

FRA Opinion – 1/2019
[Return]

Vienna, 10 January 2019

The recast Return Directive and its fundamental rights implications

Opinion of the
European Union Agency for Fundamental Rights

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Acronyms

AMF	Asylum and Migration Fund
AVR	Assisted Voluntary Return
CJEU	Court of Justice of the European Union (CJEU is also used for the time predating the entry into force of the Lisbon Treaty in December 2009)
EBCG	European Border and Coast Guard
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ETIAS	European Travel Information and Authorisation System
EU	European Union
EURODAC	European Asylum Dactyloscopy Database
GDPR	General Data Protection Regulation (Regulation (EU) 2016/679)
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA *“to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”*,

Having regard to Article 4 (1) (d) of Council Regulation (EC) No. 168/2007, with the task of FRA to *“formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”*,

Having regard to Recital (13) of Council Regulation (EC) No. 168/2007, according to which *“the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”*,

Having regard to previous FRA Opinions on related issues, in particular the FRA Opinion relating to the proposal for a revised Eurodac Regulation,¹ the FRA Opinion on interoperability,² the FRA Opinion on the proposed Regulation on the European Travel Information and Authorisation System,³ the FRA Opinion on the revised Visa Information System and its fundamental rights implications⁴ and the FRA Opinion on the revised European Border and Coast Guard Regulation and its fundamental rights implications,⁵

¹ FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact on fundamental rights of the proposal for a revised Eurodac Regulation*, FRA Opinion – 6/2016 [Eurodac], Vienna, 22 December 2016.

² FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on interoperability and fundamental rights implications*, FRA Opinion – 1/2018 [Interoperability], Vienna, 11 April 2018.

³ FRA (2017), *Opinion of the European Union Agency for Fundamental Rights on the impact on fundamental rights of the proposed Regulation on the European Travel Information and Authorisation System (ETIAS)*, FRA Opinion – 2/2017 [ETIAS], Vienna, 30 June 2017.

⁴ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised Visa Information System and its fundamental rights implications*, FRA Opinion – 2/2018 [VIS], Vienna, 30 August 2018.

⁵ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications*, FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018.

Having regard to the request of the European Parliament of 20 December 2018 to FRA for an Opinion “addressing the new elements of the [Return] Directive proposed by the Commission in the Recast in line with FRA’s mandate”,

SUBMITS THE FOLLOWING OPINION:

Opinions

1. Framework to better protect fundamental rights

FRA Opinion 1: Having a reference to the Council of Europe's Twenty Guidelines on forced return

The Council of Europe's 'Twenty Guidelines on forced return', currently mentioned in Recital (3), serve as a key reference point for a fundamental rights compliant interpretation and application of the Return Directive.

To acknowledge the importance of the Council of Europe's 'Twenty guidelines on forced return' in the interpretation and application of the Return Directive, the EU legislator should keep current Recital (3), which refers to these guidelines.

FRA Opinion 2: Pointing to priority needs for EU funding

Proposed Recital (40) states that Member States should draw on EU financial and operational support, in particular for establishing return management systems and return assistance programmes. This should be in parallel with other actions supporting effective and fundamental rights compliant return policies at the Member State level, including those designated as priority actions under the proposed Asylum and Migration Fund.

The EU legislator should consider expanding Recital (40) to underline the availability of EU financial support also for other actions that may be essential to ensure the practical implementation of fundamental safeguards required by the Return Directive. This Recital could include the other return-relevant priority actions under Annex IV of the proposed Regulation establishing the Asylum and Migration Fund: actions to develop and implement effective alternatives to detention, and measures targeting vulnerable persons with special reception and/or procedural needs, including measures to ensure effective protection of children in migration. Other actions that the EU legislator could expressly mention are effective forced return monitoring systems and provision of legal aid, as well as interpretation and translation, as Member States face difficulties in applying these three safeguards in practice.

FRA Opinion 3: Avoiding rules which undermine the primacy of voluntary departure

Article 9 (1) and (4) of the proposal seeks to introduce stricter rules limiting the use of voluntary departure. In doing so, it is at odds with the general logic of the directive to give preference to voluntary returns over forced returns. In addition, the otherwise welcome provision in proposed Article 14 (3), which obliges Member States to establish assisted voluntary return programmes, limits this unnecessarily to third-country nationals subject to a visa requirement. The last subparagraph of proposed Article 14 (3) also makes access to voluntary return programmes conditional on the cooperation of the returnee with the authorities, which, as described in FRA Opinion 6, would often be difficult to operationalise and could discourage persons from returning voluntarily.

To uphold the priority of voluntary departure over forced returns, the EU legislator should:

- **keep the minimum period of voluntary departure of seven days in proposed Article 9 (1) to prevent arbitrary immediate returns;**
- **revert the “shall clause” in the chapeau of proposed Article 9 (4) to a “may clause”, leaving the non-granting of a period of voluntary departure to Member States as an option but not prescribing it as an obligation;**
- **remove from the first sentence of proposed Article 14 (3) the following precondition: “who are nationals of third countries listed in Annex I to Regulation (EU) 2018/1806” – to not exclude visa-free third-country nationals in an irregular situation;**
- **delete the last sentence of proposed Article 14 (3) to do away with the cooperation requirement that unduly restricts the possibility to benefit from assisted voluntary return (AVR) support measures.**

FRA Opinion 4: Reflecting the duty to protect stateless persons in the context of returns

The subject matters covered by the Return Directive impact on issues that are regulated in international law. Proposed Recitals (4) and (44) therefore clarify that the directive does not affect the obligations of EU Member States under international law, including refugee and human rights law, specifically mentioning selected conventions. These recitals do, however, not expressly mention the core instrument to protect stateless persons, which is also relevant in return-related procedures.

In Recital (44), the EU legislator should consider adding the 1954 United Nations Convention Relating to the Status of Stateless Persons. Additionally, the EU legislator should explicitly refer to the “protection of stateless persons” at the end of the first sentence in Recital (4).

2. Procedures

FRA Opinion 5: Limiting undesirable consequences of combining end of legal stay and return decisions

To enhance the efficiency of returns and prevent unlawful onward movements within the EU, Article 8 (6) and Recital (7) of the proposal encourage Member States to issue a return decision together with or immediately after a decision terminating legal stay. This approach is *per se* not unlawful, but it requires clear safeguards to protect the right to asylum, the principle of *non-refoulement* and the right to an effective remedy.

To prevent the risk of violations of rights enshrined in Articles 7, 18, 19 and 47 of the EU Charter of Fundamental Rights when implementing the Return Directive, the EU legislator should strengthen the safeguards in proposed Article 8 (6) by:

- ***explicitly referencing the most relevant Charter rights in the ‘without prejudice clause’ in the last sentence of proposed Article 8 (6), along the following lines: “including the right to respect for private and family life, the right to asylum, the principle of non-refoulement and the right to an effective remedy”;***
- ***adding the word “final” before the expression “decision ending a legal stay of a third-country national”.***

FRA Opinion 6: Inserting adequate safeguards in the duty to cooperate

Article 7 of the proposal seeks to introduce the obligation of the returnees to cooperate with the authorities throughout the return process, listing four non-exhaustive examples of what such duty entails. The duty to request a travel document from the authorities of the country of origin, if implemented against persons who sought asylum and whose application is not yet decided in the final instance, creates a risk of violating the right to asylum and the principle of *non-refoulement*. Added to this, the consequences of not complying with the obligation to cooperate are not set out in the proposal, giving Member States wide discretion to establish potential sanctions.

To better respect the principle of human dignity, the right to asylum and the principle of non-refoulement, the EU legislator should delete subparagraph (d) of proposed Article 7 (1) or, alternatively, exclude its application to stateless persons, as well as to rejected asylum applicants until a final decision has been taken on their application. This could, for example, be achieved by adding a 'without prejudice clause' at the end of subparagraph (d) of the above-mentioned provision, also acknowledging the specific situation of stateless persons.

To ensure legal certainty and to avoid excessive divergences in Member States' practices, Article 7 (3) of the proposal should specify the limits of the measures that national authorities can apply in case of non-compliance with the obligation to cooperate, having due regard to applicable fundamental rights safeguards.

