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Legislating without Evidence: The Recast of the EU Return Directive

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Abstract

The article discusses the recast of the EU Return Directive (2008/115/EC) from the perspective of effectiveness and fundamental rights protection, as two underlying objectives of the Directive. Relying on the implementation assessment of the Directive carried out by the European Parliamentary Research Service, the article analyses the way in which Member States have implemented the Directive and how this has impacted the effectiveness of the Directive. If adopted as proposed, will the recast strengthen or further undermine the effectiveness? The assessment focuses on return decision, voluntary departure, entry ban, and detention. It also looks at omissions in the recast proposal, namely a missed opportunity to remedy the current shortcomings as regards non-returnable people. As the article concludes, the recast proposal will hardly improve the effectiveness of return and may lead to violations of fundamental rights of people in an irregular situation.

* The views expressed in this article are those of the author and do not necessarily reflect the position of ECRE.

Keywords

EU Return Directive – effectiveness – proportionality – return – entry ban – voluntary departure – detention – non-returnable migrants

1 Introduction

At the launch of the New Pact on Migration and Asylum in September 2020[1] and the first responses and discussions, return was one of the buzz words, mentioned over 100 times in the Pact, often in the context of the reasoning that a successful asylum policy requires an effective return policy.[2] But what is an "effective" return policy? Does this criterion only relate to the return rate or also to the sustainability of a return, the proportionality, and the dignity of the person? The interpretation of "effectiveness" also determines the answer to the questions as to what renders the current return policy ineffective and how this can be overcome. In order to increase the return rate, the Pact on Migration and Asylum maintains an earlier proposal for a border return procedure, introduces the concept of 'return sponsorship' as an option for mandatory solidarity, proposes appointment of a Return Coordinator, announces a Strategy on voluntary return and reintegration, calls on Frontex to operationalise its reinforced mandate on return, and promises stronger cooperation with third countries. However, the core proposals for amending the EU return policy have been put forward in an earlier stage, with the 2018 proposal for a recast[3] of the Return Directive (2008/115/EC).[4] As of April 2021,

1 European Commission, *Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM(2020) 609, (September 23, 2020).

2 The term "return" is used in the EU jargon as euphemism for expulsion, see J.-P. Cassarino, 'Are Current "Return Policies" Return Policies? A Reflection and Critique', in: T. Bastia and R. Skeldon (eds), *Routledge Handbook of Migration and Development*, Abingdon: Routledge 2020, pp. 343–352. For a broader discussion on the use of euphemisms in the area of migration and asylum see M. Grange, *Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?*, Global Detention Project Working Paper No. 5, Geneva: GDP 2013.

3 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*), COM(2018)634, (September 12, 2018).

4 *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*

this legislative process was still. In order to find an answer to the questions posed above, we will analyse the way in which Member States have implemented the Return Directive, and how this has impacted the objectives of the Directive. This information is mainly based on a European Parliamentary Research Service (EPRS) study on the implementation of the Directive in ten Member States.[5] After outlining two processes concerning the Directive (Section 2), we assess to what extent the proposal for a recast may resolve the current problem issues. We take this approach for four selected themes regulated by the Return Directive: the return decision, voluntary departure, entry bans and detention (Sections 3–6). We then highlight one problem issue which is not addressed by the Directive, namely the legal and humanitarian position of returnees who cannot be returned (Section 7) and end with a few concluding thoughts (Section 8).

2 The Political and Legislative Processes concerning the Return Directive

The Return Directive, which entered into force on 24 December 2010, aims to "establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity."[6] The objective of the Directive thus contains both protective and enforcement-oriented elements. The procedural safeguards include specific provisions such as the right to appeal, but also the proportionality principle, which runs like a thread through the whole Directive. This implies that voluntary departure is the most preferable option, and that during the return procedure, the least coercive measure to enforce return needs to be taken. The order in which the Directive provides for enforcement measures clearly mirrors the proportionality principle: first a return decision with a voluntary departure term, then the entry ban, measures to prevent absconding such as a deposit or a reporting

Third-Country Nationals, OJ 2008 L 348/98, (December 24, 2008), p. 115.

5 EPRS, *The Return Directive 2008/115/EC: European Implementation Assessment*, PE 642.840, (June 2020), Brussels: European Union.

6 CJEU, *Bashir Mohamed Ali Mahdi*, C-146/14 PPU, (June 5, 2014), para. 38; CJEU, *Z. Zh. v. Staatssecretaris Voor Veiligheid En Justitie and I. O. v. Staatssecretaris Voor Veiligheid En Justitie*, C-554/13, (June 11, 2015), para. 47.

obligation, and as a final measure, detention, again under strict proportionality conditions.[7]

Under Article 19 of the Directive, the European Commission (hereafter Commission) is to report on the application of the Directive every three years, starting from 2013. It actually released an evaluation report only once, in 2013, based on a meta-study of return policies in 31 countries.[8] The *Communication on EU return policy*, which the Commission released in March 2014, was partly based on data collected in that study.[9] The Commission reported that the Directive (and its interpretation by the Court of Justice of the EU (CJEU)) had enabled determined action to return irregularly staying migrants, while at the same time improving their protection. It concluded that, despite some room for a better implementation, the Directive had positively influenced the situation regarding voluntary departure and effective forced return monitoring, and contributed to more convergence of detention practices, including the reduction of pre-removal detention periods and a wider implementation of alternatives to detention. Moreover, according to the Commission, the Directive had contributed to more legal certainty by means of the procedural safeguards and had reduced the possibilities for Member States to criminalise irregular stay.[10]

The implementation study showed that the concern, expressed by some states at the time of adoption of the Directive, that the level of protection would undermine the efficiency of return procedures had not materialised.[11] While confirming that the Directive facilitates effective return procedures, the Commission highlighted that the "main reasons for non-return relate to practical problems in the identification of returnees and in obtaining the necessary documentation from non-EU authorities."[12] These conclusions had led the

7 For an overall discussion on the Directive, see S. Peers, 'Irregular Migrants: Can Humane Treatment Be Balanced against Efficient Removal?', *European Journal of Migration and Law* 17(4) (2015), pp. 289–304; for a discussion on the CJEU case-law concerning the Directive, see T. Molnár, 'The Place and Role of International Human Rights Law in the EU Return Directive and in the Related CJEU Case-Law: Approaches Worlds Apart?', in: S. Carrera et al. (eds), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden: Brill Nijhoff 2018, pp. 105–124.

8 European Commission (DG Home Affairs), *Evaluation on the Application of the Return Directive (2008/115/EC)*, Study carried out by Matrix and ICMPD, Brussels: European Commission 2013.

