONDING

Identifying any risk of absconding is central to the Commission's amendments in the recast Return Directive and is to be taken into account in any decision on detention as well as voluntary departure. The new Article 6 includes "at least" 16 "objective criteria" to be used by Member States to assess the risk of absconding, which is to be determined on the basis of an "overall assessment of the specific circumstances of the individual case".

ECRE welcomes the requirement of a case-by-case assessment of the risk of absconding, as this is required under the right to good administration as a general principle of EU law. However, ECRE has serious concerns that because it is a non-exhaustive list and includes very broad criteria, Article 6 will become a "catch-all" provision. As the list stands there are few people who arrive in Europe to seek international protection who would not fulfil at least one of the criteria. The vast majority of people seeking international protection arrive in

29. See for example La Cimade, *Décryptage du projet de loi asile et immigration*, June 2017, available in French here : <https://www.lacimade.org/decryptage-projet-de-loi-asile-immigration/>; and Legifrance, *Code de l'entrée de tu séjour des étrangers et du droit d'asile*, 30 June 2018, available in French here: <http://bit.ly/2GqENTL>

30. ECRE Comments on the Commission Proposal Amending the Migration Statistics Regulation COM (2018) 307 [http://www.asylumineurope.org/sites/default/files/ecre\\_comments\\_migrationstatistics.pdf](http://www.asylumineurope.org/sites/default/files/ecre_comments_migrationstatistics.pdf)

31. As discussed at European Migration Network (EMN) Meeting on Returns, 26 September 2018, Brussels. More information on the EMN network and its expert groups can be found here: <https://bit.ly/2DLdzyU>

32. The Swedish Red Cross has also stressed concerns over the lack of an evidence base in their comments on the Commission's proposal. See their statement available in Swedish here: <https://bit.ly/2DKclnA>

Europe irregularly (as there is no alternative), while the use of false or forged identity documents is for a vast majority of refugees a necessity to reach safety. This is recognised as the reality in Article 31 of the Refugee Convention, which prohibits States penalising refugees for irregular entry into their territory. Moreover, many undocumented migrants will by definition lack documentation proving identity, residence or financial resources or have irregularly entered into the territory of a Member State at some point in their migration experience. This also applies to stateless persons.<sup>33</sup>

Some of the criteria may even be beyond the control of the individual and could be caused by the policies and actions of Member States themselves. For example, in several Member States support including accommodation is withdrawn when a return decision is issued and secondary movements can take place for a variety of reasons, often because of difficulties in Member States such as deficiencies in reception conditions.<sup>34</sup> To then use a lack of an address or secondary movement as criteria to establish a risk of absconding is grossly unfair.

The blanket approach also contradicts Recital 6 which is maintained in the Commission recast proposal and which requires all decisions under the Directive to be taken on a case-by-case basis and based on objective criteria, implying that “consideration should go beyond the mere fact of an illegal stay” of an individual.

In addition, according to Article 6(2), Member States “shall” establish that a risk of absconding is presumed in an individual case, unless proven otherwise for four of the criteria listed:

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

This not only shifts the burden of proof to the individual but means that criteria such as not complying with an existing entry ban could lead to individuals being penalised for having to flee their country of origin following persecution in the case circumstances in the country change or if they had returned prematurely. For those reasons, ECRE strongly opposes automatic presumptions of absconding as this risks imposing a disproportionate burden of proof on returnees that may be extremely difficult to discharge and undermines the individual assessment required under Article 6(2), first sentence. As discussed below, a wide interpretation of the risk of absconding would lead to systematic detention and would reverse the presumption whereby detention should only be considered as a last resort and render the concept of voluntary departure almost theoretical.

Where co-legislators consider maintaining a list of objective criteria to assess the risk of absconding, any such list should be exhaustive to serve the objective of ensuring convergence in return practice. The list should be restricted to criteria that relate to the individual’s stated intention not to comply with the return decision. Criteria should be conducive to a risk assessment of the individual’s future conduct after return has been ordered, rather than his or her past conduct.

ECRE recommends deleting Article 6 and replacing it with:

A risk of absconding should not be automatically assumed on the basis of the third country national’s past conduct. The existence of a risk of absconding shall be determined on the basis of an assessment of the specific circumstances of the individual case and on the basis of an exhaustive list of objective criteria laid down in national legislation that are conducive to a risk assessment of the individual’s future conduct or relate to the individual’s stated intention not to comply with the return decision.

33. See the Return Handbook, section 14.4.1 ‘Attention should be paid to the specific situation of stateless persons, who may be unable to benefit from consular assistance by third-countries in view of obtaining a valid identity or travel document’, page 72: <https://bit.ly/2nITCQi>

34. For example, see reports of persisting destitution in France and Italy among others in the ECRE AIDA country reports. <https://www.asylumineurope.org/reports>

## II. ARTICLE 7: OBLIGATION OF APPLICANTS

Another central feature of the recast is a new obligation to cooperate that mirrors a similar obligation laid down in the Asylum Procedures Directive.<sup>35</sup> In Article 7, the obligation to cooperate for third country nationals covers all stages of the return procedure and has four aspects:

- » the duty to provide all the necessary elements for establishing or verifying identity;
- » the duty to provide information on the third countries transited;
- » the duty to remain present and available throughout the procedures;
- » the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document.

Elements to verify identity include the third-country nationals' statements and any documentation in their possession regarding identity, nationality or nationalities, age, country or countries and place or places of previous residence, travel routes and travel documentation. At the same time Member States must inform the third country national of the consequences of not complying with these obligations in relation to the determination of the risk of absconding, the granting of a period for voluntary departure, and the possibility to impose detention, and to access to programmes providing logistical, financial and other material or in-kind assistance. Thus, the failure or refusal of the applicant to "cooperate" leads to sanctions.

As it stands, the provision leaves a considerable margin of discretion for the authorities as regards the assessment of the level of detail to be provided by the applicant in order to avoid being considered "non-cooperative". In this regard, it is unclear, for instance, whether the individual's declared identity and statement that he or she is not in possession of an identity document would be sufficient to comply with the duty to provide all elements necessary to verify identity. Assessing the veracity of the individual's statement and therefore compliance with the obligation to cooperate may become highly subjective and arbitrary in such cases. Consequently, it could be extremely difficult for an individual to discharge their "duty" to cooperate.

In addition, some of the expected duties, e.g. to lodge a request for obtaining a valid travel document to the competent authorities of third countries, will be impossible to comply with without undermining the third country national's rights under the asylum acquis. It is expressly forbidden in Article 30 of the Asylum Procedures Directive for Member States to "disclose or obtain any information from the alleged actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant or his or her dependants, or the liberty and security of his or her family members still living in the country of origin".<sup>36</sup>

Those who have applied for asylum, would have had that application rejected and a return decision issued automatically at the same time as the rejection of the asylum application, as required under Article 8(6) of the proposal. Therefore, they could be appealing the rejection of their asylum application at the same time as appealing a return decision on the grounds it is unsafe for them to return to that third country. Were they to be forced to lodge a request to obtain a valid travel document at that stage, they could, as presumptive refugees, be considered as re-availing themselves of the protection of their country of origin and therefore no longer have an interest in challenging the negative decision on their asylum application. Individuals should not be forced to choose between their fears for their personal safety, or being at greater risk of detention or having their options for voluntary departure limited or eliminated, because of a perceived lack of cooperation. It will also be practically difficult for Member States to prove that a person is not cooperating. At the same time the individual should have an opportunity to legally challenge the State's assessment of non-cooperation. This seems to complicate an already complex procedure to the extent it is not workable.

The obligation to cooperate as it stands could also have a disproportionate effect on stateless persons who are already particularly vulnerable to detention in removal proceedings and who would find it impossible to provide the information required of them by this provision. Reports show that states largely fail to acknowledge their specific situation and do not have the procedures in place to identify statelessness and protect stateless

35. See Article 13 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter 'recast Asylum Procedures Directive'), OJ 2013 L 180/60 <https://bit.ly/2OYf3YW> and Article 4 of the current Qualification Directive, <https://bit.ly/2KAhWOx>

36. See Article 30 recast Asylum Procedures Directive), OJ 2013 L 180/60 <https://bit.ly/2OYf3YW>

people.<sup>37</sup> This can lead to arbitrary detention and makes them particularly vulnerable in removal proceedings.<sup>38</sup> In line with the Revised Returns Handbook<sup>39</sup> and judgement of the CJEU in Kadzoev,<sup>40</sup> Member States should make sure that there is a reasonable prospect of removal that justifies imposing or prolonging detention. In the approach proposed in the recast Return Directive, recognition of the fact that some people may not be able to provide the information they have a duty to give, or indeed may not have a third country that would recognise them as citizens, seems to be missing.

ECRE recommends deleting Article 7 on the obligation to cooperate as it is impractical, difficult to assess in a return context, may lead to arbitrariness and adds to the complexity of the procedure.