FRA Opinion 7: Avoiding entry bans without a return decision

Proposed Article 13 (2) introduces the possibility for Member States to impose an entry ban on third-country nationals whose irregular stay is detected by border guards when the third-country nationals leave EU territory, without issuing a return decision. The proposal indicates that this would allow to issue entry bans in a more expedited manner. This could foreseeably lead to decisions on entry bans that are issued in a swift manner without adhering to the non-derogable procedural requirements stemming from the right to good administration. Any measure issued under the Return Directive which negatively affects individuals needs to comply with the formal requirements and procedural safeguards flowing from current Articles 12 and 13 of the Return Directive and the right to good administration, including the right to be heard, which is a general principle of EU law.

The EU legislator should reconsider the possibility to give Member States the option of issuing EU-wide entry bans to people whose irregular stay is detected when they leave EU territory, without issuing to them also a return decision.

3. Remedies

FRA Opinion 8: Maintaining Member States' flexibility in relation to judicial review

Article 16 (1) of the proposed recast Return Directive would require Member States to have only one instance of judicial review against return-related decisions in case of rejected asylum seekers subject to a return procedure. Applying a one instance only judicial review at national level is compatible with EU law. CJEU case law, however, also emphasises the procedural autonomy of Member States to set up their system of courts

and determine procedural rules governing actions for safeguarding rights which individuals derive from EU law.

The EU legislator should consider adding the word “at least” after the term “the right to appeal” in the second subparagraph of proposed Article 16 (1) to properly codify applicable CJEU case law in view of the principle of procedural autonomy and taking into account relevant fundamental rights safeguards.

FRA Opinion 9: Avoiding undue restriction of the suspensive effect of appeals

Interfering with Member States’ procedural autonomy by limiting the availability of the suspensive effect of appeals (proposed Article 16 (3)) is at odds with the right to an effective remedy under Article 47 of the Charter. The envisaged new modalities regulating the suspensive effect to appeals for rejected asylum seekers subject to a return decision (third subparagraph of Article 16 (3)) do not take into account the different nature of the judicial review in the asylum and return context, notably when assessing the risk of *refoulement* and whether the right to respect for private and family life bars the removal.

To avoid unduly restricting the suspensive effect of appeals on removals, the EU legislator should delete the third subparagraph of Article 16 (3). The general rule in Article 16 (2) should apply to these situations.

FRA Opinion 10: Establishing reasonable time limits for seeking a remedy

Reducing the time limit to appeal a return decision to five days in case of rejected asylum applicants in proposed Article 16 (4) does not appear to be “reasonable” in light of the CJEU and ECtHR jurisprudence.

The EU legislator should delete the second subparagraph of Article 16 (4), or alternatively, it could provide for a time limit that complies with the CJEU requirements in the Samba Diouf ruling.

4. Detention

FRA Opinion 11: Ensuring that detention remains a measure of last resort

By removing the wording in proposed Recital (27) whereby pre-removal detention should be “limited” and deleting the word “only” in proposed Article 18 (1), the proposal unduly broadens the scope of interpretation of what constitutes lawful, proportionate and necessary use of pre-removal detention. It thus moves away from the principle of detention as a measure of last resort.

The EU legislator should maintain the reference to detention being “limited” in Recital (27) and keep the word “only” in Article 18 (1), first sentence, of the proposal, to ensure that pre-removal detention remains a measure of last resort.

FRA Opinion 12: Streamlining the concept of ‘risk of absconding’

Article 6 of the proposal introduces a non-exhaustive list of criteria that Member States must use to determine the existence of a risk of absconding. Some of the criteria proposed give rise to a rebuttable presumption of the existence of such risk. The broad scope of the criteria in paragraph (1) could lead to assuming a risk of absconding for the majority of irregular migrants in the EU, and some of its elements may not be suitable for properly

assessing the risk of absconding. The introduction of a rebuttable presumption of a risk of absconding under paragraph (2) would shift the burden of proof to the third-country national, absolving the national authorities from conducting an individual assessment of the circumstances of the case. In combination, the elements of proposed Article 6 give rise to a risk of arbitrary detention with deprivation of liberty being resorted to also when not necessary and proportionate. In practice, the proposed changes could lead to the prioritisation of detention and forced removal over less intrusive means.

To avoid that the proposed Article 6 leads to a reversal of the principle of imposing detention as a measure of last resort, the EU legislator should clearly stipulate that an overall assessment of the specific circumstances of the individual case must always be conducted. Such assessment must not only take into account those criteria pointing to the existence of a risk of absconding but also those indicating the absence of such risk, some of which could be expressly mentioned in the text. To this end, the EU legislator should:

- ***rephrase the first sentence of proposed Article 6 (1) using a more nuanced wording, such as: “When assessing the existence of a risk of absconding referred to in Article 3 (7), Member States shall take into due account the following criteria indicating that a third-country national may abscond:”;***
- ***change the first sentence of proposed Article 6 (2) as follows: “The existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria referred to in paragraph (1), as well as all relevant factors indicating the absence of a risk of absconding. Any automatic conclusion of the existence of a risk of absconding based on a single criterion must be avoided.”;***
- ***delete subparagraphs (k) and (l) of proposed Article 6 (1);***
- ***delete the second sentence of proposed Article 6 (2) which intends to introduce a rebuttable presumption of a risk of absconding.***

FRA Opinion 13: Avoiding inappropriate use of public policy, public security or national security concepts

In Article 18 (1) (c), the proposal introduces an additional ground for detention of third-country nationals in the return procedures. This relates to those third-country nationals who pose a risk to public policy, public security or national security. The Explanatory Memorandum to the proposal does not provide a detailed justification explaining why such cases cannot be addressed through the standard criminal law instruments. According to the Court of Justice of the EU, the scope of the “national security and public order” as well as “public policy” exceptions in the context of EU asylum and immigration legislation must be interpreted narrowly.

The detention of third-country nationals who pose a risk to public policy, public security or national security should be addressed by using already available criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. Should the EU legislator conclude that it is necessary and proportionate to provide an additional ground for deprivation of liberty for this category of persons under the Return Directive, it should include a new recital in the proposal, reflecting the narrow scope of these concepts as interpreted by the CJEU. Such recital should not only apply to

the grounds for detention but to all references to public policy, public security and national security included in the Return Directive.

FRA Opinion 14: Refraining from setting a bottom limit to maximum detention periods

The proposal requires, in Article 18 (5), that Member States must ensure that the maximum length of detention provided for under national law is not less than three months. Available data does not support that this would be necessary to stimulate effective returns, as there does not seem to be a clear correlation between the maximum period of detention established under national law and the effectiveness of return from individual Member States.

The EU legislator should consider keeping the rules on the maximum length of detention included in Article 15 (5) of the current version of the Return Directive unchanged.

5. Protecting personal data in the context of return

FRA Opinion 15: Reducing risks of defining return as an “important reason of substantial public interest”

The proposal designates return as an important issue of substantial public interest. Without adequate safeguards, this designation may be perceived as authorising Member States to share with third countries or international organisations all information that may be considered relevant for returns, and absolving the national authorities of applicable data protection obligations.

If the EU legislator considers that it is justified to designate return as an important issue of substantial public interest, reliance on "substantial public interest" as a legal ground for the processing of personal data must be accompanied by adequate safeguards. Proposed Recital (47) or another relevant recital should therefore:

- ***remind Member States of Article 8 of the Charter (right to protection of personal data) and of their obligation to ensure that the requirements under Article 9 (2) (g) of the Regulation (EU) 2016/679 (General Data Protection Regulation) must continue to be met. This includes proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;***
- ***clearly state that qualifying return as an important reason of substantial public interest does not justify the sharing of all data or documents that may be considered useful for returns, without further limitations;***
- ***remind Member States of the need to avoid any contacts with asylum applicants' country of origin as long as no final decision on the application for international protection has been taken.***

To be effective, similar safeguards would need to be introduced in the proposed new Regulation on the European Border and Coast Guard.

FRA Opinion 16: Framing national return management systems

Under proposed Article 14 (1), Member States will be required to set up, operate, maintain and further develop national return management systems, automatically communicating data to a central system operated by the European Border and Coast Guard Agency. The return management systems will contain further unspecified personal data of returnees. Without further safeguards, this may lead to data protection violations and to including confidential information from the asylum file.