9 European Commission, *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM(2014) 199, (March 28, 2014).

10 *Ibid.*

11 F. Lutz, 'Prologue: The Genesis of the EU's Return Policy', in: M. Moraru, G. Cornelisse and P. de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Oxford: Hart 2020, pp. 1–16, at p. 7, see also *Ibid.*, pp. 12–29.

12 *Ibid.*, p. 30.

Commission to refrain from a proposal for a recast of the Directive and instead to work on a better implementation of the Directive and to intensify its efforts to cooperate with countries of origin on readmission of their citizens.

As the Member States which contested this decision kept breathing in the neck of the Commission, it produced a cascade of policy documents on return policies. The Commission adopted an EU action plan on return in 2015, which included a return handbook with guidelines to correctly implement the Directive and carry out returns in an effective and humane manner.[13] Two years later, in March 2017, it adopted a renewed action plan on return[14] and published a *Recommendation on making returns more effective when implementing the Return Directive*.[15] Half a year later, 'new developments' led to another Recommendation in November 2017, accompanied by a revised Return Handbook, which urged states to harmonise their approaches, however now with a focus on increasing the return rate.[16] Whereas in its 2014 Communication, the Commission had emphasised the procedural guarantees and proportionality principle, in 2017 it recommended reducing certain safeguards, applying longer detention periods and restricting the voluntary departure term, by making it conditional upon a request and cooperation with return.

In the same year as it launched the Recommendation on making returns more effective, the Commission expressed its readiness to propose a revision of the Directive, if experience with the implementation of the Recommendation would require so in view of increasing the return rate. There was no public evaluation of the effect of the Recommendation, nor has there been an impact assessment to examine whether there was a need for additional EU legislative action in the field of return. In this context, the legislative proposal for a recast of the Directive in 2018,[17] adopted only one year after the Recommendation and without a recent evaluation study, came as a surprise. According to the Commission, a targeted revision of the Directive is necessary, "to notably

13 European Commission, *Communication from the Commission to the European Parliament and the Council: EU Action Plan on Return*, COM(2015) 453, (September 9, 2015).

14 European Commission, *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, (March 2, 2017).

15 European Commission, *Commission Recommendation (EU) 2017/432 of 7 March 2017 on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and of the Council*, OJ 2017 L 66/15, (March 11, 2017).

16 European Commission, *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*, OJ 2017 L 339/83, (December 19, 2017).

17 European Commission, *Proposal for recast of Returns Directive*.

reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding."[18] The lack of an impact assessment of the recast proposal as well as the absence of references to its 2014 implementation report prevented any insight into the reasons why the Commission had changed its position. One can only guess that political pressure had made the Commission depart from its strategy to focus on better implementation. In its Explanatory Memorandum, it defines the proposal as a follow-up to the June 2018 European Council, that had welcomed the intention of the Commission to present legislative proposals.[19] However, the European Council ignored that the Commission had promised a recast under the condition that the 2017 Recommendation would not lead to a higher return rate. So, in search for a justification for recasting the Return Directive, we mainly found cross-references by the Commission and European Council, interpreting each other's intentions as their own.

According to the *Better Regulation Guidelines* of the Commission, impact assessments promote more informed decision-making and contribute to better regulation.[20] An impact assessment is required for Commission's initiatives that are likely to have significant economic, environmental or social impacts.[21] The Commission justified its decision not to conduct an impact assessment of the recast Return Directive by pointing at an urgent need to amend the Directive. However, this urgent need is hard to verify in the absence of an impact assessment and recent implementation reports. In response to criticism of this lack of evidence, the Commission often refers to confidential reports from Member States, including under the Schengen Evaluation Mechanism, and exchanges with senior officials. This reasoning ignores the importance of transparent decision-making and affects the role of the European Parliament (hereafter Parliament) as a co-legislator. For these reasons, the Parliament decided to conduct a substitute impact assessment, which was published in 2019.[22] In the subsequent Parliamentary term, the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) launched an implementation report on the Return Directive, with a view to be better informed

18 *Ibid.*, Explanatory Memorandum, p. 2.

19 European Council, *European Council Meeting (28 June 2018): Conclusions*, EUCO 9/18, CO EUR 9, CONL 3, (June 28, 2018), §10. The Commission launched its recast proposal as "a contribution from the European Commission to the Leaders' meeting in Salzburg on 19–20 September 2018."

20 European Commission, *Better Regulation Guidelines: Commission Staff Working Document*, SWD(2017) 350, (July 7, 2017), Chapter III.

21 *Ibid.*, Chapter III, p. 15.

22 EPRS, *Substitute Impact Assessment on the Proposed Return Directive (Recast)*, PE 631.727, (February 2019), Brussels: European Union.

on the current problem issues and, thus, on the need for and probable effects of a recast.[23] The implementation report relies on an implementation assessment of the research department of the Parliament – EPRS – based on two external studies: a study evaluating the implementation of the Directive and a study examining the external dimension of the Directive.[24] The first one (hereafter EPRS implementation assessment) is frequently cited in this article. Its aim was to assess the implementation of the key measures established by the Return Directive in ten selected Member States.[25] The study analysed the four key measures laid down in the Directive, namely return decision, voluntary departure, entry ban, and detention, which are discussed in the next sections.

3 Return Decision

3.1 *Obligation to Issue Return Decision Immediately after Rejecting Asylum Claim*

Under Article 6(1) of the Directive, Member States should issue a return decision to any third-country national staying irregularly on their territory. This obligation is without prejudice to four exceptions set out in Article 6(2)–(5). The key exception is laid down in Article 6(4) and allows states not to adopt a return decision for compassionate, humanitarian or other reasons.[26] Under Article 6(6) of the Directive, states may decide to adopt a decision on the ending of a legal stay together with a return decision and a removal decision in a single decision or act, however, "without prejudice to the procedural safeguards." In practice, joining these decisions may shorten the time available for the person to seek a remedy. Almost all countries covered by the EPRS study combine the return decision with the removal order.[27] This corroborates findings from the 2014 Communication that solely seven states had a two-step procedure at that time.[28] In its recast proposal, in draft Article 8(6), the Commission turns the option of Article 6(6) into an obligation to issue

23 Committee on Civil Liberties, Justice and Home Affairs (LIBE), *Draft Report on the Implementation of the Return Directive, 2019/2208*, INI, Rapporteur Tineke Strik, 9 June 2020.

24 EPRS, *Implementation Assessment*, Brussels: European Union 2020. The evaluation study has been conducted by Izabella Majcher and the study of the external dimension of the Return Directive has been conducted by Mark Provera.