### III. ARTICLE 8: TERMINATION OF LEGAL STAY

The proposed Article 8(6) introduces an obligation for Member States to issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third country national refugee status or subsidiary protection status in accordance with Regulation (EU).../... [Qualification Regulation]. This is justified in the new Recital 7 by the need to reduce the risk of absconding and the likelihood of unauthorised secondary movements. The recast proposal also maintains the possibility for Member States to adopt in one administrative or judicial act a decision on the ending of legal stay together with a return decision, a removal order and an entry ban.

The proposed amendment consolidates the CJEU's ruling in the case of Gnandi, where it held that the current asylum and return acquis do not preclude the issuing of a return decision together with or immediately after a negative first instance decision on the asylum application.<sup>41</sup> However, the CJEU emphasised at the same time that a person subject to a return decision issued immediately after or together with the negative first instance decision on the asylum application "is to retain his status as an applicant for international protection, within the meaning of that directive, until a final decision is adopted in relation to his application".<sup>42</sup>

From an efficiency perspective the suggested approach may at first sight be tempting. However, given the conditions imposed by the Court for such an approach to be in compliance with the right to an effective remedy, including the automatic suspension of all legal effects of the return decision pending the appeal against the negative asylum decision, there may be little efficiency gains in practice. The decision cannot be enforced before a final decision at the first appeal level. By imposing an obligation on Member States to follow such approach, there is a risk of further contributing to conceptual confusion and legal uncertainty as to the asylum seeker's status when he or she must be allowed to remain on the territory in any case pending the outcome of the appeal under the Asylum Procedures Directive.<sup>43</sup> This could also be resource intensive as States will have to issue more decisions. Stateless persons may also have submitted or intend to submit an application for stateless status under the 1954 Convention and a national determination procedure after having their application for asylum refused. In addition, there could be humanitarian grounds for a person to stay on the territory of a Member State. ECRE, therefore, remains opposed to the introduction of such an imperative. Member States should take into consideration all relevant circumstances in each individual case before issuing a return decision, including the possibility of granting an authorisation to reside on the territory on humanitarian grounds.

ECRE recommends the following amendments:

**Article 8(6): [deleted text up to paragraph 2]. The text continues unchanged from....**

This Directive shall not prevent....

**Recital 7: [delete].**

37. As enshrined in the 1954 UN Convention relating to the Status of Stateless Persons. Only four EU Member States are currently not state parties. See [here](https://bit.ly/2DZFEmP) for more information: <https://bit.ly/2DZFEmP>

38. See European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention, An Agenda for Change*, 2017: <https://bit.ly/2Sci4mv>

39. See Commission Recommendation of 27.09.2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6505. Section 14.1.

40. CJEU, Case C-357/09 PPU – Kadzoev, Judgment of 30 November 2009.

41. CJEU, Case C-181/16, Sadikou Gnandi v Etat belge, Judgment of 19 June 2018.

42. CJEU, Sadikou Gnandi, par. 63.

43. *Idem*, par. 64.

## IV. ARTICLE 9: VOLUNTARY DEPARTURE

The notion that voluntary departure is preferable to enforced removal is one of the key principles underpinning the Return Directive. ECRE welcomes the general idea that third country nationals under an obligation to leave the territory of a Member State should be given the opportunity to do so of their own accord. However, ECRE has concerns that the concepts of voluntary departure and enforced removal are becoming harder to distinguish due to the difficult conditions that many rejected asylum seekers and undocumented migrants in Europe find themselves in today<sup>44</sup> and because of the restrictions placed on opportunities for voluntary departure in this recast.

While Recital 13 calls for an “appropriate” period for voluntary return, Article 9 now provides for a period of “up to thirty days” depending on the prospect of return with the stipulation of a minimum period of seven days deleted. This means that there could be a minimum of a one-day period for voluntary departure, which defeats the object of a voluntary departure period and renders voluntary departure less likely. There is no evidence that a voluntary departure period of less than seven days will increase the number of those who take up voluntary departure – logically the opposite is likely. Individuals and families will be forced to take quicker decisions and will have very little time to prepare. Member States have also pointed to difficulties in implementing voluntary departure in short time frames. Nine Member States (AT, CY, DE, EE, HU, LU, SE, SI, SK) cite insufficient length of voluntary departure periods as a challenge in a 2017 EMN study on effectiveness of return.<sup>45</sup> This was both for individuals in terms of closing businesses, withdrawing children from schools and finding flights etc, as well as for the state’s administration in terms of issuing documents, providing medical support during travel and so on).<sup>46</sup> Generally, current practice in Member States shows that the time needed for voluntary departure is significantly longer than seven days and additional extensions can be and are granted.<sup>47</sup>

ECRE believes that thirty days should be the minimum period granted for voluntary departure. Many of those who will need to return have spent long periods in the EU or have families with children at school, and need time to prepare for the return and correctly handle their affairs before return. Individuals should be given an opportunity to leave earlier should they wish to, but should not be forced to do so. In addition, there are instances where Member States cannot process applications for voluntary departure quickly enough, and where individuals and families would like to return sooner but need assistance to leave.<sup>48</sup> This is particularly the case where there are fewer embassies in a country, fewer direct flights, or where the process for providing assisted voluntary return packages can take more time. The Article should be amended in that light.

Article 9 (4)a now stipulates that a period for voluntary departure shall not be granted where it has been assessed that the third-country national poses a risk of absconding, has had a previous application for legal stay dismissed as fraudulent or manifestly unfounded, or they pose a risk to public policy, public security or national security. In recent years, Member States have extended the range of criteria under which asylum claims can be designated “manifestly unfounded”, at times even beyond the acceleration grounds in the recast Asylum Procedures Directive.<sup>49</sup> Combined with the new Article 6 of the Directive, which provides the broad list of those to be seen as at risk of absconding, Member States would be forced to deny any voluntary departure period to the vast majority of third-country nationals subject to an obligation to return. These individuals and families would then be deprived of the possibility of complying with a return decision autonomously, before such decision is enforced through coercive measures, with all the costs, both human and financial, that this entails. This would undermine the primacy of voluntary return over forced return, one of the key principles underpinning the Return Directive, maintained in the Commission proposal and contradict the objectives of the EU’s return policy.<sup>50</sup>

Moreover, the inclusion of a prohibition on granting a voluntary departure period in such a vast range of situations risks rendering the safeguard laid down in Article 9(2) almost meaningless in practice. In this Article,

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44. See ECRE’s Policy Note: *Voluntary Departure and Return: Between a Rock and a Hard Place*: <https://bit.ly/2MpcdPL>

45. EMN, *The effectiveness of return in EU Member States*, 2017, page 73: <https://bit.ly/2E09vVM>

46. *Ibid.* Page 73.

47. *Ibid.* Page 74.

48. For example, financial assistance with a flight. This was brought to our attention by the NGO Mosaico, Italy, where irregular migrants who receive a return decision and wish to go home have been unable to apply for assisted voluntary return packages, which are funded by AMIF as the funds have ended before the end of the year due to annual funding cycles. November 2018.

49. In this regard applications are prioritised with an accelerated appeal on the basis of the possible application of the internal protection alternative in Ireland, while in Hungary applications from Afghan nationals were rejected in the accelerated procedure as manifestly unfounded invoking the internal protection alternative, , notwithstanding considerably high recognition rates in other EU Member States. See AIDA, *Accelerated, prioritised and fast-track asylum procedures. Legal framework and practice in Europe*, May 2017, p.3-4: <https://bit.ly/2tsBE8D>

50. *Idem.* Recital 13.

the period for voluntary departure must be extended where necessitated by the specific circumstances of an individual case. ECRE considers the latter to be an essential safeguard both from the perspective of the migrant's dignity and the best interests of the child as well as the sustainability of the return. As Member States would be likely obliged not to grant a period of voluntary departure in the vast majority of cases, they would by definition be unable to extend such period.

In addition, such a prohibition is not consistent with the proposal's call on Member States in Article 14 to have programmes providing for enhanced return assistance and counselling and support for reintegration in third countries of return with the aim of promoting voluntary return. The new recital and its reference to the common standards on Assisted Voluntary Return and Reintegration Programmes developed by the Commission in cooperation with Member States and endorsed by the Council is to be welcomed.

Therefore, ECRE strongly recommends deleting the obligation on States not to grant a period of voluntary departure in the circumstances listed in Article 9(4). Co-legislators should refrain from creating legal obstacles to voluntary return of third-country nationals in the EU legal framework.

The Commission proposal still allows Member States to provide in national law that such a period will only be granted following an application of the third country national concerned. Although in that case Member States are obliged to inform the individual of the possibility of lodging such a request, in practice it would clearly be very difficult to monitor compliance by the responsible national authorities with this obligation. As of 2017, the period for voluntary departure was automatically granted with the return decision in the majority of Member States.<sup>51</sup> In line with this good practice, ECRE calls on co-legislators to delete the possibility in the Directive for setting additional legal requirements which may prevent third country nationals from choosing a more humane form of return.

ECRE recommends the following amendments:

Article 9(1): A return decision shall provide for an appropriate period for voluntary departure of **[deleted text] a minimum of thirty days**, without prejudice to the exception referred to in paragraphs 2 and 4.