In view of fully complying with Article 8 of the Charter and the EU acquis on data protection, the EU legislator should modify Recital (38) to:

- ***remind Member States of the applicability of EU data protection legislation to any processing of personal data in their return management systems, including the communication of this data to the central system operated by the European Border and Coast Guard Agency. The principles of lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability of the data controller could be explicitly mentioned;***
- ***underline that the national return management systems should not contain any information obtained during the personal interview carried out on the basis of Article 15 of Directive 2013/32/EU (Asylum Procedures Directive).***

6. Border procedure

FRA Opinion 17: Postponing discussions on the border procedure

Article 22 of the proposal would oblige Member States to introduce a special procedure at borders for third-country nationals whose application for international protection has been rejected in the border procedure under the proposed revision of the EU asylum legislation. Given that the reform of the Common European Asylum System is ongoing and the scope of the border procedure under the asylum *acquis* and safeguards applicable during such procedure are not yet known, it is premature to create a legislative framework that seeks to reflect and be closely interlinked with the proposed Asylum Procedure Regulation.

Furthermore, a number of specific elements of the proposed Article 22 raise serious fundamental rights risks, including the proposed very short deadline to submit an appeal, the absence of an automatic suspensive effect in cases where the applicant presents an arguable claim of risk of *refoulement*, the form of decisions and the regulation of detention in the border procedure.

In the absence of agreed legislation on asylum framing the border procedure, it is not possible to suggest solutions that would re-design the proposed border procedure in the Return Directive to ensure its fundamental rights compliance.

The EU legislator should omit Article 22 from the proposal. The proposed text raises a number of specific fundamental rights issues.

Given the interdependence between the proposed border procedure and the asylum procedure, any discussion to design a border procedure for returns should be postponed until a final agreement on the details of the new EU asylum framework is reached.

Introduction

This Opinion by the European Union Agency for Fundamental Rights (FRA) aims to inform the European Parliament's position on the legislative proposal for a recast Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), presented by the European Commission on 12 September 2018.⁶ Throughout the text, this FRA Opinion refers to the legislative text using the wording "the proposal" or "the Commission proposal". References to "proposed Article" or "proposed Recital" designate provisions in the Commission proposal, whereas the terms "current Article" or "current Recital" refer to the text of the Return Directive in force in January 2019.

The Return Directive was adopted in 2008 to provide common standards and procedures to be applied by Member States to persons who do not fulfil the conditions for entry, stay or residence in a Member State, with a view of promoting an effective return policy.⁷ It lays down common rules related to the issuing of return decisions and enforcement of removals, the use of pre-removal detention as well as procedural safeguards, including access to effective remedies. It integrates into the European Union (EU) return policy a set of principles stemming from international and EU law, including the EU Charter of Fundamental Rights (the Charter), and notably the principle of *non-refoulement*, the best interests of the child, the primacy of voluntary departure over forced returns, the right to family life, and the use of detention as a measure of last resort. The directive entered into force on 13 January 2009 and Member States had to transpose its provisions into their domestic legislation until 24 December 2010 (with the exception of the free legal assistance and/or representation for which the transposition deadline expired one year later).

In the initial evaluation report on the application of the Return Directive published in March 2014, the European Commission observed that the flexibility of the directive and the implementation of its provisions by Member States had positively influenced the situation regarding voluntary departure and effective forced return monitoring. It had also contributed to achieving more convergence on detention practices, including the overall reduction of pre-removal detention periods with a wider implementation of alternatives to detention across the EU.⁸

Since the adoption of the European Agenda on Migration in May 2015,⁹ the objective of increasing the EU return policy's effectiveness, measured primarily by the enforcement rate of return decisions issued by individual Member States, has been gradually gaining prominence. In March 2017, the European Commission adopted a Recommendation

⁶ European Commission (2018), *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*, Brussels, 12 September 2018, 2018/0329(COD); COM(2018)634 final, Brussels, 12.9.2018.

⁷ *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*, OJ L 348, 12.24.2008, pp. 98-107.

⁸ European Commission (2014), *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM 2014(199) final, Brussels, 29 March 2014, pp. 15-17, 21-22.

⁹ European Commission, *A European Agenda on Migration*, Brussels, 13 May 2015, COM(2015) 240 final.

including a set of measures for Member States to make returns more effective.¹⁰ A number of these recommendations are based on the findings of the Schengen evaluation mechanism, which, after its reform,¹¹ began to assess the conformity of the return systems and practices of the Member States with the EU return *acquis* in 2015.¹² To tackle obstacles to the implementation of return decisions and increasing the rate of returns, the European Commission also revised in 2017 the Return Handbook,¹³ which provides guidance to national authorities competent for carrying out return related tasks on the application of the Return Directive. In its Conclusions of 28 June 2018, the European Council highlighted the need to step up the effective returns of migrants in an irregular situation and welcomed the European Commission's intention to make legislative proposals for a more effective and coherent European return policy.¹⁴ In May 2018, the European Parliament called on EU Member States to ensure swift and effective return procedures, once a return decision has been issued. At the same time, it emphasised the requirement of full respect for fundamental rights, and humane and dignified conditions when carrying out returns.¹⁵

On this basis, the European Commission proposed a targeted recast of the Return Directive. In the Explanatory Memorandum to the proposal, it highlights two major challenges: the difficulties and obstacles encountered by the Member States within their own countries in successfully enforcing return decisions, and the cooperation with countries of origin to enable actual removals. The Commission proposal focuses on addressing the first category of issues.

From a fundamental rights point of view, the most important changes the proposal introduces are:

- including stricter rules for granting a period for voluntary departure while making it compulsory for Member States to have in place a national system for assisted voluntary returns;
- streamlining procedural steps throughout the return procedure, including linking the issuing of return decisions to the termination of legal stay (such as the rejection of an application for international protection), stipulating an explicit obligation of the third-country national to cooperate with the authorities, and extending the use of entry bans;

¹⁰ 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, C(2017)1600, OJ L 66, 11.3.2017, pp. 15-21.

¹¹ Council Regulation (EU) No. 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, 7 October 2013, OJ L 295, 6.11.2013, pp. 27-37.

¹² Council Regulation (EU) No. 1053/2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, 7 October 2013, OJ L 295, 6.11.2013, pp. 27-37.

¹³ 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 L 339/83, 19.12.2017. Initially, Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 final, Brussels, 1.10.2015, Annex.

¹⁴ European Council (2018), *European Council meeting (28 June 2018) – Conclusions*, Brussels 28 June 2018, EUCO 9/18, para 10.

¹⁵ European Parliament (2018), *Resolution of 30 May 2018 on the annual report on the functioning of the Schengen area*, P8_TA(2018)0228, para. 44.

- proposing stricter rules for remedies against return decisions by prescribing a maximum period for lodging an appeal and limiting the suspensive effect of such appeals;
- providing conditions for enhanced use of pre-removal detention, including by introducing specific criteria to conclude whether a third-country national poses a risk of absconding, and requiring that the maximum detention period permitted under national law is no less than three months;
- requiring the Member States to set up a system for the exchange of information, including personal data, with the European Border and Coast Guard Agency, and relaxing the requirements for personal data sharing with third countries;
- establishing a new border procedure for the rapid return of rejected applicants for international protection.

In addition, the proposal contains a number of further modifications, including changes to the recitals reflecting the modifications proposed to the operative provisions and underlining the overall priority attached to the effectiveness of return policy. Partly due to the increasing calls by some Member States for an urgent revision of the Return Directive, the proposal has been tabled without an impact assessment to examine whether there is a need for additional EU action in the field of return – despite the Commission’s earlier commitment to table legislative amendments to the directive only after a thorough evaluation of its implementation.¹⁶ This also did not allow examining the degree to which the recent difficulties in implementing returns are of structural nature or are specifically linked to the exceptional situation following the arrivals in 2015-2016.

FRA regrets the absence of a thorough impact assessment. This would have helped to assess what the proposed changes would achieve in practice and made it easier to determine the necessity and proportionality of interferences to fundamental rights. Nor did the European Commission publish an evaluation showing whether the recent policy changes and recommendations introduced after 2015 have actually affected the return rate or the fundamental rights of returnees. This means that the justification of the proposed changes is limited to a rather brief Explanatory Memorandum.

The proposal has been introduced together with a proposal for a new Regulation on the European Border and Coast Guard (EBCG Regulation),¹⁷ in the context of which FRA submitted an Opinion at the request of the European Parliament on 27 November 2018.¹⁸ Given that such proposal envisages an enhanced role of the European Border and Coast Guard Agency in supporting Member States in the field of returns, Chapter 5 of this FRA Opinion builds on FRA’s Opinion of 27 November 2018.

¹⁶ See Annex 1 to the [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, Brussels, 2.3.2017, Annex 1, p. 3.