25 Belgium, Bulgaria, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, and Sweden, see *Ibid.*, pp. 38–41.

26 Article 6(4) is further discussed in Section 7.

27 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 54.

28 European Commission, *Communication on EU Return Policy*, p. 26.

a return decision immediately after the adoption of a decision ending a legal stay, including a decision refusing asylum application. In the latter case, in particular, the almost simultaneous decision may lead to protection gap for the person, if the examination of the asylum request has not included the broader risk of *refoulement* as meant in Article 3 of the European Convention on Human Rights (ECHR) and Article 5 of the Directive.[29] In fact, the EU asylum *acquis* lays down an assessment limited to refugee and subsidiary protection status. None of these statuses, as defined in the Qualification Directive (2011/95/EU), offers an absolute protection against *refoulement*.

3.2 *Five-Day Limit to Appeal for Rejected Asylum Seekers*

According to the European Court of Human Rights (ECtHR), the right to an effective remedy under Article 13 of the ECHR implies that the time-limit for submitting the appeal must not be excessively short as otherwise, the remedy would be inaccessible in practice.[30] The Directive currently does not regulate this question. According to the EPRS study, most of the assessed states provide for multiple periods depending on the reasons for the return and the procedure leading to the issuance of the return decision. Three time-limits can be distinguished, namely around a month (six countries), around two weeks (four countries), and a few days (three countries).[31] The period of a few days to lodge an appeal can hardly ensure access to an effective remedy. Rather than outlawing this practice, the recast proposal aggravates these concerns. Under draft Article 16(4), the period for submitting the appeal, if the return decision is a consequence of a final decision rejecting asylum, is to be five days at maximum. Such a time-limit can hardly comply with the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter of Fundamental Rights of the EU (hereafter EU Charter).[32] In addition, it would require legislative and administrative changes for several Member States, as currently most states provide for longer period for appealing, in line with the above EPRS study findings. The question arises whether EU secondary legislation in the form of a directive should impose on Member States an obligation to have rules which are more restrictive than most states currently have.

29 Article 5 provides that when implementing the Directive, states should respect the principle of *non-refoulement*. For similar conclusions, see FRA, *The Recast Return Directive and Its Fundamental Rights Implications*, Vienna: FRA 2019, pp. 31–32; EPRS, *Substitute Impact Assessment*, Brussels: European Union 2019, pp. 65–66.

30 ECtHR, *Baysakov and Others v. Ukraine*, 54131/08, (February 18, 2010), para. 74; ECtHR, *Shamayev and Others v. Georgia and Russia*, 36378/02, (April 12, 2005), para. 458–461.

31 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 58.

32 FRA, *The recast Return Directive*, Vienna: FRA 2019, pp. 41–42.

3.3 *Restricting Suspensive Effect of Appeal*

In its well-established case-law on the right to an effective remedy under Article 13 of the ECHR, the ECtHR requires that an appeal which is based on the principle of *non-refoulement* has automatic suspensive effect.[33] Article 13(2) of the Directive leaves an option to states to either provide for suspensive effect in their legislation or endow the authority or body in charge of the review with the power to suspend the execution of deportation. In order to comply with the Strasbourg case-law, Member States should refrain from using this discretion. In line with the findings of the EPRS study, out of the ten covered countries, automatic suspensive effect is ensured in merely four countries and in two of them only in the administrative phase of the appeal. In the remaining states, the person needs to apply for it.[34] Rather than remedying the current situation whereby states have such diverging practices and people risk being removed before their appeal is considered, the recast proposal aggravates these concerns. It lays down several complex rules which would ultimately restrict the scope of the suspensive effect of the appeal.[35] Under draft Article 16(3), if the return decision is issued to a refused asylum seeker, states should not grant suspensive effect to an appeal against the return decision in the absence of relevant new elements or findings, which would significantly modify the specific circumstances of the case. Regardless of whether this provision is adopted, states are bound to comply with the right to an effective remedy as explained in the CJEU case-law. The Court requires suspensive effect of appeal if the enforcement of a return decision would expose the person to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[36]

33 ECtHR, *M.S.S. v. Belgium and Greece*, 30696/09, GC, (January 21, 2011), p. 293; ECtHR, *Abdolkhani and Karimnia v. Turkey*, 30471/08, (September 22, 2009), para. 108.

34 EPRS, *Implementation Assessment*, Brussels: European Union 2020, pp. 58–59.

35 For similar concerns, see ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, Brussels: ECRE 2018, pp. 16–18.

36 CJEU, *Centre Public d'action Sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, C-562/13, (December 18, 2014), para. 50 and 52; CJEU, *Abdoulaye Amadou Tall v. Centre Public d'action Sociale de Huy*, C-239/14, (December 17, 2015), para. 58.

4 Voluntary Departure

4.1 *De-prioritising and Reducing the Period for Voluntary Departure*

According to the UN Special Rapporteur on the Human Rights of Migrants, voluntary return should be promoted and facilitated.[37] Likewise, under the Draft Articles on Expulsion of Aliens elaborated by the International Law Commission, the host state should take appropriate measures to facilitate the voluntary departure and give the person a reasonable period of time to prepare for the departure.[38] The promotion of voluntary departure is also one of the key principles of the Return Directive. According to Article 3(8) of the Directive, voluntary departure means a departure in compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.[39] In light of recital 10, Article 7(1) prescribes that a return decision provides for an appropriate period for voluntary departure without prejudice to a few exceptions. In *Z.Zh. and I.O.*, the CJEU stressed that the principle of proportionality must be observed throughout all stages of the return procedure established by the Directive, including the stage where a state decides on the grant of the period for voluntary departure. As one of the core general principles of EU law, the principle of proportionality entails that the return process should be carried out by means of the least restrictive measures possible in the individual circumstances of the case.[40] Thus, prioritising voluntary over forcible return also emerges from the EU law principles. There are additional reasons for the promotion of the voluntary departure under the Directive: the chance of re-entering the EU territory irregularly is less likely and it is less costly then forced return.[41] Under recital 10 of the Directive, in order to promote voluntary departure, states should provide enhanced return assistance and counselling and make the best use of the relevant funding possibilities offered under the European funds. Voluntary departure supported by logistical, financial, or material assistance is referred to as "assisted voluntary return" (AVR).[42] AVR programmes usually include financial and in-kind assistance and

37 SRHRM, *Report of the Special Rapporteur on the Human Rights of Migrants: Study on the Return and Reintegration of Migrants*, A/ HRC/ 38/ 41, (May 4, 2018), Geneva: UN 2018, para. 87–88.