Article 9(4) Member States **[deleted text] may grant a period for voluntary departure of no less than 7 days** or exceptionally refrain from granting a period of voluntary departure in following cases:

(a) **[deleted text] At the request of the individual**

(b) **[deleted text]** where the third-country national concerned poses a risk to public policy, public security or national security

(c) **in case of explicit expression of non-compliance with return-related measures applied by virtue of this Directive or non-compliance with a measure aiming at preventing the risk of absconding**

**Recital (13):** Where there are no reasons to believe that the granting of a period for voluntary departure would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and an appropriate period for voluntary departure of **[deleted text] at least thirty days**, depending in particular on the prospect of return, should be granted. **[Deleted text]** An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case.

## V. ARTICLE 13 ENTRY BANS

Article 13 of the recast Directive sets down an obligation for Member States to impose an entry ban on irregularly staying third country nationals if no period of voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, the issuing of an entry ban remains optional. Given that the circumstances under which a period of voluntary departure must be refused are broadly defined and have been extended and that there is now a wide ranging obligation to cooperate, it is quite conceivable that the combined application of Articles 7 and 9 may lead to the systematic imposition of entry bans on persons

51. Sixteen Member States reported that voluntary departure was automatically granted while 6 Member States at that time started a voluntary departure procedure upon request from the individual. See: EMN The effectiveness of return in EU Member States, 2017. Page 70. <https://bit.ly/2E09vVM>

subject to return decisions.

ECRE reiterates its disagreement with the imposition of an entry ban on asylum seekers whose applications have been rejected and who are facing return, as removal should be considered a sufficient resolution to their situation.<sup>52</sup> Furthermore, in practical terms such a measure may have far-reaching negative consequences for persons seeking asylum in the EU. An EU-wide entry ban constitutes a blunt instrument because it does not take into account possible changes in the countries of origin that may entail risk of persecution and force individuals to leave again after they have been returned. A re-entry ban may have devastating effects on the right to seek asylum and may lead to serious breaches of international human rights and refugee law. In addition, persisting disparities in asylum procedures, the “asylum lottery”, means that asylum seekers are still likely to be unfairly denied protection in some Member States. In this context, EU-wide entry bans could place the consequences of poor implementation of the asylum acquis on the individual.

Despite the assertion in Article 13(6) that the provisions regulating entry bans will apply without prejudice to the right to international protection as defined in the EU Qualification Directive, the lack of tangible guarantees safeguarding such a right, combined with the possible imposition of an obligation to register the entry bans in the SIS in the future,<sup>53</sup> would very likely undermine the right to asylum. Such risk is exacerbated by the broad definition of the risk of absconding and the wider range of situations where a period of voluntary departure must be refused by Member States.

The new Article 13 (2) allows Member States to additionally impose an entry ban, which does not accompany a return decision, on a third-country national who has been irregularly staying in the territory of the Member States and whose irregular stay is detected in connection with border checks carried out at exit in accordance with Article 8 of Regulation (EU) 2016/399 (Schengen Borders Code), where justified on the basis of the specific circumstances of the individual case and taking into account the principle of proportionality. Recital 25 states that this aims to prevent further re-entry and reduce the risks of irregular migration.

The possibility to impose an entry ban for the Schengen area to a person who clearly intends to leave the territory of the Member States voluntarily seems contrary to the rationale of the entry ban in the context of the Return Directive, which is to sanction a person’s non-compliance with an obligation to return. Imposed upon exit on persons who have stayed irregularly on the territory, the entry ban would be used as a tool to retroactively penalise irregular residence. This may in practice be counterproductive in view of the Commission’s objective to increase the number of returns as the prospect of an entry ban imposed upon exit may discourage third country nationals wanting to leave the EU. Moreover, carrying out an individual assessment taking into account proportionality on the occasion of a border exit check, without being able to rely on a reasoned return decision is challenging and may result in standard decisions with potentially grave consequences for the individuals concerned.

ECRE recommends the following amendments:

**Article 13(1):** Return decisions [~~deleted text~~] may be accompanied by an entry ban:

**Article 13(2):** *delete*

**Recital (25):** *delete*

## VI. ARTICLE 14 RETURN MANAGEMENT

The new Article 14 requires Member State to set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive, in particular as regards the management of individual cases as well as of any return-related procedure. This is considered to contribute to the efficiency of the return process as the national systems are to be linked to the Schengen Information System (SIS) as well as to the central management system to be hosted by the EBCG Agency as envisaged in Article 50 of the Commission EBCG proposal.<sup>54</sup>

52. ECRE, [Information note](https://bit.ly/2Aqr2J3) on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, January 2009: <https://bit.ly/2Aqr2J3>

53. See Communication from the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security, COM(2016) 205 final, Brussels, 6 April 2016. <https://bit.ly/2QIVUEJ>

54. See Recital 38 and Article 49(2)(d) ECBG proposal.

In addition, Article 14(3) requires Member States to establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation, for the purpose of supporting the return of illegally staying third-country nationals who are subject to visa requirements, which may include support for reintegration in the third country of return. The granting of such assistance, including its kind and extent however, shall be subject to the cooperation of the third-country national concerned as provided for in proposed new Article 7.

ECRE broadly welcomes that all States would be obliged to introduce national return management case systems. This could be a tool to collect better and enhanced data on returns, which has been lacking<sup>55</sup>, both to inform evidence-based policy making and to assess the impact of policies and systems on individuals and their rights. This could also support comprehensive annual reporting to the European Parliament on EU return policy and its impact on fundamental rights, to be carried out by the Commission on behalf of Member States. The latter would come in addition to the Commission's reporting duties under Article 23 of the recast proposal, which is limited to the application of the Return Directive.

ECRE also welcomes that logistical and other assistance can be provided to irregularly staying third-country nationals who need to return a third country. This includes reintegration support, which can be crucial both in helping the returnee to come to terms with return as well as providing some practical assistance, which may enhance the sustainability of return. ECRE regrets, however, that assistance in reintegration is linked in Article 14 to the obligation to cooperate in the new Article 7 of the recast Return Directive. As mentioned previously the obligation to cooperate would be difficult to discharge both for the individual and for Member States to prove or provide redress and ECRE recommends deleting it. However, should it remain, assistance to reintegrate should not be dependent on cooperation as defined in Article 7. The wide-ranging nature of Article 7 could severely restrict the number of people eligible for reintegration assistance.<sup>56</sup> As reintegration assistance supports individuals and allows for return with more dignity, it should not be limited in this way. Neither should reintegration packages be used to incentivise return.<sup>57</sup>

As far as the centralised system for return case management within Frontex is concerned, there is currently little information on what it will look like. Article 50 on information exchange systems and management of return from the proposal on the European Border and Coast Guard<sup>58</sup> states that the Agency shall develop, deploy and operate information systems and software applications allowing for the exchange of classified and sensitive non-classified information for the purpose of return within the European Border and Coast Guard and for the purpose of exchanging personal data. Furthermore, the Agency shall set up, operate and maintain a central system for processing all information and data, automatically communicated by the Member States' national return management systems, necessary for the Agency to provide technical and operational assistance on returns.

The proposed boosting of the EBCG's operational capacity and resources, in particular in the area of return, including on the territory of third countries also implies increased processing of personal data by the Agency in cooperation with Member States. Specific data protection safeguards have been introduced in the proposal for an EBCG Regulation as well as a prohibition to exchange any information with third countries allowing them to identify persons whose request for international protection is under examination to match the EBCG's new powers in this regard. In addition, the Council text on the Commission proposal for an Asylum Procedures Regulation adds a specific provision on data protection.

The Return Directive and the proposed recast, however, remain silent on the issue except for a general reference in Recital 47 to Member States' obligations to ensure that personal data exchanged with third countries outside bilateral or EU readmission agreements, comply with conditions laid down in Regulation (EU) 2016/679 or in the national provisions transposing Article 38 of Directive (EU) 2016/680. In light of increased risks of violation of data protection rules triggered by national and centralised return management systems, data protection guarantees should be strengthened in the Return Directive by incorporating the abovementioned obligations on Member States in Article 14. Moreover, information on the fact that a third-country national has applied for international protection may be perceived negatively by the third country authorities and may have grave consequences for the returnee or his family upon return. Therefore, the exchange of such information with the country of return should be explicitly prohibited, in particular as such information is not relevant for preparing

55. See ECRE Comments on the Commission Proposal amending the Migration Statistics Regulation COM (2018) 307: [https://www.asylumineurope.org/sites/default/files/ecre\\_comments\\_migrationstatistics.pdf](https://www.asylumineurope.org/sites/default/files/ecre_comments_migrationstatistics.pdf)

56. See also commentary from the Swedish Refugee Advice Centre *Kommentar om EU-kommissionens förslag till reviderat återvändandedirektiv*, available here in Swedish: <https://bit.ly/2SckFAr>

57. See Recommendations for humane return policies in Europe, Joint NGO Statement, May 2018. Pages 5-6. <https://bit.ly/2zsaiRN>

58. *Idem* EBCG Proposal.

the return and obtaining the necessary documentation for return.