¹⁷ European Commission (2018), [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°98/700/JHA, Regulation \(EU\) No. 1052/2013 of the European Parliament and of the Council and Regulation \(EU\) n° 2016/1624 of the European Parliament and of the Council](#), Brussels, 12 September 2018, 2018/0330(COD); COM(2018)631 final.

¹⁸ FRA (2018), [Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications](#), FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018.

As part of its work in the area of migration, FRA has been closely following the developments of the EU return policy, as well as its implementation by EU Member States. FRA provides support to the Schengen Evaluation Mechanism in the field of return and readmission as an observer in on-site evaluation visits.¹⁹ It attends meetings of the “Contact Group Return Directive 2008/115/EC”,²⁰ regularly convened by the European Commission, where Member States’ return experts discuss, with the Commission in lead, the current hands-on challenges and newly emerged issues relating to the implementation and application of the Return Directive. The Agency has also been dealing with diverse return-related matters in the context of its research, provision of legal opinions, field presence in the “hotspots” in Greece and Italy, as well as in its close cooperation with the European Border and Coast Guard Agency. In all these settings, the increased attention to the effectiveness of return policies could be observed, particularly after the increase in migratory movements in 2015-2016.

At the same time, at the national level, challenges in applying the fundamental rights standards enshrined in the Return Directive persist, including in relation to some of its core principles. Therefore, a comprehensive reform of the return *acquis* should only pursue the goal of increased effectiveness if it can, at the same time, ensure that the steps taken in that direction are accompanied by unambiguous and enforceable fundamental rights safeguards.

Jurisprudence of international, EU and national courts illustrates the complexity of legal issues involved in the return procedures, in particular how returns may affect the fundamental rights of the persons concerned. Since the entry into force of the Return Directive (13 January 2009), the Court of Justice of the European Union (CJEU) has delivered 26 rulings interpreting the directive. All this case law has been produced following the activation of the preliminary ruling reference procedure. This procedure before the CJEU is triggered when national courts find themselves in need of more clarity regarding the interpretation and application of various provisions of the directive.²¹ This shows the need for a careful balance between competing interests and considerations, including Member States’ legitimate interests to expel and remove migrants in an irregular situation, on the one hand, and the fundamental rights of the people concerned, on the other hand. Annex 1 lists all CJEU rulings relating to the Return Directive issued by 10 January 2019, also indicating their subject matter. In its rulings, the CJEU draws on a large body of European Court of Human Rights (ECtHR) jurisprudence relevant to the subject matter of the Return Directive. It thereby reflects Article 52 (3) of the Charter which stipulates that where fundamental rights under the Charter correspond to rights guaranteed by the European

¹⁹ *Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen*, OJ L 295/27, Article 10 (5).

²⁰ For a brief description of this Contact Group and further relevant information, including the agendas and meeting minutes, see <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2232>.

²¹ For more information on CJEU return-related case law and its embeddedness in international human rights law, see Molnár, T. (2018), ‘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 Carrera, S., den Hertog, A. P. L., Panizzon, M., Kostakopoulou, D., *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Leiden, Brill/Nijhoff, 2018, pp.105-124.

Convention on Human Rights (ECHR), the meaning and scope of those rights must be the same.²²

Both the CJEU and ECtHR jurisprudence illustrate that ensuring respect for fundamental rights in return procedures, besides safeguarding the rights of the returnees, also serves the interests of national authorities, as well as the effectiveness and overall credibility of the EU return policy. It prevents situations where fundamental rights violations during the return procedure lead to challenges at a later stage, resulting in delays in the removal operations, prolonged detention and interventions of national or international courts, as well as reputational damage to the national authorities concerned.

The proposal integrates some of the CJEU case law interpreting the Return Directive. It focuses, however, primarily on those judgements that support the goal of increased effectiveness and facilitation of the return procedures, not using the opportunity to integrate case law that consolidates the fundamental rights safeguards enshrined in the directive. At the same time, the proposal continues to highlight the underlying principles governing EU return policy, including the principles of *non-refoulement*, the best interests of the child, the primacy of voluntary departure over forced returns, the right to family life, and the use of detention as a measure of last resort. These principles have largely remained unchanged in the recitals of the proposal. It is, therefore, important to ensure that the operational provisions of the Return Directive also continue to reflect these fundamental rights and principles and ensure their practical application by the national authorities.

Due to the formulation of the proposal as a targeted recast – rather than a comprehensive review of the whole text – and in light of the scope of the European Parliament’s request, this FRA Opinion focuses on the key proposed changes to the Return Directive. Therefore, it does not provide suggestions on how fundamental rights safeguards could be better incorporated in other parts of the text, for example, as concerns the procedure for ordering and reviewing detention decisions, alternatives to detention, conditions of detention and the detention of children and families, which the Agency has repeatedly identified as key fundamental rights issues in the application of the Return Directive.²³

Furthermore, this FRA Opinion does not examine the fundamental rights implications of possible additional amendments that may be made to other provisions of the Return Directive during the legislative process. This includes, for instance, a past suggestion to enable returns to any third country that would accept a third-country national, regardless of his or her consent and irrespective of whether the returnee has any link to such third country.²⁴ This raises significant concerns not only from a fundamental rights point of view, but also with regard to the sustainability of such returns.

²² For an overview of ECtHR jurisprudence in this domain, see FRA (2014), *Handbook on European law relating to asylum, borders and immigration. Edition 2014*, Luxembourg, Publications Office of the European Union.

²³ See, for instance, FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union; FRA (2015), *Alternatives to detention for asylum seekers and people in return procedures*, Vienna; FRA (2010), *Detention of third country nationals in return procedures*, Luxembourg, Publications Office of the European Union.

²⁴ This proposal was part of the position of the Council during the negotiations of the current text of the Return Directive in 2007-2008. See e.g. Lutz., F. (2010), *The Negotiations on the Return Directive. Comments and Materials*, Nijmegen, Wolf Legal Publishers, pp. 179-213.

This FRA Opinion comprises 17 individual opinions that relate to various fundamental rights enshrined in the Charter “addressed to the Member States [...] when they are implementing Union law”²⁵ or “when they act in the scope of EU law.”²⁶ It touches on the following rights, namely:

- the right to human dignity (Article 1 of the Charter);
- the prohibition of torture, inhuman and degrading treatment or punishment (Article 4 of the Charter);
- the right to liberty (Article 6 of the Charter);
- the right to respect for private and family life (Article 7 of the Charter) and the right to protection of personal data (Article 8 of the Charter);
- the right to asylum (Article 18 of the Charter);
- the protection in the event of removal, expulsion or extradition (Article 19 of the Charter);
- equality before the law (Article 20 of the Charter);
- non-discrimination (Article 21 of the Charter);
- the rights of the child (Article 24 of the Charter);
- the right to good administration (a general principle of EU law mirrored for Union institutions and bodies in Article 41 of the Charter);
- the right to an effective remedy and to fair trial (Article 47 of the Charter).

This Opinion is structured as follows: Chapter 1 looks at selected horizontal fundamental rights implications of the proposed changes, including the role of voluntary departure as opposed to forced return. Chapter 2 deals with specific fundamental rights challenges arising from the proposal under the individual stages of the return procedure. Chapter 3 examines the changes to the system of remedies. Chapter 4 analyses the impact of the proposal in the field of pre-removal detention. Chapter 5 looks at the impact of selected parts of the proposal in the field of protection of personal data, without prejudice to a possible dedicated opinion delivered by the European Data Protection Supervisor. Finally, Chapter 6 addresses the main fundamental rights concerns arising from the proposed introduction of a border procedure.

²⁵ See Article 51 of the [Charter of Fundamental Rights of the European Union](#), OJ C 326, 26.10.2012, p. 391-407; FRA (2018), [Challenges and opportunities for the implementation of the Charter of Fundamental Rights](#), Opinion 4/2018.

²⁶ CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013 [GC], paras. 20-21. See also: FRA (2018), [Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance](#), Luxembourg, Publications Office of the European Union, pp. 17-18; Hancox, E. (2013), ‘The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: Åkerberg Fransson’, 50 *Common Market Law Review* (2013) pp. 1411-1432.