38 International Law Commission, Draft Articles on Expulsion of Aliens, A/ CN.4/ L.832, (May 30, 2014), Article 21.

39 The voluntary departure is not a genuinely voluntary return, hence it is elsewhere referred to as mandatory departure, see ECRE, *Voluntary Departure and Return: Between a Rock and a Hard Place*, Policy Note 13, Brussels: ECRE 2018.

40 CJEU, *Z.Zh. and I.O.*, para. 47–49 and 69.

41 EPRS, *Implementation Assessment*, Brussels: European Union 2020, pp. 65–66.

42 EMN, *Asylum and migration glossary*, Brussels: European Commission, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en.

unfold in three phases, namely, the pre-return, return, and post-return phase.[43] The programmes vary in length, the scope of assistance granted, and geographical focus. AVR programmes are typically co-funded by the Asylum, Migration and Integration Fund (AMIF) and government and implemented mainly by International Organisation for Migration.[44]

Article 7(1) of the Directive prescribes that the period for voluntary departure is between 7 and 30 days. In light of the proportionality principle, imposing a voluntary departure term shorter than 30 days should be proportionate and duly justified. Over half of the countries assessed in the EPRS study have transposed these time-limits into their domestic legislation. In four countries, the law provides for a period of 30 days and in one country, the period is between 15 and 30 days. Article 7(2) obliges Member States to, where necessary, extend the period for voluntary departure by an appropriate period in specific circumstances, such as a lengthy stay, children attending school, or other family and social links in Member States. This possibility for extension is indeed provided for in most countries assessed by the EPRS, sometimes also in other circumstances. Respondents of some states acknowledge that extension of the voluntary departure term is also advantageous for states, as the regular period under the Directive is too short to prepare an AVR operation.[45]

In its recast proposal, the Commission has abolished the rule in current Article 7(1) that a minimum period for voluntary departure is to be seven days. Further, the length of this period is to be determined with due regard to the individual circumstances, "taking into account in particular the prospect of return," which lies outside the person's control. The Commission has motivated the deletion of the minimum 7-day period by pointing that states hardly use this minimum in practice,[46] which is not a convincing argument. A period of less than seven days is mostly too short for a realistic return and may in practice result in people not being able to leave within that period.[47] In this regard, if the person is not granted a voluntary departure term or does not leave within that period, he or she may face harmful repercussions, already existing under the current rules. In such circumstances, an entry ban will be automatically

43 EMN, *Programmes and Strategies in the EU Member States fostering Assisted Return to and Reintegration in Third Countries*, Brussels: EMN 2011, p. 8; IOM, *Assisted Voluntary Return and Reintegration (AVRR) in the EU*, Geneva: IOM 2010, pp. 1–2.

44 EPRS, *Implementation Assessment*, Brussels: European Union 2020, pp. 69–70.

45 *Ibid.*, p. 67.

46 EPRS, *Substitute Impact Assessment*, Brussels: European Union 2019, p. 52.

47 For similar concerns, see ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive*, Brussels: ECRE 2018, p. 11; Ch. Mommers, 'The Proposed Recast of the EU Returns Directive: Voluntary Return under Threat?', *EU Law Analysis*, August 28, 2020, http://eulawanalysis.blogspot.com/2020/08/the-proposed-recast-of-eu-returns.html.

imposed and the person is excluded from the safeguards pending return.[48] The proposed amendment disregards the fact that the minimum 7-day period was established in 2008 to avoid arbitrary states' practices whereby unrealistically short periods were granted to rely on the lack of compliance by the person to justify an entry ban and a detention.[49] Also the argument of allowing flexibility for states where a swift departure is possible, for instance directly after irregular entry, cannot justify such far reaching consequences. The second paragraph of draft Article 9(1) actually underlines the possibility for a person to leave earlier than the granted voluntary departure term provides for.

Article 7(4) of the Directive allows states to grant a period shorter than seven days or even to refrain from granting a period for voluntary departure in three specific circumstances, namely if there is a risk of absconding, an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy or security or national security. According to the EPRS study, half of the states covered transposed all three grounds into their legislation, while two countries rely on the risk of absconding and threat to national security and one country uses only the threat to national security. On the other hand, some states provide additional grounds, which appears incompatible with the exhaustive language of Article 7(4).[50] The CJEU made clear that, as Article 7(1) is a mandatory provision, granting a period of voluntary departure of 7–30 days is the rule, whereas Article 7(4) regulates the exceptions to this rule, so it should be interpreted in a restrictive manner.[51] The voluntary departure period can only be shortened or refused if otherwise the objective of the return procedure would be undermined. It should be individually assessed whether applying the derogation is compatible with the person's fundamental rights. Moreover, if a derogation can be justified, then the proportionality principle and the preference of voluntary departure, as enshrined in recital 10, still require that reducing the period of voluntary departure be preferred over refraining from it all together.[52]

The recast proposal obliges states to refrain from a voluntary departure term in case of one of the three circumstances under the current Article 7(4). This proposal, which would imply the automatic prevention of granting a period of voluntary departure, is hard to reconcile with the proportionality principle and the obligation to conduct an individual assessment as required in the CJEU

48 See Sections 5(1) and 7, respectively.

49 EPRS, *Substitute Impact Assessment*, Brussels: European Union 2019, p. 53.

50 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 68.

51 CJEU, *Z.Zh. and I.O.*, para. 47–49 and 69.

52 The legislation of merely two countries covered by the EPRS study foresee both shortening and refusing voluntary departure period, see EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 68.

case-law.[53] Even if the EU legislature would decide that voluntary departure is no longer the preferred option, the EU proportionality principle and the fundamental rights remain applicable. Remarkably though, neither the Commission nor Member States formally depart from the principle of voluntary departure as the preferred option.[54] The recast proposal, in Article 14 and recital 14, even includes a strengthened obligation for states to promote and incentivise the use of the AVR programmes. All in all, these amendments are so substantial that they will undoubtedly undermine the priority of voluntary departure and render the AVR programmes ineffective. Presenting the legislative proposal as a *recast*, which implies a very limited amendment, is therefore misleading.