Overall, confidentiality and the potential misuse of data in the field of Justice and Home Affairs remain of great concern. A recent example from the UK shows that a severe misuse of data from the Schengen system is possible, even by a Member State that is not part of the Schengen Area.<sup>59</sup>

Finally, the collection and storage of additional data on individuals in migration procedures could make the proposals for interoperability in justice and home affairs even more complex. It should be noted that the European Data Protection Supervisor has called for wider debate on existing and future EU databases for information sharing in the fields of migration, asylum and security because of unclear implications for data protection and other fundamental rights and freedoms, as well as for the governance and supervision of the databases.<sup>60</sup>

#### **ECRE recommends the following changes:**

Article 14(1): Add the following sentence: **Member States shall not disclose the fact that a person has lodged an application for international protection to the authorities of the country of return.**

Article 14(3): Delete the last sentence.

## **VII. ARTICLE 16: REMEDIES**

The right to an effective remedy is a fundamental safeguard to ensure protection from refoulement. Some aspects of Article 16 of the Commission proposal for the recast Return Directive are deeply concerning particularly new provisions on the submission of new elements at the appeal stage, the time limits for lodging appeals and the suspensive effect of appeals. The amendments submitted by the Commission on the right to an effective remedy must be considered together with the proposed changes to Article 8, which impose an obligation on States to issue return decisions immediately after decisions ending a legal stay of third country nationals, including negative decisions at first instance on asylum applications.

The proposed changes increasingly blur the distinction between two legal regimes under EU law: the asylum and return acquis. In this regard, the effective remedy against return decisions issued to persons whose asylum applications have been rejected presents lower safeguards as regards suspensive effect and time limits of the appeal and levels of appeals than the effective remedy against a return decision, which is unrelated to a request for international protection. The justification for such distinction, according to the Commission, is to be found in the fact that the first category of 'third-country nationals would have already had their individual examination examined and decided upon and non-refoulement risks assessed by a judicial authority in the context of the asylum procedure.<sup>61</sup>

This assumption is incorrect. The risk of refoulement in the sense of Article 19(2) of the Charter does not necessarily form part of the assessment of asylum applications. First, a person may be refused international protection while still running a risk of ill-treatment in the country of origin, for example where exclusion clauses apply pursuant to Articles 12 and 17 of the recast Qualification Directive. Second, Member States are not required under the asylum acquis to examine risks of refoulement as part of the asylum procedure beyond those set out in the recast Qualification Directive. In practice, while some asylum authorities may grant protection against return under national law (e.g. AT, DE, IT, HU), in many Member States (e.g. FR, ES, CY), the asylum procedure cannot result in the granting of authorisation to stay based on legal constraints on return that are not related to international protection grounds.

Furthermore, in doing so, the proposal dangerously undermines the key principle that applicants for international protection have a right to remain on the territory until a final decision on their application is taken, including a final decision by a first instance appeal court.

59. See article, UK unlawfully copying data from EU policy system, EU Observer, 25 May 2018. <https://euobserver.com/justice/141919>

60. See press release: [https://edps.europa.eu/press-publications/press-news/press-releases/2018/edps-calls-wider-debate-future-information-sharing\\_en](https://edps.europa.eu/press-publications/press-news/press-releases/2018/edps-calls-wider-debate-future-information-sharing_en)

61. See Recital 20.

## *Restrictions on appeal and the suspensive effect of appeal*

ECRE broadly welcomes the fact that under Article 16(1) third country nationals are afforded “an effective remedy to appeal against or seek review of decisions related to return” and that it is now specified that appeals against return decisions would be heard exclusively by a judicial authority that will have the power to review decisions including the possibility of temporarily suspending their enforcement, in line with Article 47 EU Charter of Fundamental Rights.

Article 16(1) now imposes a single level of jurisdiction against the return decision where it is based on a decision rejecting an asylum application based on the (not yet finalised) Asylum Procedure Regulation and when that decision has already been subject to an effective judicial review according to Article 53 of that Regulation.

In recent CJEU jurisprudence, it is made clear that in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect before at least one judicial body.<sup>62</sup> At the same time, it also follows from the case law that neither the Asylum Procedures Directive, nor the Return Directive nor the EU Charter of Fundamental Rights require that there be two levels of jurisdictions.<sup>63</sup> Whereas this jurisprudence does not preclude national legislation, which does not confer automatic suspensory effect for appeals against judgments issued at first instance,<sup>64</sup> however, it does not rule this out either. By taking a more prescriptive approach than the CJEU case law, the Commission proposal arguably disregards the principle of procedural autonomy.

The approach taken in any case contrasts sharply with the strict limitation of the scope of the provisions on effective remedy in the proposal for an Asylum Procedures Regulation to the first level appeal and strongly defended during Council negotiations. In ECRE's view, the recast Return Directive should not restrict the right to an effective remedy against decisions taken under the Directive to one single jurisdiction but allow Member States to provide for more protective systems in line with the possibility for Member States to maintain more favourable provisions in accordance with Article 4(3) of the Directive. Although it is related to time limits for appeals in the asylum procedure, this principle has been stressed by national courts, for example the Austrian Constitutional Court,<sup>65</sup> who have found it important not to include derogations into their judicial systems from a constitutional perspective.

In addition, Article 16(3) provides for a remedy with automatic suspensive effect only where there is a risk of a breach of the principle of non-refoulement. ECRE welcomes the mandatory provision of a remedy with automatic suspensive effect where there is a risk of a breach of the principle of non-refoulement. A judicial remedy against a removal decision remains meaningless if the third country national has already been sent to the country where there is a risk of persecution, torture, or inhuman or degrading treatment. An appeal must have suspensory effect if brought against a return decision which if enforced, could expose the person concerned to a serious risk of being subjected to inhuman or degrading treatment, in view of the requirements of Articles 19(2) and 47 of the EU Charter, Article 13 ECHR, and case law from the European courts,<sup>66</sup> which, by virtue of Article 52(3) of the Charter, are to determine the meaning and scope of analogous rights under the Charter. The right to an effective remedy must also be available and accessible in practice.<sup>67</sup>

However, Article 16 also provides that should a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into due account of the specific circumstances of the individual case upon the applicant's request or acting ex officio. Member States shall ensure that a decision on the request for temporary suspension of the enforcement of a return decision is taken within 48 hours from the lodging of such a request by the third-country national concerned. In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended, as appropriate, by the competent judicial authority.

Prescribing a system of first instance appeals with non-suspensory effect against return decisions in all other cases than those where a breach of the principle of non-refoulement is at stake in the recast Return Directive

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62. See for example CJEU, Case C-180/17, X v Belastingdienst/Toeslagen, Judgment of 26 September 2018, par. 33.

63. CJEU, Case C-180/17, par. 34.

64. CJEU, Case C-180/17, par. 48.

65. See AIDA Country Report Austria 2018, in particular the discussion on time-limits: <https://bit.ly/2BzPrOn>

66. For case law on the link between effective remedy and automatic suspensive effect see ECtHR, A.M. v the Netherlands Application no. 29094/09, Judgement of 5 July 2016.

67. ECtHR, S.J. v Belgium, Application No 70055/10, Judgment of 19 March 2015.

sets a dubious standard from a fundamental rights perspective as well as an efficiency perspective.

In ECRE's view, providing the third country national with an automatic right to remain on the territory during the time limit within which the right to an effective remedy must be exercised and pending the outcome of the remedy in case the individual exercises such a right, constitutes the best guarantee to ensure that their right to an effective remedy is respected in practice, including where other human rights such as the right to family unity are at risk.

This reduces not only the risk of human rights violations taking place, it also avoids additional burdens on the already stretched judicial systems.<sup>68</sup> Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice would depend less on factors that may be beyond the third-country national's control, such as access to and availability of adequate information and quality legal assistance. Given the scarcity of legal assistance in certain Member States, requiring the submission of a separate appeal in order to secure the right to remain on the territory pending the examination of the appeal is highly onerous for both legal advisers and courts as it creates double scrutiny of the same material, burdening the already stretched judicial systems. Both in the case of *Conka v. Belgium* and the case of *M.A. v. Cyprus* the ECtHR stated that the requirements of Article 13 ECHR, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and "pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis".<sup>69</sup> The Court held in particular that "it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13".<sup>70</sup>

Furthermore, no automatic suspensory effect, nor a possibility to request one would be required where no relevant new elements or findings significantly modifying the specific circumstances of the applicant have arisen and where the reason for temporary suspension was assessed in the asylum procedure and was subject to an effective judicial review.

As mentioned above, this derogation appears to be based on the assumption that the risk of refoulement has already been assessed in the appeal against the negative asylum decision. However, this is not necessarily the case, as a first instance decision on an asylum application is concerned with an assessment of whether or not an applicant meets the eligibility criteria for refugee or subsidiary protection status or whether an application can be rejected on admissibility grounds. The absolute nature of the principle of non-refoulement enshrined in Article 3 ECHR and Article 47 EU Charter offers wider protection than the EU asylum acquis, which allows for derogations from the principle of non-refoulement vis-à-vis refugees in exceptional cases. In such cases, access to a remedy under the Asylum Procedures Directive would not guarantee full compliance with the principle of non-refoulement.