1. Framework to better protect fundamental rights

The Return Directive as currently in force refers a number of times to international law, including human rights law as well as EU fundamental rights law. These references feature both in the preamble – see current Recitals (2), (17), (22)-(24) – and in some of its operative provisions (current Articles 1, 5, 9 and 17). The proposal adds a further reference to international law on refugee protection and human rights obligations in proposed Recital (4). In addition to mentioning several international conventions on the protection of human rights (the ECHR and the 1989 United Nations Convention on the Rights of the Child²⁷) and refugee protection (the 1951 Geneva Convention relating to the Status of Refugees²⁸ and its 1967 New York Protocol²⁹) in the above Recitals, Article 1 sets out a general human rights obligation of Member States. It stipulates that the common standards and procedures laid down in the directive must be applied “in accordance with fundamental rights as general principles of [Union] law as well as international law, including refugee protection and human rights obligations.” All this is corroborated by the requirement to respect the fundamental rights and to observe the principles enshrined in the Charter (current Recital (24), reproduced in proposed Recital (45)). The directive thus attributes, in principle, a significant role to fundamental rights in the application of return-related procedures and measures.

The Explanatory Memorandum declares that the proposal respects fundamental rights, and enumerates selected Charter rights.³⁰ Although several of the proposed changes impact on a number of rights in an area which is sensitive from a fundamental rights perspective, the Explanatory Memorandum does not meaningfully engage with the fundamental rights implications of the proposed amendments.

In the Chapter 1, this FRA Opinion suggests ways to strengthen existing horizontal fundamental rights safeguards to reinforce them in light of the intrusive nature of some of the proposed amendments on fundamental rights.

1.1. Having a reference to the Council of Europe’s Twenty Guidelines on forced return

The proposal suggests deleting – from current Recital (3) of the preamble – the reference to the Council of Europe’s ‘Twenty Guidelines on forced return’ adopted by the Committee of Ministers in May 2005.³¹ The Explanatory Memorandum accompanying the proposal does not give an explanation why it would be necessary to remove such a reference from the text.

Although not being an EU but a Council of Europe instrument, the Twenty Guidelines on forced return had provided a useful and authoritative source of inspiration when drafting

²⁷ United Nations Convention on the Rights of the Child, New York, 20 November 1989 (UNTS No. 27531, Vol. 1577, p. 3).

²⁸ Convention relating to the Status of Refugees, Geneva, 28 July 1951 (UNTS No. 2545, Vol. 189, p. 137).

²⁹ Protocol relating to the Status of Refugees, New York, 31 January 1967 (UNTS No. 8791, Vol. 606, p. 267).

³⁰ European Commission (2018), *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*, 2018/0329(COD); COM(2018)634 final, Brussels, 12.9.2018 – Explanatory Memorandum, p. 6.

³¹ Council of Europe, *Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted at the 925th Meeting of the Ministers’ Deputies*, Strasbourg, 4 May 2005.

the original proposal of the directive. Similarly, these guidelines proved to be very helpful during the final stage of negotiations between the co-legislators, since all Member States had already accepted them, at least politically, at ministerial level in the framework of the Council of Europe. Hence, the compromise solutions on a number of contentious issues have often been inspired by this set of standards as the middle-ground basis for agreement (“golden bridge”).³² Given that current Recital (3) explicitly refers to these guidelines, they can be considered as a complementary tool for the interpretation of the directive. The CJEU already referred to them in its case law unfolding various provisions of the Return Directive.³³

Pursuant to Recital (24) read in conjunction with Article 1, fully respecting fundamental rights in the application of the directive is an underlying obligation of Member States across the return procedures. The Twenty Guidelines can shed more light on how to ensure a fundamental rights compliant implementation of the Return Directive, as it provide practical guidance for national authorities on how to uphold the relevant human rights standards in the context of return. The EU Return Handbook – a Commission recommendation providing guidance to the Member States’ authorities carrying out return related tasks – explicitly reflects this function of the guidelines.³⁴

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The Council of Europe’s ‘Twenty Guidelines on forced return’, currently mentioned in Recital (3), serve as a key reference point for a fundamental rights compliant interpretation and application of the Return Directive.

To acknowledge the importance of the Council of Europe’s ‘Twenty guidelines on forced return’ in the interpretation and application of the Return Directive, the EU legislator should keep current Recital (3), which refers to these guidelines.

1.2. Pointing to priority needs for EU funding

Newly proposed Recital (40) highlights the availability of financial support provided by the Asylum and Migration Fund (AMF)³⁵ as well as the operational support by the European Border and Coast Guard Agency. It encourages the Member States to make use of such support, particularly for establishing return management systems. This is linked to Articles 49 and 50 of the proposed EBCG Regulation which envisage technical and operational assistance by the European Border and Coast Guard Agency to Member States in developing national return management systems. The Recital also encourages Member States to use the AMF to establish programmes for the provision of assistance to support

³² See e.g. Lutz., F. (2010), *The Negotiations on the Return Directive. Comments and Materials*, Nijmegen, Wolf Legal Publishers, pp. 24, 28; Lutz, F. and Mananashvili, S. (2016), ‘Return Directive 2008/115/EC’ in Hailbronner, K. and Thym, K. (eds.), *EU Immigration and Asylum Law. A Commentary*, Munich/Oxford/Baden-Baden, C.H.Beck/Hart/Nomos, 2016, second edition, pp. 666.

³³ See, for example, CJEU, C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, 28 April 2011, paras. 43-44, which refers to Guideline No. 8.

³⁴ The EU Return Handbook lists the Twenty Guidelines on forced returns among the relevant documents for practitioners and refers to the specific guidelines in relation to various aspects and issues of the return procedure [see [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](#), Annex (OJ L 339, 19.12.2017, pp. 83-159), sections 10.1; 12.4; 15.3; 15.4; and 19].

³⁵ European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, COM(2018)471 final, Brussels, 12 June 2018.

the return of migrants in an irregular situation, such as assisted voluntary return (AVR) programmes.

Ensuring sufficient financial support for Member States who want to set up or significantly strengthen their national AVR programmes would considerably contribute to enhancing voluntary departures. At the same time, in the context of the newly proposed Recital (40), such phrasing would amount to deprioritising other objectives, including those on the list of priority actions in Annex IV of the proposed AMF Regulation. Some of these indirectly and unintentionally deprioritised objectives implement core principles of EU return policy, for example actions to develop and implement effective alternatives to detention, and measures targeting vulnerable persons, including those to ensure effective protection of children in migration. Other areas where EU funding has been playing an important role in ensuring the practical implementation of safeguards required by the Return Directive include the operation of national forced return monitoring systems, required under current Article 8 (6) of the directive; provision of interpretation and translation, required by current Article 12 (2); and provision of free legal assistance, required by current Article 13 (4). Expanding Recital (40) to cover also these other key actions would also be fully in line with the draft report on the proposed AMF Regulation in which the European Parliament emphasises that returns should be not only effective but also “safe and dignified” and subject to “appropriate safeguards”.³⁶

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Proposed Recital (40) states that Member States should draw on EU financial and operational support, in particular for establishing return management systems and return assistance programmes. This should be in parallel with other actions supporting effective and fundamental rights compliant return policies at the Member State level, including those designated as priority actions under the proposed Asylum and Migration Fund.

The EU legislator should consider expanding Recital (40) to underline the availability of EU financial support also for other actions that may be essential to ensure the practical implementation of fundamental safeguards required by the Return Directive. This Recital could include the other return-relevant priority actions under Annex IV of the proposed Regulation establishing the Asylum and Migration Fund: actions to develop and implement effective alternatives to detention, and measures targeting vulnerable persons with special reception and/or procedural needs, including measures to ensure effective protection of children in migration. Other actions that the EU legislator could expressly mention are effective forced return monitoring systems and provision of legal aid, as well as interpretation and translation, as Member States face difficulties in applying these three safeguards in practice.

1.3. Avoiding rules which undermine the primacy of voluntary departure

The priority of voluntary departure over forced returns (removal) is an underlying, horizontal principle under the Return Directive. It explicitly stems from Recital (10) of the current version of the directive and this philosophy remains unchanged in light of new Recitals (13)-(14). The CJEU underlined the preference for voluntary departure numerous times. According to the CJEU, the priority given to voluntary departure “seeks, inter alia, to

³⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2018), *Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, 2018/0248(COD), 29 October 2018, in particular proposed amendments 9, 22 and 45.

ensure that the fundamental rights of [the returnees] are observed in the implementation of a return decision [...]. In accordance with Article 79 (2) [of the Treaty on the functioning of the European Union], the objective of Directive 2008/115 is, as is apparent from [...] the preamble thereto, 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.”³⁷

The proposal seeks to set out stricter rules to limit the actual use of voluntary departure, which is the preferred option from a fundamental-rights as well as from a sustainability perspective.