4.2 *Criteria for Establishing the Risk of Absconding*

In draft Article 6, the Commission establishes an open-ended list of sixteen criteria for establishing the risk of absconding. These criteria resemble the national grounds for establishing a risk of absconding in the current legislation of several states, complemented with criteria related to irregular entry, unauthorized movement to another state or refusal to go there, and ongoing criminal investigations or proceedings.[55] This amendment will considerably impact the possibility of a voluntary departure but also the use of detention measures and the entry ban. The Commission aims to ensure "clearer and more effective rules for granting a period for voluntary departure and detaining a third-country national," but the non-exhaustive character of the list immediately undermines this aim and limits further harmonisation. As the criteria are widely formulated, such as irregular entry or the lack of documents proving the identity, residence or financial resources, they can be held against most of the rejected asylum seekers and a large proportion of the irregular migrants.[56] Under four criteria,[57] states should presume a risk of absconding and returnees

53 CJEU, *E*, C-240/17, (January 16, 2018), para. 49; CJEU, *Mahdi*, para. 70; CJEU, *Md Sagor*, C-430/11, (December 6, 2012), para. 41; CJEU, *Z.Zh. and I.O.*, para. 49; CJEU, *Hassen El Dridi Alias Soufi Karim*, C-61/11 PPU, (April 28, 2011), para. 41. For similar concerns, see FRA, *The recast Return Directive*, Vienna: FRA 2019, pp. 24–25.

54 See recital 13 of the recast proposal of the Commission and recital 14 of the Partial General Approach of the Council, Council Document 9620/19, MIGR 81, COMIX 279, CODEC 1145, 23 May 2019.

55 See for the existing national criteria European Commission, *Communication on EU Return Policy*, p. 14.

56 For similar concerns, see ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive*, Brussels: ECRE 2018, pp. 7–8.

57 These grounds are the use of false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints; opposing violently or fraudulently the return procedures; not complying with a measure aimed at preventing the risk of absconding; or not complying with an existing entry ban.

are thus confronted with a reversed burden of proof. The proposed Article 6(2) prescribes that regarding the remaining criteria the immigration authorities conduct an individual assessment but its scope and content are unclear. It should in any case include the person's fundamental rights, as prescribed by the CJEU, and specifically the right to family life and the best interests of the child.[58] The lack of parameters of the required individual assessment, combined with the wide scope of the listed criteria, may further consolidate the current practice in many states of "ticking the box,"[59] instead of seriously conducting a case-by-case examination. Especially in light of the need to prioritise voluntary departure and of the last resort nature of detention, it would have been appropriate to also provide for criteria to exclude a risk of absconding.

One of the criteria for establishing a risk of absconding relates to the obligation to cooperate, which is defined by a non-exhaustive list of criteria in draft Article 7. Although the term "cooperation" commonly implies actions of at least two actors, the obligations under draft Article 7 mainly lie with the person concerned. The sole obligation of the authorities is to inform the person about the consequences of not complying with cooperation duties. More states' obligations could be recalled here, especially those stemming from the EU Charter. In *Boudjlida*, the CJEU stressed the importance of the right to be heard at all stages of the return procedure, including the stage of voluntary departure, where the person should be able to express his or her point of view on the detailed return arrangements, such as the period allowed for departure and whether the return is to be voluntary or coerced.[60] Article 4 of the Qualification Directive, dealing with the assessment of all elements of an application for protection, is more balanced, as it also emphasises the duty of the state to assess the relevant elements of the application. According to the CJEU, this obligation entails that in case of incomplete elements, the state has to cooperate actively with the applicant in order to assemble all elements needed to substantiate the application.[61] The Court explained that a state may also be better placed than an applicant to gain access to certain types of documents. Establishing the obligation for such mutual cooperation would better serve the objective of the Return Directive. In fact, documents from other national institutions may be needed to substantiate the situation of the person

58 See also CJEU, *O.S. & L*, C-356/11 and C-357/11, (December 6, 2012), para. 80.

59 M. Moraru, 'Judicial Dialogue in Action: Making Sense of the Risk of Absconding in the Return Procedure', in: M. Moraru, G. Cornelisse and P. De Bruycker(eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Oxford: Hart 2020, pp. 125–48, at p. 131.

60 CJEU, *Khaled Boudjlida v. Préfet Des Pyrénées-Atlantiques*, C-249/13, (December 11, 2014), para. 51–52.

61 CJEU, *M.M.*, C-277/11, (November 22, 2012), para. 65–66.

and the person's family members and the return procedure largely depends on the cooperation with third countries. Reaching out to the authorities of third countries, however, can only take place safely after a final decision on the asylum claim has been taken. Hence, the duty of the person to lodge a request with the competent authorities of third countries to issue a valid travel document, as proposed in draft Article 7(1)(d), may violate the right to asylum and the principle of *non-refoulement* because this obligation concerns "all stages of the return procedure," so also prior to the final decision in an asylum procedure.

5 Entry Ban

5.1 *More Entry Bans, More Returns?*

Under the scheme of return in the Directive, the effect of return is magnified by the instrument of the entry ban. According to Article 3(6) of the Directive, entry bans aim at prohibiting the returnee's (legal) re-entry to the whole Schengen area for a specified period. The supranational effect is achieved whereby the sending state registers an alert in the Schengen Information System and all other remaining states implement it according to the Schengen Borders Code (Regulation 2016/399) by refusing the person's entry. The entry ban thus has punitive and deterrent functions, with wide-ranging implications on the returnee's life choices. Recital 6 of the Directive, which emphasises that the decisions made under the Directive should be adopted on a case-by-case basis, applies to the entry ban as well.

In Article 11(1), the Directive establishes mandatory and optional entry bans. Return *shall* be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been fulfilled during that period. In other cases, states *may* impose an entry ban. The mandatory entry ban in the two aforementioned circumstances precludes the individual assessment as a core ingredient of the principle of proportionality. According to the EPRS study, five out of ten examined countries provide in their legislation or practice for automatic imposition of entry ban in the two circumstances under Article 11(1).[62] These findings corroborate findings from the 2013 evaluation of the Directive, according to which almost half of the countries bound by the Directive provided for automatic imposition of entry ban in these cases.[63] The optional entry ban, for its part, risks being imposed alongside a voluntary departure, making the entry ban a systematic measure and

62 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 77.

63 European Commission (DG Home Affairs), *Evaluation on the application of the Return Directive*, Brussels: European Union 2013, p. 165.

depriving voluntary departure of any incentives. According to the EPRS study, in three examined countries, the legislation establishes automatic application of entry bans in all cases of return, hence also if the person has departed during the period for voluntary departure.[64] Article 11(3) of the Directive provides that states may refrain from issuing, or withdraw or suspend an entry ban in individual cases for humanitarian reasons. States may also withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons. This is reflected at the domestic level. Half of the countries examined by the EPRS study establish in their legislation or practice exceptions for humanitarian reasons, mainly reasons related to family life and health reasons or for certain categories of vulnerable persons.[65] However, while welcome, Article 11(3) reads like an exception to the rules laid down in Article 11(1). Arguably, the principle of proportionality requires a reverse order.