Beyond Article 3 considerations it is also worth mentioning that suspensive effect (through the mechanism of Rule 39 of the Rules of the European Court of Human Rights) has been accorded to cases where there is a risk of a flagrant denial of justice<sup>71</sup> and where there is a potentially irreparable risk to private or family life.<sup>72</sup>

In the case of *Gnandi*, the Court of Justice ruled that the right to an effective remedy as guaranteed under the Return Directive, the Asylum Procedures Directive and the EU Charter of Fundamental Rights does not preclude the adoption of a return decision immediately after the rejection of an asylum application by the determining authority or together in the same administrative act. However, this is only allowed provided that a number of conditions are met: all legal effects of the return decision are suspended pending the outcome of the appeal; the applicant is entitled to the benefits under the reception conditions directive and he or she is entitled to rely on any change in circumstances with significant bearing on the assessment of his situation under the Return Directive that occurred after the adoption of the return decision.

The convoluted wording of Article 16(3) implies that in order to have access to an appeal with automatic

68. Although not EU specific, the recent pilot judgment of the Turkish Constitutional Court is instructive on the 'structural problem' posed by such arrangements, since it is up to the Court to deal with numerous requests for suspension. See: <https://bit.ly/2D4wQMd>

69. ECtHR, *M.A. v. Cyprus*, Application No. 41872/10, Judgment of 23 July 2013, par. 137.

70. ECtHR, *Conka v. Belgium*, par. 82.

71. ECtHR, *Othman (abu Qatada) v. the United Kingdom*, Application No. 8139/09, 17 January 2012

72. ECtHR, *Neulinger and Shuruk v. Switzerland*, Application No.41615/07, (Grand Chamber) Judgment of 6 July 2010.

suspensive effect or the possibility to request for suspensive effect, rejected asylum seekers must present “relevant new elements or findings significantly modifying the applicants circumstances”, where they have not arisen. It remains entirely unclear what is meant by such relevant new elements, and what threshold applies with regard to the extent to which they should modify the applicants circumstances. The wording seems borrowed from the standard used in the recast Asylum Procedures Directive with respect to the lodging of subsequent asylum applications. Applying such a standard in relation to the right to an effective remedy, however, would create an unduly high burden of proof on the applicant, which undermines legal certainty for the individual and access to justice.

It should be noted that in a number of Member States, a request for a suspension of the enforcement of the obligation to return in the context of an appeal against a second instance asylum decision is not contingent on the applicant furnishing new elements or findings at that stage. Rather, the suspension is authorised by appeal courts, for example, where enforcement of the return decision would cause irreversible harm<sup>73</sup> or irreparable harm<sup>74</sup> or where the Court assumes that return would expose the person to a real risk of a violation of Articles 2, 3 and 8 ECHR or Articles 6 or 13 ECHR<sup>75</sup> or where the asylum request is considered to have an arguable claim in the sense of Article 13 ECHR.<sup>76</sup> A similar threshold has been cited by the CJEU in appeals against an enforceable return decision in the context of persons with serious-illness. In *Abdida* the CJEU specifies that national legislation which does not provide an appeal with suspensive effect against an enforceable return decision where a person faces a serious risk of grave and irreversible deterioration in his state of health if returned is contrary to Directive 2008/115.<sup>77</sup> The inclusion of new elements in both of these contexts are not, then, a pre-requisite to the suspension of the enforcement of the return decision.

In the case of *Gnandi*, the CJEU emphasised that applicants should be entitled to rely on “any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of his situation” under the Return Directive. It therefore secured the applicant’s right to submit any new elements in order to ensure an ex nunc risk assessment. The Commission proposal, however, seems to reverse that logic and turns the submission of such new elements into a requirement for the applicant in order to obtain suspensive effect of the appeal lodged against the return decision. A pre-requisite, which also appears to run contrary to State practice, as mentioned above, on when suspensive effect of an appeal should be granted.

Furthermore, in the CJEU’s jurisprudence, access to a remedy enabling automatic suspension of enforcement of the measure authorising removal is not straightforwardly connected to access to an appeal with suspensive effect in the asylum procedure. Indeed, in the case of *Tall*,<sup>78</sup> the CJEU found that the lack of suspensory effect of an appeal brought only against a decision rejecting an application for international protection is compatible with non refoulement where the enforcement of such decision cannot lead to removal of the person. By contrast, however, an appeal brought against a return decision and a priori a removal decision, must have suspensory effect since that decision may expose the person to a risk of refoulement.

For those reasons, ECRE’s preferred option is to guarantee persons subject to a return decision access to an effective remedy with automatic suspensive effect without restrictions.

However, if the options described in Article 16 (1) and (3) were to be maintained by co-legislators, ECRE recommends that such a system is only applied on the basis of the court or tribunal acting ex officio as this would at least avoid asylum applicants requiring to undertake a separate procedural step to ensure their right to remain in the territory pending the outcome of the appeal, which is a core aspect of the right to an effective remedy. Furthermore, in line with the jurisprudence of the ECtHR and the CJEU, such appeal procedures will only meet the requirements of an effective remedy if (1) sufficient time is offered to the applicant to prepare the request for interim relief, if necessary with the help of a lawyer and/or interpreter;<sup>79</sup> (2) the burden to prove the need to suspend the expulsion decision is not set too high.<sup>80</sup> This would also mean fewer opportunities for divergence and more clarity across Member States.

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73. AIDA, Country Report Poland, Sixth Update, February 2018.

74. Greek Presidential Decree No 18/89, Article 52.

75. Austria BFA Procedures Act Section 18 (5); Federal Administrative Court, W125 2105171-3, 3 October 2018.

76. Dutch Council of State, 201609138/3/V2, 20 December 2016

77. Case C562/13, *Abdida*, 18 December 2014, para 53.

78. CJEU, Case C-239/14, *Abdoulaye Amadou Tall v Centre public d’action sociale de Huy*, Judgment of 17 December 2015.

79. ECtHR, *I.M. v. France*, par. 150

80. ECtHR, *M.S.S. v. Belgium and Greece*, par. 389.

## Legal advice

The provisions on legal advice for third-country nationals concerned remain unchanged by the Commission. Article 16(5) and (6) provide that Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

In ECRE's view, this provision severely circumscribes the ability of third country nationals to access free legal assistance in particular by allowing Member States to limit the granting of assistance to where the appeal or review is likely to succeed. Access to legal aid can also be difficult, particularly when a person is in detention or held at a border (see section below on time limits). Being an essential aspect of the right to an effective remedy, ECRE calls on co-legislators to consider amending Article 16(6) by deleting the possibility to making free legal assistance and/or representation subject to the conditions in the Asylum Procedures Directive.

## Time limits

Article 16(4) provides that Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective legal remedy. Reasonable time limits for lodging an appeal are essential to ensure the effectiveness of the remedy that is at the disposal of the applicant. However, the proposal then sets strict time limits not exceeding five days to lodge an appeal against a return decision when such a decision is the consequence of a final decision rejecting an application for international protection. Where the newly proposed border procedure applies, such time limit is even further reduced to 48 hours according to Article 22(5).

Both time limits are extremely short and raise questions as to the effectiveness of the appeal. The proposal's prescriptive approach must not undermine the right to an effective remedy as guaranteed under Article 47 EU Charter. In many instances, applicants have found it difficult to comply with strict time limits when they are subject to a detention order, *inter alia* because of the lack of effective access to legal aid and interpretation. This is particularly the case if detention centres are in remote locations, making it difficult for legal representatives to access.

In border proceedings in France, for instance, the inability to make a quality appeal are well documented,<sup>81</sup> particularly if there is ineffective access to an interpreter and legal aid, which is often the case. In the case of *Samba Diouf*, which concerned the lack of appeal against the decision to examine an asylum application in an accelerated procedure in Luxembourg, the CJEU considered that the period prescribed for lodging an appeal in the accelerated procedure must be sufficient in practical terms to enable the applicant to prepare and bring an action. In this case, the CJEU ruled that a fifteen-day time limit for bringing an action did not seem unreasonable but also held that it is for the national court to determine whether that time limit is sufficient in view of the circumstances.<sup>82</sup> In light of this jurisprudence, the proposed five day and 48 hour time limits for lodging an appeal in Article 16 are unreasonably short in ECRE's view.

The ECHR provides that the applicant must be afforded a hearing "within a reasonable period of time". When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.<sup>83</sup> Furthermore, while the Court accepts that time limits should be established, it considered that the speed of the proceeding should not undermine the effectiveness of the procedural guarantees that aim to protect the applicant against *refoulement*.<sup>84</sup>

Member States must have the flexibility to extend periods depending on the individual circumstances of the particular case. In *Pontin*, the CJEU considered a fifteen-day time limit for a dismissed pregnant woman to bring an action for reinstatement. In this case, one of the main factors that the CJEU took into account was the particular situation in which pregnant women find themselves. It also took into account that some of the days included in that fifteen-day period could expire before the applicant was even notified of her dismissal.<sup>85</sup>

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81. AIDA, Country Report France, Fourth Update, December 2015.