Removing the duty to give at least seven days for voluntary departure

First, Article 9 (1) of the proposal deletes the minimum seven days period to be granted for voluntary departure. The Explanatory Memorandum to the proposal does not provide any justification for this deletion. Without offering to a returnee a minimum time to organise tickets, collect his or her belongings and pack, it is difficult to imagine how he or she may make use of the option of voluntary departure.

The absence of a minimum period for voluntary departure could lead to immediate returns raising issues under the right to human dignity in Article 1 of the Charter. Immediate returns without the opportunity to make even the most basic arrangements would be arbitrary and may unduly affect a number of other fundamental rights, such as the right to property, the right to education or the right to health care. This is particularly the case for a person who has previously resided in that Member State for a longer period, had his/her centre of life there and may have strong family or social ties, business or contractual obligations etc. Immediate return upon issuance of a return decision would go against such overarching principles of the directive as the principle of fair return procedures, carried out in a humane manner and with full respect for fundamental rights and dignity as laid down in proposed Recital (4).

Prescribing situations where voluntary departure must not be granted

Second, proposed Article 9 (4) requires that voluntary departure must not be granted in the following situations:

- where it has been assessed that the returnee poses a risk of absconding;
- where the person has had a previous application for legal stay dismissed as manifestly unfounded or fraudulent; and
- where the individual concerned poses a risks to public policy, public security or national security.

From a practical point of view, the number of returnees who would be covered by these clauses is significant, particularly in light of the broad criteria used to establish the existence of a risk of absconding (see Section 4.2). In addition, the category of persons whose application for legal stay has been dismissed as “manifestly unfounded” would cover all rejected asylum applicants from countries designated as “safe countries of origin” or “safe third countries”. In practice, the operation of proposed Article 9 (4) could affect returnees from whole regions. For example, looking at the figures of the International

³⁷ CJEU, C-554/13, *Z. Zh. v. Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v. I. O.*, 11 June 2015, para. 47; CJEU, C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, 5 June 2014, para. 38.

Organisation for Migration (IOM) on voluntary returns from the EU to the Western Balkans countries in 2017 – all of which are considered for inclusion in a common EU list of safe countries of origin³⁸ – over 17,500 people returned home with IOM assistance.³⁹

The envisaged new rules can lead to an exponential increase in forced returns of persons who are currently the chief beneficiaries of voluntary returns, with the Member States having to bear the associated costs and procedural burdens. In addition, it would lead to many more entry bans being issued, possibly also in circumstances where it would not be proportionate to do so, since under proposed Article 13 an entry ban must be imposed whenever a returnee is refused the possibility of voluntary departure (subject to exceptions in individual cases).

Depriving Member States of the possibility to grant voluntary departure to such a large number of migrants in an irregular situation would not only undermine the primacy of voluntary departure over forced return as a key principle laid down in the directive (current Recital (10) and proposed Recitals (13)-(14)), but may also undermine the principle of individualised decision-making. Recital (6) of the Return Directive states that “decisions taken under this [d]irective should be adopted on a case-by-case basis and based on objective criteria”. This principle is also central in the return-related case law of the CJEU.⁴⁰

Furthermore, the “risk of absconding” and the “risk to public policy, public security and national security” as two of the grounds for denying voluntary departure need to be assessed on a case-by-case basis themselves in the same return procedure (see *infra* Sections 4.2 and 4.3). Therefore, these scenarios cannot be *per se* a ground for automatically denying returnees to leave voluntarily (e.g. for those who have been previously detained).⁴¹

Finally, the prohibition to grant a period for voluntary departure in such a vast range of situations conflicts with the rationale of proposed Article 9 (3) which allows for imposing certain obligations aimed at avoiding a risk of absconding during the period given for voluntary departure. If the existence of a risk of absconding would, as proposed in point (a) of Article 9 (4), *per se* prevent voluntary departure, then the measures envisaged in Article 9 (3) would be purely hypothetical, which would defeat the object and purpose of providing for such alternatives. Such a prohibition would considerably increase the costs of the returns without any practical benefit.

Promoting assisted voluntary returns (AVR)

Proposed 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 purposes of supporting the return of those migrants in an irregular situation who are subject to a visa requirement under Annex I of the Visa List

³⁸ European Commission (2015), *Proposal for a Regulation establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU on common procedures for granting and withdrawing international protection*, COM(2015) 452 final – 2015/0211(COD), Brussels, 9 September 2015. In April 2017, the Council announced the suspension of negotiations on this file and its content could be covered by the proposed Asylum Procedures Regulation (currently being negotiated).

³⁹ International Organisation for Migration (2018), *Assisted Voluntary Return and Reintegration – 2017 Key Highlights*, Geneva.

⁴⁰ See e.g. CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014.

⁴¹ Meijers Committee (2018), *CM1816 Comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM(2018) 634 final, Amsterdam, 27 November 2018, p. 4.

Regulation (EU) 2018/1806.⁴² Recital (14) adds that the common standards on assisted Voluntary Return and Reintegration Programmes,⁴³ developed by the European Commission in cooperation with the Member States and endorsed by the Council in May 2016, should be taken into account when shaping such policies. The granting of above assistance, including reintegration support in the third country of return, would, however, be conditional on the cooperation of the returnee with national authorities as provided for in newly introduced Article 7 of the proposal.

Explicitly referring to the common EU standards on Assisted Voluntary Return and Reintegration Programmes, coupled with the compulsory nature of setting up such programmes are welcome additions to the text. Creating a clear-cut legal basis for assisted voluntary returns will bring more convergence in the implementation of Member States programmes providing various forms of assistance to voluntary returnees.

Nonetheless, the envisaged personal scope of the beneficiaries raises concerns. According to paragraph (3) of proposed Article 14, Member States would only be obliged to offer such programmes to those irregularly staying third-country nationals who need to have a visa to enter the EU in light of the Visa List Regulation.⁴⁴ Neither the operative provisions, nor the Explanatory Memorandum to the proposal shed light on the possible justification(s) behind this differentiation. This differential treatment of the two groups of irregular migrants does not appear to meet the conditions for objective justification developed by the CJEU when interpreting the principle of non-discrimination under Article 21 of the Charter. In particular, it is not clear what legitimate aim the proposed new rule pursues and what the objective criteria for the differentiated treatment are.⁴⁵ As a consequence, it may amount to discrimination on the basis of nationality which is not permissible under Article 20 and possibly also Article 21 (2) of the Charter and under ECtHR case law.⁴⁶

From a practical perspective, it remains to be seen to what extent it is efficient to draw the dividing line between the categories of eligible and not eligible third-country nationals on the basis of the visa requirement. In practice, the proposed rule would result in excluding the two top nationalities benefitting from assisted voluntary returns and reintegration programmes in Europe facilitated by the International Organisation for Migration in 2017, namely biometric passport-holder nationals of Serbia and Albania, alongside other visa-free countries in the global top ten such as the Former Yugoslav Republic of Macedonia, Moldova and the Ukraine.⁴⁷ If one compares the top nationalities of irregular migrants in certain EU countries, the largest share of returnees (including rejected asylum applicants)

⁴² Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 303, 28.11.2018, pp. 39-58.

⁴³ Council of the European Union (2016), *Non-binding common standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by Member States*, Document No. 8829/16, Brussels, 11 May 2016.

⁴⁴ See Annex I of Regulation (EU) 2018/1806.

⁴⁵ CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014. For more on the application of the objective justification for differential treatment under European non-discrimination law, see FRA (2018), *Handbook on European non-discrimination law. 2018 edition*, Luxembourg, Publications Office of the European Union, section 3.

⁴⁶ See e.g. ECtHR, *Gaygusuz and Turkey (intervening) v. Austria*, Application No. 17371/90, 16 September 1996.

⁴⁷ International Organisation for Migration (2018), *Assisted Voluntary Return and Reintegration – 2017 Key Highlights*, Geneva.

falls under the excluded “visa-free” category of third-country nationals (from the Western Balkans or the Ukraine, for example).⁴⁸

Finally, the wide-ranging nature of the returnees’ obligation to cooperate under proposed Article 7 could severely restrict the number of people eligible for AVR support. It could also become practically counterproductive, as it could discourage persons from returning who would otherwise take advantage of more readily available AVR opportunities. As the AVR programmes support individuals and allow for return in a dignified manner, and also to be consistent with the related objectives set forth in Recital (14), this option should not be limited this way.⁴⁹

FRA Opinion 3

Article 9 (1) and (4) of the proposal seeks to introduce stricter rules limiting the use of voluntary departure. In doing so, it is at odds with the general logic of the directive to give preference to voluntary returns over forced returns. In addition, the otherwise welcome provision in proposed Article 14 (3), which obliges Member States to establish assisted voluntary return programmes, limits this unnecessarily to third-country nationals subject to a visa requirement. The last subparagraph of proposed Article 14 (3) also makes access to voluntary return programmes conditional on the cooperation of the returnee with the authorities, which, as described in FRA Opinion 6, would often be difficult to operationalise and could discourage persons from returning voluntarily.