According to Article 11(2), the length of an entry ban should be determined with regard to all the relevant circumstances of the individual case and should not in principle exceed five years. States are allowed to exceed this length if the person represents a serious threat to public policy, public security, or national security. The EPRS study highlights various examples of how states implement the individual assessment of the validity of entry ban. Germany, for instance, weights the nature of the offence and the reason for return against the length of legal stay and family and social ties developed in the country. The length may be reduced if it entails a disproportionate hardship on the person's private or family life. In France (in law) and Sweden (in practice), if a voluntary departure period was not granted, a longer entry ban may be imposed than in the situation if the person did not depart during that period. Dutch and Polish legislations are detailed and provide for four different lengths which relate to the basis of the return decision.[66]

If the co-legislators accept the recast proposal to enlarge the discretion and even oblige Member States to refrain from a voluntary departure term,[67] considerably more people will be subject to an entry ban. This triggers questions on the effectiveness of the return as well as on the individual consequences for the person concerned. Regarding effectiveness, it is important to distinguish the different objectives of an entry ban. On the one hand, it aims to incentivise compliance with the voluntary departure period with a measure that both implies a reward for good behaviour and a penalty for bad behaviour. The applicability of the entry ban to the territory of all Member

64 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 77.
65 *Ibid.*, pp. 80–81.
66 *Ibid.*, pp. 79–80.
67 See Section 4.1.

States strengthens the impact of this instrument. It is questionable whether characterising the entry ban as an incentive is still adequate when its application becomes almost "the rule." If no period for voluntary departure is granted in the first place, how can a person proof his or her compliance with the return decision by returning voluntarily? This will also impede the person's chances to get the duration of the entry ban shortened or the ban withdrawn. On the contrary, the lack of perspective of a "reward" may serve as an incentive not to comply with a return decision and even abscond, as the already imposed entry ban will create an obstacle for the returnee to re-enter the EU.[68] In the case of family life, the return may become a tricky decision, as the person would not know when family reunification will be allowed. Although the Family Reunification Directive (2003/86/EC) grants an individual right, which prevails over the validity of an entry ban, such insecurity is inherent in the imposition of an entry ban. Further, the fragility of a country of origin may constitute an obstacle to voluntary return if the perspective of re-entry, in case the circumstances turn unsafe, becomes illusionary due to the entry ban. Hence, the recast proposal may render the instrument of an entry ban ineffective or even counterproductive by stripping its incentivising function. Ultimately, this consequence would undermine one of the core objectives of the Directive which is to promote effective returns.

5.2 *Entry Ban upon Exit*

In draft Article 13(2), the Commission purports to allow Member States to impose an entry ban in the absence of a return decision, if the irregular residence is detected at the time the person tries to leave the Schengen area. It is not difficult to imagine that such perspective may discourage the person from leaving a Member State. From the effectiveness angle, instead of penalising a person for leaving, offering a person the possibility to re-enter through a legal channel may prove to be a stronger incentive to end the irregular stay and leave the host state.[69] Recital 6 of the Directive requires that authorities adopt a motivated decision, involve trained personnel, and ensure access to information and legal aid, as well as the right to be heard. These requirements make the decision-making particularly challenging at the border and will hardly contribute to the aim of a swift departure of the person.[70]

68 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 82.

69 For similar concerns, see ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive*, Brussels: ECRE 2018, p. 13.

70 For similar concerns, see FRA, *The recast Return Directive*, Vienna: FRA 2019, pp. 35–37; EPRS, *Substitute Impact Assessment*, Brussels: European Union 2019, p. 54.

6 Detention

6.1 *Public Policy as a Ground for Immigration Detention*

The Directive in Article 15(1) explicitly lists two grounds justifying immigration detention, namely the risk of absconding and avoiding or hampering the return. In *Kadzoev*, the CJEU stressed that detention on grounds of public order and safety cannot be based on the Return Directive.[71] This ruling limits the states' power to place migrants in pre-removal detention on public order and security grounds. The recast proposal resembles a law-making intervention to sidestep CJEU's jurisprudence, as draft Article 18(1)(c) introduces risk to public policy or public or national security as a new ground for detention. As a rationale, the Commission notes that new risks have emerged in recent years, which would make it necessary to detain migrants who pose a threat to public order or national security. The Commission has not defined these "new risks." Detention on this account pursues objectives typical for criminal justice systems, like deterrence, prevention and incapacitation. By allowing Member States to use administrative detention measures for such purposes, the proposal undermines procedural safeguards of national and European criminal law.[72] Article 5 of the ECHR also distinguishes between detention based on criminal law (the conviction, suspicion or the prevention of a criminal offence) and the detention of migrants (to prevent irregular entry or effectuate expulsion). Reliance on public policy grounds blurs the lines between administrative immigration detention and punitive detention, labelled "crimmigration" in academia.[73] Even if public policy reasons are added to the detention grounds in the Directive, the CJEU will most probably apply a strict interpretation of the public policy criteria, requiring that the individual conduct represent a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the state concerned.[74] As the recast proposal has not affected the aim of immigration detention, which

71 CJEU, *Saïd Shamilovich Kadzoev* (*Huchbarov*), C-357/09 PPU, (November 30, 2009), para. 69–71. For a discussion on pre-removal detention case-law of the CJEU, see M.-L. Basilien-Gainche, 'Immigration Detention under the Return Directive: The CJEU Shadowed Lights', *European Journal of Migration and Law* 17(1) (2015), pp. 104–126.

72 For similar concerns, see ECRE, *ECRE Comments on the Commission Proposal for a Recast Return Directive*, Brussels: ECRE 2018, p. 20.

73 C.C. García Hernández, *Crimmigration Law* (Chicago: American Bar Association 2015); I. Majcher, 'The Effectiveness of the EU Return Policy at All Costs: The Punitive Use of Administrative Pre-Removal Detention', in: N. Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalisation*, New York: Springer 2020, pp. 109–129.

74 CJEU, *Z.Zh. and I.O.*, para. 60; CJEU, *J. N. v. Staatssecretaris Voor Veiligheid En Justitie*, C-601/15 PPU, (February 15, 2016), para. 64–65; CJEU, *T*, C 373/13, (June 24, 2015), para. 78–79.

is the preparation of the return and/or carrying out the removal process (as per draft Article 18(1)), the detention on this new ground also has to meet the criteria regarding due diligent removal arrangements, a reasonable prospect of removal and the necessity to ensure successful removal.