82. CJEU - C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Judgment of 28 July 2011, par. 66-68.

83. See e.g. ECtHR, *Pedersen and Baadsgaard v Denmark*, Application No 49017/99, Judgment of 17 December 2004.

84. ECtHR, *I.M. v France*, Application No 9152/09, Judgment of 2 February 2012, par. 147.

85. CJEU, Case C-63/08 *Pontin v. T-Comalux SA*, Judgment of 29 October 2009.

### *ECRE recommends*

16(1). The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 15(1), before a competent judicial authority. **[Deleted text]**

16(3) The enforcement of the return decision shall be automatically suspended during the period for bringing the appeal **[deleted text]** and, where that appeal has been lodged within the set period, during the examination of the appeal **[deleted text]**. Should a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into due account the specific circumstances of the individual case **[deleted text]** acting ex officio.

Member States shall ensure that a decision on the request for temporary suspension of the enforcement of a return decision is taken within 48 hours **[deleted text]** of the lodging of an appeal. **The enforcement of the return decision will be suspended during this time period.** In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended, as appropriate, by the competent judicial authority.

**[Deleted text]**

16(4). Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective remedy pursuant to this Article.

**[deleted text]**

## **VIII. ARTICLE 18: DETENTION**

### *Grounds for detention*

The Commission proposal considerably extends the grounds for detention and the likelihood of a third country national being detained.

In Article 18(1) the deletion of the word “only” combined with retaining the wording “in particular” provides further flexibility for States as far as the detention grounds are concerned. The Directive refers “in particular” to the existence of a risk of absconding and to situations in which a third country national hampers or avoids removal, thus suggesting that this provision is not exhaustive. In line with the case law of the CJEU<sup>86</sup> and the ECtHR,<sup>87</sup> the grounds for restrictions on liberty should be narrowly defined.<sup>88</sup> ECRE’s reservations concerning the broad definition of risk of absconding included in the Directive have been detailed above. Member States should not automatically assume that third country nationals who no longer have a legal basis to remain in their territory are likely to abscond and should therefore be detained. If detention is automatic, the principle of proportionality has not been observed.

The extension of grounds to include a risk to public policy, public security or national security adds to the criminalisation of irregular migrants and at the same time criminal law safeguards could be circumvented through the use of administrative detention.<sup>89</sup> Such a criminalisation approach also transpires from Recital 30 according to which the Directive should not preclude Member States from laying down effective, proportionate and dissuasive penalties and criminal penalties, including imprisonment, in relation to the infringements of migration rules, even though this is provided that such penalties are compatible with the objectives of the Directive, and are in full respect of fundamental rights.

ECRE recommends that this new detention ground be deleted as it is at odds with the abovementioned narrow interpretation of administrative detention required under international human rights law. Should co-

86. See for example, case C-61/11 PPU - El Dridi, Judgment of the Court (First Chamber) of 28 April 2011.

87. For information on how the ECtHR has interpreted Article 5 § 1 (f) – Detention with a view to deportation or extradition - see [European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights Right to liberty and security, Updated on 31 August 2018, pages 26-28. https://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf)

88. For a discussion on the narrow interpretation of the grounds for detention in asylum cases see Steve Peers, *Detention of asylum-seekers: the first CJEU judgment*, blog post from 9 March 2016.

89. See for example ECRE Policy Note: Taking Liberties: Detention and Asylum Law Reform <https://www.ecre.org/wp-content/uploads/2018/09/Policy-Note-14.pdf>

legislators nonetheless maintain risk to public policy, public security or national security as a detention ground, the preamble to the directive should clarify that such ground needs to be interpreted in line with the strict interpretation of the CJEU of a similar ground in the recast Reception Conditions Directive with respect to asylum detention.

In the case of JN, the Court explicitly referred to the interpretation of the concepts of national security and public order in its case law on other EU law instruments, in particular the EU Citizens Directive, which is considered also to be applicable in the case of said Directive. This implies that detention where public order or national security so require is only allowed if “the individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned.”<sup>90</sup> Whereas this remains a matter of case-by-case assessment by national administrations and courts, it is clear from the J.N. jurisprudence that a very high threshold applies. This should be consolidated in the directive in case this detention ground is maintained

It should be noted that implicitly, Article 22(7) on the Border Procedure also seems to include a new ground for detention that is not listed previously in Article 18, namely to prepare for return or carry out the removal process of a third-country national who has been detained under the recast Reception Condition Directive or the Asylum Procedure Regulation. As discussed below, ECRE recommends deleting this provision as well.

### *Maximum duration of detention*

Article 18(5) no longer sets a “limited” period of detention but a “maximum” period of between three and six months. This means that the maximum period for detention in national law would have to be at least three months. This should not mean that all irregular migrants must be detained for that long, only that this must be a possibility.<sup>91</sup> This would mean for countries such as Portugal and Spain an increase in current detention periods laid down in national legislation. This may then be prolonged to the previous limit of a further 12 months or 18 months in total as per Article 18(6). The maximum time period of four months’ detention proposed under the border procedure in Article 22(7) would be in addition, making a maximum period of detention of 22 months for rejected asylum seekers subjected to the newly proposed return procedure at the border.

The only justification provided by the Commission for such excessive detention periods is that maximum detention periods in some Member States are not sufficient to ensure the implementation of return.<sup>92</sup> However, there is no evidence that this is the case. State practice seems to suggest rather the opposite. In September 2014, the Extraordinary Commission of Italian Senate for the Protection and Promotion of Human Rights published a report<sup>93</sup> on Identification and Expulsion Centres which concluded that if a detainee’s repatriation does not occur within the first 30 to 60 days of detention in the Centres, it is very unlikely that it will happen later for reasons including lack of cooperation from the authorities of the country of return. In addition, human rights advocates have highlighted the particular difficulties faced by stateless persons who are vulnerable to being detained for longer periods and even face arbitrary detention even though there is little possibility for effective return.<sup>94</sup> The devastating effects detention has on the individuals concerned as well as their fundamental rights are well-documented.<sup>95</sup>

Deprivation of liberty constitutes an extreme sanction for people who have committed no crime and therefore should be used only as a last resort and for the shortest period possible. ECRE has serious concerns about the lengths of time that people can be detained and maintains its position that the maximum periods of detention allowed under the current Return Directive are excessive. While this proposal seems to justify detention as the only way to ensure that removal takes place, as discussed earlier, there is evidence that the effectiveness of detention in terms of facilitating return decreases the longer detention lasts. Any further extension of the maximum period of detention in the recast Return Directive must be strongly resisted. Therefore, ECRE calls for the deletion of the proposed extension in Article 18(5) and Article 22(7).<sup>96</sup>

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90. Case C-601/15 PPU J.N. v. Staatssecretaris van Justitie en Veiligheid, Judgment of 15 February 2016

91. See Steve Peers’ blog, [Lock ‘em up: the proposal to amend the EU’s Returns Directive](https://bit.ly/2QllzgB), 12 September 2018 for more discussion on this point. <https://bit.ly/2QllzgB>

92. See Recital 29.

93. Idem.

94. See European Network on Statelessness report, *Protecting Stateless Persons from Arbitrary Detention, An Agenda for Change*, 2017.

95. See for example ECRE Policy Note: [Taking Liberties: Detention and Asylum Law Reform](#)

96. See below.

ECRE recommends

Reinstating the word 'only' and deleting the words 'in particular' in Article 18(1);

Deleting the whole of Article 18(1)(c) – detention on the grounds of public policy, public security or national security.

***ECRE recommends amending Article 18(5) as follows:***

*Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a [reinstated text] limited period of detention, [reinstated text] which may not exceed six months.*

## IX. ARTICLE 22 BORDER PROCEDURE

The proposed new Article 22 is extremely problematic from a human rights perspective in various respects. In particular, the nexus between asylum and return procedures, including systematic detention at the border, detention periods, time limits for lodging appeals and the effectiveness of the remedy provided, and the proposed fast-track return procedure, sets low standards, at odds with international human rights law and the EU Charter of Fundamental Rights. For the reasons detailed below, ECRE opposes the introduction of mandatory fast-track return procedure at the border and calls for the deletion of this provision.

### Scope

If the stated aim of the recast is to provide “clarity” on return procedures the introduction of a border procedure exclusively applicable to third-country nationals subject to an obligation to return following a decision on an application for international protection taken by virtue of Article 41 of the [as yet not finalised] Asylum Procedure Regulation will not achieve this.