To uphold the priority of voluntary departure over forced returns, the EU legislator should:

- ***keep the minimum period of voluntary departure of seven days in proposed Article 9 (1) to prevent arbitrary immediate returns;***
- ***revert the “shall clause” in the chapeau of proposed Article 9 (4) to a “may clause”, leaving the non-granting of a period of voluntary departure to Member States as an option but not prescribing it as an obligation;***
- ***remove from the first sentence of proposed Article 14 (3) the following precondition: “who are nationals of third countries listed in Annex I to Regulation (EU) 2018/1806” – to not exclude visa-free third-country nationals in an irregular situation;***
- ***delete the last sentence of proposed Article 14 (3) to do away with the cooperation requirement that unduly restricts the possibility to benefit from assisted voluntary return (AVR) support measures.***

1.4. Reflecting the duty to protect stateless persons in the context of returns

Proposed Recital (4) stipulates that the implementation of the Return Directive must fully respect the international obligations of EU Member States, including refugee protection and human rights obligations. Renumbered Recital (44) adds that the directive does not affect obligations stemming from the 1951 Convention Relating to the Status of Refugees and its 1967 New York Protocol.

⁴⁸ Eurostat (2018), *Top 20 countries of citizenship of non-EU citizens returned to their country of origin from the EU, 2016 and 2017*.

⁴⁹ Cf. European Council on Refugees and Exiles (2018), *Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, p. 14.

In recent times, the international community has given increased attention to the situation and protection of stateless persons. The displacement of stateless population groups, such as Rohingya from Myanmar, Kurds from Syria, Bidoons from Kuwait and Palestinians from the Middle East, has raised challenging questions on how to handle stateless persons in the context of returns.

At the United Nations (UN) level, the protection and treatment of stateless persons is regulated in the 1954 Convention Relating to the Status of Stateless Persons,⁵⁰ which has meanwhile been ratified by the large majority of EU Member States.⁵¹ In addition, at the September 2012 UN High Level Rule of Law Meeting during the UN General Assembly in New York, the EU and its Member States pledged that all Member States not yet parties to the 1954 Statelessness Convention would ratify this international instrument. The EU would furthermore develop a framework for raising issues of statelessness with third countries.⁵²

At the EU level, in the EU Council Conclusions on statelessness,⁵³ adopted in December 2015, the Council and the Member States acknowledged the importance of strengthening the protection of stateless people within the Union, “thus allowing them to enjoy core fundamental rights and reducing the risk of discrimination or unequal treatment”.

Reflecting the above developments, the revised Return Handbook of September 2017 explicitly mentions certain specific protection needs of stateless migrants in an irregular situation (e.g. in relation to apprehension practices or their pre-removal detention).⁵⁴ In the *Kadzoev* judgment (C-357/09),⁵⁵ the CJEU also highlighted that Member States should pay attention to the specific situation of stateless persons when assessing the (absence of) reasonable prospect of removal that justifies (or not) imposing or prolonging detention. This is often the case when authorities seek to remove stateless persons, since they may be unable to benefit from consular assistance by third-countries in view of obtaining a valid identity or travel document. FRA repeatedly pointed out in its reports on immigration detention that for stateless persons the likelihood of successful removal is minimal. In general, there is no country of nationality that is obliged to take the person back and the country of former habitual residence often denies admission to stateless persons who have left. It can easily lead to prolonged and thus arbitrary detention.⁵⁶

⁵⁰ [Convention relating to the Status of Stateless Persons of 28 September 1954](#) (UNTS No. 5158, Vol. 360, p. 117).

⁵¹ As of January 2019, 24 EU Member States are Party to the 1954 Convention. See at the [UN Treaty Collection](#).

⁵² [Pledges of the European Union and its Member States to be made on the occasion of the forthcoming High-Level Meeting on the Rule of Law of 24 September 2012](#) (19 September 2012), Section A. (Strengthening the rule of law at the international level), point 4 and Section B. (Strengthening the rule of law at the national level), point 3.2.

⁵³ Council of the European Union (2015), [Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness](#), Press Release No. 893/15, 4 December 2015.

⁵⁴ [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 L 339, 19.12.2017; See in its sections 1.1; 1.2; 1.3; 5; and 14.4.1.

⁵⁵ CJEU, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009.

⁵⁶ FRA (2010), [Detention of third-country nationals in return procedures](#), Luxembourg, Publications Office of the European Union, pp. 25-26; FRA (2017), [European legal and policy framework on immigration detention of children](#), Luxembourg, Publications Office of the European Union, p. 46.

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The subject matters covered by the Return Directive impact on issues that are regulated in international law. Proposed Recitals (4) and (44) therefore clarify that the directive does not affect the obligations of EU Member States under international law, including refugee and human rights law, specifically mentioning selected conventions. These recitals do, however, not expressly mention the core instrument to protect stateless persons, which is also relevant in return-related procedures.

In Recital (44), the EU legislator should consider adding the 1954 United Nations Convention Relating to the Status of Stateless Persons. Additionally, the EU legislator should explicitly refer to the “protection of stateless persons” at the end of the first sentence in Recital (4).

2. Procedures

This second Chapter deals with selected steps and elements of the return procedure, which the proposed amendments target and raise the most fundamental rights concerns. These include connecting the decisions ending a legal stay with the return decision; the returnees' obligation to cooperate with the national authorities; as well as the issuing of entry bans. Various fundamental rights protected by the Charter are at stake when introducing the proposed measures, such as the right to human dignity (Article 1); the right to respect for private and family life (Article 7); the right to asylum (Article 18); the principle of non-*refoulement* (Article 19); the right to good administration (a general principle of EU law mirrored in Article 41); and the right to an effective remedy and to a fair trial (Article 47).

2.1. Limiting undesirable consequences of combining end of legal stay and return decisions

According to the European Commission, Member States do not systematically issue return decisions when they terminate the legal stay of a third-country national.⁵⁷ To address this, the proposal suggests to add a new provision, namely Article 8 (6), which would require Member States "to issue a return decision immediately after a decision ending a legal stay of a third-country national, including a decision not granting a third-country national [international protection]". This solution builds upon the already existing possibility (a 'may clause') to combine a decision on ending of legal stay and a return decision within one single act as provided for in current Article 6 (6) of the directive. Proposed Recital (7) explains that the purpose of reinforcing the link between these two decisions – ending legal stay and return – is to reduce the risk of absconding and the likelihood of unauthorised secondary movements. Proposed Recital (7) suggests that, ideally, the decision ending legal stay should be taken together with the return decision in the same administrative or judicial act, as is already the practice in some Member States.

As illustrated in Figure 1, the Return Directive comes into operation either after an irregular migrant is apprehended within the territory of an EU Member State or following a decision based on other instruments of EU law or based on national law. Such decisions include non-admissions at the border under the Schengen Borders Code (Regulation (EU) No. 2016/399⁵⁸) if the opt-out in Article 2 (2) (a) of the Return Directive does not apply. It includes decisions on rejecting, or terminating legal stay based on one of the EU legal migration directives⁵⁹ or on the basis of national law (for permits which are not harmonised