6.2 *Minimum Obligatory Length of Detention*

The principles of necessity and proportionality entail that the immigration detention should be as short as possible. Although the Directive also provides for this rule, it may become meaningless in light of the maximum time frame for detention. Under current Article 15(5)–(6), detention should be up to six months, extendable by additional 12 months, on account of the lack of cooperation of the person concerned or of the destination country. Over 55 percent of Member States have established the maximum period of detention at 18 months and a further 17 percent allow detention for up to 12 months.[75] These maximum periods are sometimes applied in practice. That said, there is no evidence that extended detention periods help removals, as removals tend to take place in initial phases of detention.[76] In draft Article 18(5), the Commission modified the current rules on the initial period of detention to ensure that the maximum period in national law is not shorter than three months. This provision may trigger a three-month automatic detention across the EU, which would then violate the lawfulness of detention. As underlined in the CJEU's ruling in *FMS*, Article 15 of the Directive precludes detention from being ordered without the examination of the necessity and proportionality of this measure.[77]

6.3 *Detention of Children*

In the past years, a norm of non-detention of children has gradually emerged and superseded the last resort principle (which is applicable to adults). Following other international bodies,[78] the UN Committee on the Rights of the Child and UN Committee on Migrant Workers established in their 2017

75 I. Majcher, *The European Union Returns Directive and Its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention, and Removal*, Immigration and Asylum Law and Policy in Europe 45, Leiden: Martinus Nijhoff 2019, p. 422.

76 EPRS, *Implementation Assessment*, Brussels: European Union 2020, p. 92.

77 CJEU, *FMS, FNZ, SA, SA Junior v. Országos Idegenrendészeti Főigazgatóság Dél-Alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, C-924/19 PPU, C-925/19 PPU, (May 14, 2020), para. 302(7).

78 As regards unaccompanied children, Parliamentary Assembly of the CoE and UN Special Rapporteur on the Human Rights of Migrants, see respectively PACE, *Resolution 1707 (2010): Detention of Asylum Seekers and Irregular Migrants in Europe*, Strasbourg: Council of Europe 2010, para. 9(1)(9); SRHRM, *Report of the Special Rapporteur on the Human*

General Comment that the principle of the last resort, which limits the detention of children within the juvenile criminal justice system, does not apply in immigration proceedings because it would be incompatible with the best interests of the child. Children should thus not be detained. Rather, unaccompanied children should be placed in an alternative care system and families with children should be placed in non-custodial, community-based, settings.[79] Article 17 of the Directive, however, still follows the older approach. Although Article 17(5) refers to the best interests of the child, which is also enshrined in Article 24(2) of the EU Charter, Article 17(1) allows detention of children as a last resort, which actually applies to all categories of returnees. As a result, states have adopted various approaches, ranging from prohibiting detention of unaccompanied children to limiting this measure to certain grounds or to children above certain age. Still, some states do not restrict this measure beyond the minimum requirement that detention of a child be a last resort solution.[80] The recast proposal does not remedy this situation; on the contrary, children are not excluded from the proposed maximum period of initial detention of at least three months to be established in national legislation. It is a missed opportunity for the Commission to ensure that the Directive is in line with the current international standards. In its implementation report on the Return Directive, adopted December 2020, the Parliament expressed its agreement with the clarification of the UN Committee on the Rights of the Child that children should never be detained for immigration purposes.[81]

7 Solutions and Minimum Safeguards for Non-returnable People

The underlying assumption of the Return Directive, as implied in Article 6, is that an irregularly residing person is either removed or granted a residence

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Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation, A/HRC/20/24, Geneva: UN 2012, para. 72(h).

79 CMW and CRC, *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*, CMW/C/GC/4–CRC/C/GC/23, (November 16, 2017), para. 11–13.

80 EPRS, *Implementation Assessment*, Brussels: European Union 2020, pp. 99–100.

81 See para. 34 of European Parliament resolution of 17 December 2020 on the implementation of the Return Directive (2019/2208(INI)), P9_TA-PROV(2020)0362. For a commentary of this resolution, see I. Majcher, 'The Implementation of the EU Return Directive: The European Parliament Aligns the EU Expulsion Policy with Recommendations of UN Human Rights Expert Mechanisms', *EU Law Analysis*, January 18, 2021, http://eulawanalysis.blogspot.com/2021/01/the-implementation-of-eu-return.html.

permit. If the removal is postponed for specific reasons, as mentioned in Article 9, the safeguards of Article 14 will apply in the meantime. By regulating these three scenarios only, the Directive fails to address the legal limbo situation of irregular migrants who cannot be returned for a longer period or even permanently. The strong resistance of Member States to bind themselves to European rules on rights for undocumented migrants, is reflected in recital 12, stipulating that the situation of non-returnable people "should be addressed," and that their basic conditions of subsistence should be defined according to national legislation. They rejected the initial proposal of the Commission to refer to certain essential rights in the Reception Conditions Directive (2013/33/EU).[82] Article 14 became the compromise between the Council and the Parliament, as it reduces the legal force of these entitlements, by referring to them as *principles* and allowing states to merely *take* [*them*] *into account as far as possible*.[83] Apart from the discretion this formulation leaves to states, the provision is only applicable to people during the period for voluntary departure and periods for which the removal has been postponed for the reasons mentioned in Article 9.[84] Among the reasons for postponement of removal, Article 9 does not explicitly include lack of cooperation by the country of origin, which is a frequent obstacle for immigration authorities. Furthermore, it is noteworthy that in *Abdida*, the CJEU ruled that if a person suffering from a serious illness has appealed against a return decision and whose enforcement may expose the person to a serious risk of grave and irreversible deterioration of the state of health, the safeguards of Article 14 are applicable pending return. According to the Court, the effectiveness principle requires that the emergency health care also includes the provision for the basic needs of the person concerned.[85]

If proposed Article 9 (the current Article 7) would be adopted, Article 14 will apply less frequently to returnees, as many of them may not be granted a voluntary departure period. As the 2013 study on the situation of third-country nationals pending return shows, states adopted diverse approaches towards

82 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*, COM(2005)391, (September 1, 2005), Article 13(1).