Even if the objective is to establish a nexus between asylum and return procedures, a questionable approach in itself, the importance of a specific return procedure for applicants for international protection rejected at the border has not been demonstrated. The adverse effect on fundamental rights of those concerned is potentially huge. If adopted, the proposed procedure would legitimise and mainstream long-term detention with seriously reduced procedural safeguards at the border. While it fits in the logic of containing applicants for international protection and migrants at the external borders of the EU during the entire process, experience with the hotspots in Greece in particular has shown that such a strategy is bound to fail.<sup>97</sup> The experience of the hotspots has also demonstrated wide-ranging fundamental rights implications, including gaps in information, a lack of legal assistance, under-identification of vulnerable persons, restricted freedom of movement, and de facto detention. As such, the implementation of the EU hotspot approach, in particular in the Greek context, offers a number of relevant and important lessons learned in terms of the human costs of (fast-track) border procedures.

There needs to be a thorough assessment of the effectiveness and fundamental rights impact of hotspots before developing additional border and transit zone procedures.

In addition, many Member States currently do not operate asylum procedures at the border and continue to oppose a mandatory border procedure as part of the negotiations on the Council position on the Commission proposal for an Asylum Procedures Regulation.<sup>98</sup> Imposing an obligation on Member States to create a border procedure through the recast Return Directive is disproportionate and a deterrent measure rather than a viable tool to achieve the EU's policy objectives. Moreover, if Advocate General Szpunar's opinion<sup>99</sup> is followed then it could also be that the Returns Directive will need to be applied in future to third-country nationals where internal border controls have been reinstated. So in theory Member States may have to be able to introduce capacity for border procedures when they decide to reinstate temporary border controls.

97. See inter alia, Danish Refugee Council, *Fundamental Rights and the EU Hotspot Approach*, October 2017; AIDA, *Country Report Greece, 2017 Update*; European Court of Auditors, *EU response to the refugee crisis: the 'hotspot' approach*, Special Report No 6, 2017; DCR, ECRE, CIR, GCR, Pro Asyl, *The implementation of the hotspots in Italy and Greece. A study*, December 2016.

98. See Council of the European Union, Doc. 12701/18, Brussels, 10 October 2018.

99. See press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180156en.pdf>

## *The nexus between asylum and return procedures*

The border procedure aims to ensure “direct complementarity” between asylum and return border procedures and prevent gaps between the procedures.<sup>100</sup> Thus, this is not only a border procedure but an accelerated border procedure to return an individual that may follow an accelerated border procedure to assess an application for international protection.<sup>101</sup> The proposed Asylum Procedures Regulation itself contains several extremely concerning elements including potentially applying accelerated border procedures to minors, mandatory safe country and admissibility concepts, and extremely short deadlines for applicants to comply with often onerous procedural requirements.<sup>102</sup> As special procedures in the EU Member States are typically characterised by short time frames for the authorities to process claims, reduced time limits for applicants to lodge appeals, and the lack of appeals with automatic suspensive effect, the use of such procedures raises serious fundamental rights concerns.

Border procedures and other accelerated procedures under the asylum acquis entail higher risks of breaches of the principle of non-refoulement in individual cases, in particular when combined with the systematic application of safe third country and safe country of origin concepts, as they undermine the individual assessment of asylum applications. In addition, data published by EASO reveal that the use of special procedures such as border and accelerated procedures generally result in a much higher proportion of applications being rejected than is the case in regular procedures. To illustrate, 89% of applications examined under accelerated procedures and 92% of applications examined in border procedures in the EU in 2017 resulted in negative decisions.<sup>103</sup>

By combining the accelerated procedures in the Asylum Procedures Directive with an accelerated return procedure at the border more people may have their applications for international protection summarily examined and, quite probably rejected, at the border, while being detained. They will then have limited opportunities to challenge the decision and be subjected to a fast-track border return procedure with even fewer safeguards.

The reports on the dysfunctional procedures in the hotspots in Greece illustrate that such an approach is unworkable in practice and results in massive human rights violations, while return rates remain extremely low. Shifting the reception and containment of asylum seekers to remote locations at the borders or in transit zones creates a parallel system or zone where rights violations may be more likely to occur. In addition, it does not increase overall efficiency. It will also considerably raise the administrative burden for Member States which have to establish complex and often lengthy legal proceedings at borders.

ECRE is concerned that the Commission proposal for the recast Return Directive is consolidating negative trends to the detriment of third-country nationals’ rights under international law and the EU Charter.

## *Detention at the borders*

For any procedure, whether at the border or elsewhere, detention should be a measure of last resort. By analogy, Article 8(3)(c) of the Reception Condition Directive<sup>104</sup> permits detention during an (asylum) border procedure but Member States still have to prove necessity, proportionality and consider alternatives to detention. In practice, those Member States, which apply a border procedure do so automatically (e.g. BE, NL, PT, FR) without complying with the Reception Condition Directive requirements.<sup>105</sup> ECRE fears that introducing the proposed border procedure in the Return Directive will have a similar effect.

According to Recital 36 it is necessary and proportionate to ensure that a third country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure be kept in detention in order to prepare the return and/or carry out the removal process, once his or her application has been rejected. This is to avoid that a third country national is automatically released from detention and allowed entry into the territory of the Member State despite having been denied a right

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100. Recital 32.

101. Article 22(1) of the recast Return Directive says “following a decision rejecting an application for international protection” taken by virtue of Article 41 of Regulation EU.../... [The Asylum Procedure Regulation]. The Commission proposal defines this as a negative decision no longer subject to an appeal in the asylum procedure. The border procedure is a sticking point for several Member States for the Asylum Procedure Regulation. This underlines the difficulty in trying to base one legislative proposal on another proposal that has not been finalised. See article by Statewatch, Common European Asylum System (CEAS): Asylum procedures at the border a sticking point for Member States, 24 October 2018, <https://bit.ly/2P1QZ7a>

102. <https://www.ecre.org/ecre-comments-on-the-proposal-for-an-asylum-procedures-regulation/>

103. See EASO, Annual Report on the Situation of Asylum in the European Union 2017, July 2018: <https://bit.ly/2P5Oq43>

104. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29 September 2013. <https://bit.ly/2tlZICK>

105. See for example AIDA, Country Report Belgium, 2017 Update published in March 2018, <https://bit.ly/2DNcAhy>

to stay. Therefore, according to the proposal a limited period is needed in order to try to enforce the return decision issued at the border. The third-country national may be detained under the return border procedure for a maximum period of four months and as long as removal arrangements are in progress and executed with due diligence. Where it has not been possible to enforce return by the end of the period, an additional period of detention of the third-country national may be ordered under Article 18, up to a maximum of 22 months.

This approach is reflected in Article 22(7) which thus introduces a new ground for detention, that of having previously applied for international protection.

## *Appeal procedure*

Article 22(5) and (6) regulate appeals against return decisions issued to persons rejected in the asylum procedure at the border and are based on the same principles underlying Article 16 on remedies. ECRE's comments on the Article 16 apply *mutatis mutandis*. Reasonable time limits for lodging an appeal are essential to ensure the effectiveness of the remedy that is at the disposal of the applicant. The proposed time limit for appeal at the border is reduced to 48 hours by Article 22(5). Moreover, contrary to Article 16, Article 22(6) also adds two conditions to the automatic suspensive effect of the appeal in addition to the risk of breach of non-refoulement. However, jurisprudence requires automatic suspensive effect in case of an arguable claim of risk of refoulement.

In light of the precarious situation of third country nationals subject to a return decision in border procedures and in detention and a potential lack of access to proper interpretation and quality legal assistance and representation,<sup>106</sup> ECRE considers that the proposed time limits for lodging an appeal in Article 22 in particular may infringe Article 47 of the EU Charter. It should be noted that in the context of persons issued a return decision while being held in prisons where NGO presence is not permanent, the French Constitutional Court ruled in June 2018 that a 48-hour limit to appeal return decisions was unconstitutional.<sup>107</sup> In any event, in line with the jurisprudence of the CJEU discussed above, Member States must always have the ability to set longer periods or extend the time limits in light of the particular circumstances of the applicant. If the recast Return Directive is to set specific time limits under which appeals must be lodged, these must meet the standards of reasonableness. A reasonable period for lodging appeals contributes to better informed proceedings before the courts and tribunals and may eventually result in more efficient appeal proceedings. As the right to an effective remedy requires a rigorous examination in fact and in law, this also implies an effective possibility for the applicant to submit factual and legal argumentation challenging the refusal decision. The CJEU has said when speaking of accelerated asylum procedures that at least 15 days would be needed for appeal.<sup>108</sup> This may be an option as long as vulnerable groups are explicitly excluded from the border procedure (see the section below on unaccompanied minors).

Furthermore, according to Article 22(6), decisions upon a request for temporary suspension of the enforcement of the return decision when further appeals are lodged are to be taken within 48 hours. In individual cases involving complex issues of fact or law the time-limits may be extended as appropriate by the competent judicial authority. In ECRE's opinion where there are complex issues of fact or law then the individual's case should not be examined in a border procedure.