83 F. Lutz, *The Negotiations on the Return Directive*, Nijmegen: Wolf Legal Publishers 2010, para. 2.18.

84 Under Article 9(1), Member States *shall* postpone removal: (a) when it would violate the principle of non-refoulement, or (b) for as long as a suspensory effect is granted and they *may* postpone it taking into account the specific circumstances of the individual case, such as (a) the third-country national's physical state or mental capacity; (b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

85 CJEU, *Moussa Abdida*, para. 58–60.

non-returnable people. Yet, overall, they do not receive a residence permit and consequently face obstacles in accessing socio-economic rights and are at risk of detention.[86] That said, non-returnable people who do not fall under the scope of Article 9 are entitled to the right to human dignity, as enshrined in Article 1 of the EU Charter, as Union law is still applicable to them through Article 2(1) of the Directive. Outside the scope of EU law, the Council of Europe (CoE) legal framework came to provide for economic and social rights to irregular migrants. Regarding the Netherlands, the European Committee on Social Rights (ECSR) held that the human dignity of every person, regardless of their residence status, requires that everyone on the territory of a Member State be entitled to emergency social assistance and shelter. Access to these services cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion, according to the ECSR. It therefore decided that on the basis of Articles 13(4) and 31(2) of the European Social Charter, the Netherlands must provide for emergency assistance and shelter to migrants in an irregular situation, even when they are requested to leave the country.[87] A few years earlier, the Committee had already held that irregularly residing migrant children should be provided with food, clothing and adequate shelter.[88]

In *Mahdi*, the CJEU found that the purpose of the Directive is not to regulate the conditions of residence of people who cannot be deported. The Court observed that states are not obliged to issue an autonomous residence permit for a person who has no identity documents and has not obtained such documentation from his or her country of origin, and thus cannot be removed, yet, states may do so under Article 6(4) of the Directive.[89] Arguably, this provision should be applied together with Article 5 and interpreted as mandatory if the protection from *refoulement* is at stake. In the Commission's proposal for the Directive, Member States were not allowed to issue a return decision if the

86 European Commission (DG Home Affairs), *Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries*, HOME/2010/RFXX/PR/1001, study carried out by Ramboll and Eurasylum, Brussels: European Commission 2013, pp. 27–32 and 68–73.

87 ECSR, *Conference of European Churches* (*CEC*) *v. the Netherlands*, 90/2013, (July 1, 2014).

88 ECSR, *Defence for Children International* (*DCI*) *v. the Netherlands*, 47/2008, (October 20, 2009).

89 CJEU, *Mahdi*, para. 86–89; for a commentary see D. Acosta, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: Mahdi', *Common Market Law Review* 52(5) (2015), pp. 1361–1378, pp. 1368–1371; J.-B. Farcy, 'Unremovability under the Return Directive: An Empty Protection?', in: M. Moraru, G. Cornelisse and P. De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Oxford: Hart 2020, pp. 437–454, at pp. 447–448.

return would violate the principle of *non-refoulement*.[90] During the negotiations, Member States rejected this obligation and transformed it into the much weaker Article 5, which provides that when implementing the Directive, states should respect the principle of *non-refoulement*. Article 9(1) obliges states to postpone removal if that would violate the principle of *non-refoulement*, but not to withdraw or refrain from issuing a return decision. This implies that the person concerned remains in an irregular situation, unless a state would use the option of Article 6(4) to refrain from issuing a return decision for compassionate, humanitarian, or other reasons and to grant the person concerned the right to stay. All in all, without regularisation channels, return policy is incomplete and ineffective. In its 2014 Communication, the Commission stressed that "protracted situations" should be avoided and non-deportable people should not be left indefinitely without basic rights and at risk of unlawful re-detention.[91] The Directive can thus be considered as not preventing and even creating a vulnerable category of migrants – non-returnable people – who cannot be removed yet who are not granted any regular status. This gap results in EU return policy being both inefficient and potentially encroaching upon fundamental rights of the people concerned. The recast of the Directive does not remedy this long-known shortcoming, which is a missed opportunity to tackle one of the key gaps in the EU return policy.[92]

8 Conclusion

Despite earlier conclusions that the Return Directive has strengthened the procedural safeguards for third-country nationals but also facilitates efficient return procedures, Member States have successfully insisted on a proposal to make the Directive more restrictive. As the Commission's recast proposal was not accompanied by an impact assessment and the Commission failed to report on the implementation of the current rules, many of the draft amendments are merely based on presumptions in relation to their effects. What is more certain is that they will affect the fundamental rights and the principle of proportionality.

90 European Commission, *Proposal for Returns Directive*, Article 6(4).

91 European Commission, *Communication on EU Return Policy*, p. 8.

92 A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', *European Journal of Migration and Law* 11(1) (2009), pp. 1–17; D. Acosta, 'The Returns Directive: Possible Limits and Interpretation', in: K. Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers 2011, pp. 7–24, at pp. 16–17.

We pointed at the resulting increased use of detention, despite the lack of a correlation between number of detainees and the number of returns. Likewise, reducing options for voluntary departure and imposing an entry ban upon exit may even be counterproductive as less people would be willing to cooperate with the return process. One of the underlying approaches is to link the return procedure and asylum procedure, which disregards the necessary safeguards related to the principle of *non-refoulement*. In order to secure an individual assessment and respect for fundamental rights, harmonisation could be better achieved by establishing the red-lines and criteria as developed by the CJEU in its case-law on the risk of absconding and the principle of proportionality. Furthermore, ensuring the clear distinction between immigration detention and detention related to criminal proceedings would prevent circumventions of criminal law safeguards or immigration detention imposed despite insufficient perspective of return.

Not only is the proposed recast questionable from the perspective of the effectiveness of the return and the fundamental rights compliance but it also fails to address long-standing problem issues that could have been solved with new legislation. In this regard, the Commission could have proposed to remove the option of not applying the Directive in border situations as a way to combat and prevent irregularities at the external borders like persistent pushbacks, and at the same time to ensure stronger safeguards for the newly proposed border procedure in the Asylum Procedures Regulation. The recast proposal could have outlawed detention of children and increased the use of alternatives to detention in practice. The Commission could also have used this opportunity to finally address the situation of non-returnable people, who end up in limbo situation due to lack of obligation to offer the right to stay if the return is impossible, which is sometimes due to absence of effective and equal partnership between Member States and countries of origin. Similarly, it could have tackled the lack of EU standards on immigration detention conditions, by ensuring a minimum level of liberty within detention centres and rights for detainees in accordance with the purpose of immigration detention. That would have been appropriate after the Commission had blocked negotiations within the CoE on a recommendation on rules for immigration detention a few years earlier.

All in all, instead of ensuring evidence-based policy making, the Commission bowed to pressure and rhetoric from the governments. There is an urgent need for an open and rational discussion on the very concept of sustainable and effective return and reintegration policies and willingness to address the gaps in the current rules which have been ignored so far. The negotiations on the new Pact on Migration and Asylum, with its focus on return, are the right opportunity to start this discussion.