## *Unaccompanied minors and other vulnerable groups in border procedures*

The particular vulnerability of unaccompanied children in asylum and migration related procedures and their need for special protection and safeguards is acknowledged in international human rights standards,<sup>109</sup> EU law and jurisprudence.<sup>110</sup> Because of their age and as they travel unaccompanied by their parents or other adults having the legal capacity to represent them, they are not only frequently subject to human rights violations

106. The lack of access to adequate legal assistance in the Greek hotspots (in particularly from within but also from outside detention) is a well-documented challenge. See for example, Legal Aid Gaps 2018 <https://drc.ngo/media/4240248/legal-aid-gaps.pdf> - a review of challenges and barriers to legal aid assistance for migrants, asylum seekers and refugees in Greece by Legal Aid Actors Task Force. January 2018.

107. Decision 2018-741 QPC, judgment from 19 October 2018.

108. CJEU - C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration, Judgment of 28 July 2011.

109. See UN Committee on the rights of the Child, General Comment No 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, par. 1.

110. In the case of Mubulanzila Mayeka and Kaniki Mitunga v. Belgium, concerning the expulsion of a 5 year old child, the Court considered that she was in an "extremely vulnerable situation" and that she "indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention": ECtHR, Mubulanzila Mayeka and Kaniki Mitunga v. Belgium, Application No 13178/03, Judgment of 12 October 2006, par. 55.

during their journey, but increasingly also subject to various forms of violence and exploitation, including trafficking, after their arrival in Europe. The percentage of unaccompanied asylum seeking children in EU Member States has increased significantly in recent years. According to EASO in 2016, 65,570 unaccompanied minors (UAMs) applied for international protection in the EU+, although the figure halved to 32,715 in 2017. That year, the share of UAMs relative to all applicants was 4%.<sup>111</sup>

The Joint UNCRC/UNCMW Comment on the detention of children in the context of migration sets out a general prohibition of detention for immigration purposes.<sup>112</sup> Although the Return Directive more generally is to be implemented “in the best interests of the Child”, both the Asylum Procedures Directive<sup>113</sup> and the proposed Asylum Procedures Regulation allow for the examination of applications of unaccompanied children in accelerated and border procedures, which means that the border procedure for returns could apply to them too.

In ECRE’s view, neither applications for asylum nor return procedures for unaccompanied children should ever be examined in accelerated or border procedures as they are ill-fitted to take into account their particular vulnerability and ensure that their need for special procedural guarantees can be addressed in practice. As a rule, such procedures do not provide the necessary guarantees for compliance with Member States obligations’ under international standards, including Articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC), according to which the best interest of the child shall always be a primary consideration and appropriate measures shall be taken to ensure that a child who is seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights. The same applies to other categories of vulnerable applicants for international protection as defined in the asylum acquis.

The application of the border procedure to unaccompanied minors includes the possibility of such procedure being carried out while the applicants are detained. The harmful effects of immigration detention on children, and in particular unaccompanied children, have been widely documented and acknowledged in jurisprudence. In ECRE’s view, children, whether accompanied or unaccompanied, should never be detained as this is never in their best interests.<sup>114</sup> Their double vulnerability stemming from their intrinsic vulnerability as asylum seekers and children and their specific needs are decisive factors which must take precedence over considerations of immigration control.

Under existing EU asylum law, the exceptional nature of detention of unaccompanied children is acknowledged in Article 11 of the recast Reception Conditions Directive. Read in light of the principle of best interest of the child, which according to the UNCRC must be a primary consideration in any decision concerning children, this already leaves very little scope for States to lawfully detain children and in particular unaccompanied children. In addition, the jurisprudence of the European Courts militates against the detention of unaccompanied children, which has on various occasions held that their detention in premises not suitable to their needs violates States’ obligations under Article 3 ECHR.<sup>115</sup>

Today, children cannot be detained in Sweden, Cyprus, Italy and the Netherlands and unaccompanied children cannot be detained in Slovenia. Italy does not detain unaccompanied children in practice.<sup>116</sup> As conducting a return border procedure automatically implies detention, ECRE strongly opposes subjecting children to the border procedure envisaged in Article 22. In practice, where border procedures are conducted at remote locations at the external borders of the EU, unaccompanied children often have no access to guardians and legal representatives. This is indispensable to navigate them through a complex procedure and uphold their rights. However, even where such representation is available, in the case of border procedures in particular, it is to be provided in conditions which are not adapted to their specific needs, which inevitably undermines its quality and effectiveness. Therefore, if the return border procedure is maintained, ECRE strongly recommends including an explicit prohibition to apply border procedures to unaccompanied children and other vulnerable categories of migrants.

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111. See EASO, Annual Report on the Situation of Asylum in the European Union 2017, June 2018, on-line version, section 4.10. <https://bit.ly/2E25MOL>

112. Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return: <http://www.refworld.org/docid/5a12942a2b.html>

113. *Idem*.

114. See ECRE, Comments on the Commission Proposal to recast the Reception Conditions Directive, October 2016, 14. <https://bit.ly/2sJZ32k>

115. See for instance, ECtHR, *Rahimi v. Greece*, Application No 8687/08, Judgment of 5 July 2011, *Mohamad v. Greece*, Application No 70586/11, Judgment of 11 December 2014

116. See AIDA country reports: <https://www.asylumineurope.org/>

Finally, there could be particular challenges facing stateless people in border procedures as they may be refused international protection at first instance/on the border as statelessness is not perceived as a protection ground. They may, however, have a route to protection as a stateless person in countries where there is a statelessness determination procedure. The rights enshrined in 1954 Convention require identification and determination of statelessness to grant those rights, which cannot be done in detention, and may need to be done after an asylum decision as per the UNHCR Handbook on Protection of stateless persons.<sup>117</sup>

*ECRE recommends:*

*Delete Chapter V – the Border procedure*

## ANNEX – LIST OF PROPOSED AMENDMENTS

Recital (7): delete.

Recital (13): Where there are no reasons to believe that the granting of a period for voluntary departure would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and an appropriate period for voluntary departure of [deleted text] at least thirty days, depending in particular on the prospect of return, should be granted. [Deleted text] An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case.

Recital (25): delete

Article 6 Risk of Absconding

ECRE recommends deleting Article 6 and replacing it with:

A risk of absconding should not be automatically assumed on the basis of the third country national's past conduct. The existence of a risk of absconding shall be determined on the basis of an assessment of the specific circumstances of the individual case and on the basis of an exhaustive list of objective criteria laid down in national legislation that are conducive to a risk assessment of the individual's future conduct or relate to the individual's stated intention not to comply with the return decision.

Article 7 Obligation to Cooperate

ECRE recommends deleting Article 7 on the obligation to cooperate as it is impractical, difficult to assess in a return context, may lead to arbitrariness and adds to the complexity of the procedure.

Article 8 Return Decision

Article 8(6): [deleted text up to paragraph 2]. The text continues unchanged from..."This Directive shall not prevent ..."

Article 9 Voluntary Departure

Article 9(1): A return decision shall provide for an appropriate period for voluntary departure of [deleted text] a minimum of thirty days, without prejudice to the exception referred to in paragraphs 2 and 4.

Article 9(4) Member States [deleted text] may grant a period for voluntary departure of no less than 7 days or exceptionally refrain from granting a period of voluntary departure in following cases:

- (a) [deleted text] At the request of the individual
- (b) [deleted text] where the third-country national concerned poses a risk to public policy, public security

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117. See UNHCR Handbook on Protection of Stateless Persons, Geneva 2014: <https://bit.ly/2DZZzSD>

or national security

(c) in case of explicit expression of non-compliance with return-related measures applied by virtue of this Directive or non-compliance with a measure aiming at preventing the risk of absconding

#### Article 13 Entry ban

Article 13(1): Return decisions [deleted text] may be accompanied by an entry ban:

Article 13(2): delete

#### Article 14 Return Management

Article 14(1): Add the following sentence: Member States shall not disclose the fact that a person has lodged an application for international protection to the authorities of the country of return.

Article 14(3): Delete the last sentence.

#### Article 16 Remedies

16(1) The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 15(1), before a competent judicial authority. [Deleted text]

16(3) The enforcement of the return decision shall be automatically suspended during the period for bringing the appeal [deleted text] and, where that appeal has been lodged within the set period, during the examination of the appeal [deleted text]. Should a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into due account the specific circumstances of the individual case [deleted text] acting ex officio.

Member States shall ensure that a decision on the request for temporary suspension of the enforcement of a return decision is taken within 48 hours [deleted text] of the lodging of an appeal. The enforcement of the return decision will be suspended during this time period. In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended, as appropriate, by the competent judicial authority.

[Deleted text]

16(4) Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective remedy pursuant to this Article. [deleted text]

#### Article 18 Detention

Reinstating the word 'only' and deleting the words 'in particular' in Article 18(1);

Deleting the whole of Article 18(1)(c) – detention on the grounds of public policy, public security or national security.

ECRE recommends amending Article 18(5) as follows:

Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a [reinstated text] limited period of detention, [deleted amended text and reinstated previous text] which may not exceed six months.

#### Chapter V Border Procedure

ECRE recommends deleting Chapter V, the Border Procedure.



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