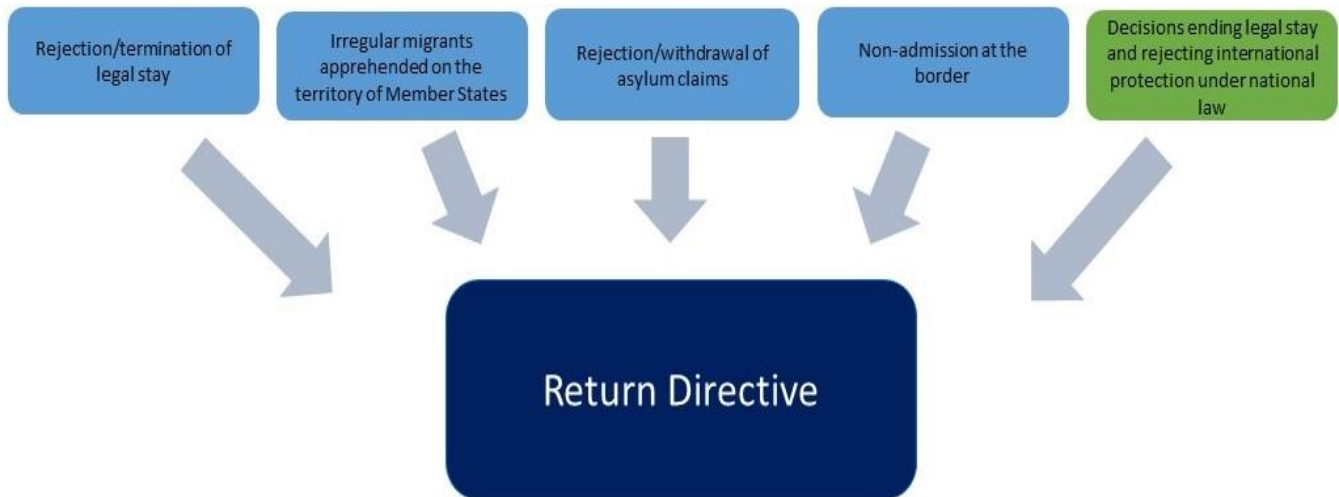
⁵⁷ Explanatory Memorandum to the proposal, p. 7.

⁵⁸ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1.

⁵⁹ See, for example, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1; and Directive (EU) 2016/801 of the

at EU level). Finally, a return decision may follow a decision rejecting an application for international protection or ceasing or withdrawing protection status under the EU asylum *acquis*.

Figure 1: Decisions triggering the application of the Return Directive



Notes: Blue = governed by EU law, Green = regulated under national law
Source: FRA, 2019

The amendments proposed in Article 8 (6) and Recital (7) codify the CJEU’s ruling in *Gnandi* (C-181/16), where the court held that EU asylum and return *acquis* do not preclude the issuing of a return decision together with or immediately after a negative first instance asylum decision.⁶⁰ In this ruling, the CJEU, however, emphasised also that a person subject to a return decision issued together with or immediately after a negative first instance asylum decision “is to retain his status as an applicant for international protection, within the meaning of the [Asylum Procedures Directive], until a final decision is adopted in relation to his application.”⁶¹ The CJEU also noted that a return decision adopted immediately after the first instance negative asylum decision or incorporated into the latter cannot be enforced before a final decision has been reached at the first appeal level before a court.⁶² Otherwise, this approach would not comply with the right to an effective remedy enshrined in Article 47 of the Charter.

If a return decision were to be implemented before a final decision on international protection, this would also undermine the right to asylum (Article 18 of the Charter) and the principle of *non-refoulement* (Article 19 of the Charter and Article 3 of the ECHR) as interpreted by the CJEU and the ECtHR in their respective case law.⁶³ Closely connecting or

European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132/21.

⁶⁰ CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018.

⁶¹ *Ibid.*, para. 63.

⁶² *Ibid.*, para. 64. The Explanatory Memorandum to the proposal also expressly recalls this jurisprudence (p. 7).

⁶³ For an overview of the ever-growing jurisprudence of the two courts in the regard, see FRA (2014), *Handbook on European law relating to asylum, borders and immigration. Edition 2014*, Luxembourg, Publications Office of the European Union, sub-sections 3.1-3.3; den Heijer, M. (2014), ‘Article 18 – Right to Asylum’ in Peers, S., Hervey, T., Kenner, J., Ward, A., *The EU Charter of Fundamental Rights. A*

merging the two procedural steps must not lead to the reduction of safeguards which are necessary to ensure that Articles 18 and 19 of the Charter are not circumvented.

In its current wording, the Return Directive underlines in Article 6 (6) that when Member States combine a decision ending legal stay with a return decision, this must be “without prejudice to the procedural safeguards” under EU law and under the directive itself. The proposal keeps this provision, which becomes the last sentence of proposed Article 8 (6). However, such safeguard is formulated in a general manner and may, without further specifications, lead in practice to returns of persons for whom the existence of a bar to removal has not yet been clarified.

Issuing the return decision together with the decision to end legal stay must not take away the returnee’s right to appeal against each decision separately before a court. The “two in one” format simply represents an administrative technique to adopt two decisions in one go. However, these administrative decisions continue to be governed by two separate legal regimes, where each must provide for effective judicial review. The issues to be reviewed in the two procedures are not necessarily the same, as the following example illustrates: A decision on rejecting an asylum application will review whether the applicant fulfils or not the conditions set out in the Qualification Directive (Directive 2011/95/EU⁶⁴). But it does typically not examine whether there are other bars to removal, for example, deriving from the right to protection of private and family life under Article 7 of the Charter and Article 8 of the ECHR. Persons must have the possibility to request a judicial review of all alleged violations of all relevant Charter rights, otherwise the right to an effective remedy under Article 47 of the Charter would not be complied with.

In other cases, new applications for legal stay can further complicate the landscape of ongoing procedures. After the “first” decision rejecting or ending the legal stay, a person may have submitted or might want to submit further application(s) for other forms of legal stay. An example includes stateless persons who, after having their asylum claim rejected, initiate a statelessness determination procedure to obtain the stateless status under the 1954 Statelessness Convention.⁶⁵ Persons whose work or study permits are terminated and who may wish to apply for international protection are another example. Finally, as the CJEU pointed out, the situation may change and Member States are required to allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision.⁶⁶ In these cases, the practical benefits of issuing a return decision together with the first decision ending a legal stay are limited.

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To enhance the efficiency of returns and prevent unlawful onward movements within the EU, Article 8 (6) and Recital (7) of the proposal encourage Member States to issue a return

Commentary, Oxford/Portland, C.H. Beck/Hart/Nomos, 2014, pp. 519-541; Guild, E. (2014), ‘Article 19 – Protection in the Event of Removal, Expulsion or Extradition’ in Peers, S., Herve, T., Kenner, J., Ward, A., *The EU Charter of Fundamental Rights. A Commentary*, Oxford/Portland, C.H. Beck/Hart/Nomos, 2014, pp. 543-562.

⁶⁴ [Directive 2011/95/EU](#) of the European Parliament and Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, pp. 9-26.

⁶⁵ The Return Handbook explicitly recognises that stateless persons staying in the Member State in which, according to national law, they enjoy a right to stay during a statelessness determination procedure are not considered “illegally staying” (p. 7).

⁶⁶ CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018, para. 64.

decision together with or immediately after a decision terminating legal stay. This approach is *per se* not unlawful, but it requires clear safeguards to protect the right to asylum, the principle of *non-refoulement* and the right to an effective remedy.

To prevent the risk of violations of rights enshrined in Articles 7, 18, 19 and 47 of the EU Charter of Fundamental Rights when implementing the Return Directive, the EU legislator should strengthen the safeguards in proposed Article 8 (6) by:

- **explicitly referencing the most relevant Charter rights in the ‘without prejudice clause’ in the last sentence of proposed Article 8 (6), along the following lines: “including the right to respect for private and family life, the right to asylum, the principle of non-refoulement and the right to an effective remedy”;**
- **adding the word “final” before the expression “decision ending a legal stay of a third-country national”.**

2.2. Inserting adequate safeguards in the duty to cooperate

Article 7 of the proposal seeks to introduce a new obligation of the returnees to cooperate with the competent national authorities “at all stages of the return procedures”. This mirrors a similar obligation laid down in the Asylum Procedures Directive⁶⁷ and reflects the CJEU case law, for example, in the *K.A. and Others* (C-82/16) and the *Boudjlida* (C-249/13) rulings.⁶⁸ The formulation of this obligation, however, raises concerns of incompatibility with certain Charter rights.

Proposed Article 7 needs to be read in conjunction with newly introduced Article 6 (1) (j). According to it, lack of cooperation puts returnees at risk of detention since it is considered an indicator for the existence of a ‘risk of absconding’ (see Section 4.2). Proposed Article 7 (3) does not specify further sanctions that Member States may envisage for non-cooperation. Without a thorough impact assessment, it is impossible to assess whether the threat of sanctioning returnees for non-cooperation will actually result in increased cooperation which would lead to significantly higher return rates. The proposed rules may thus result in significant interferences with returnee’s fundamental rights without necessarily increasing the effectiveness of returns.

The proposed provision illustrates with four specific duties what the obligation to cooperate entails. Among them proposed Article 7 (1) (d) includes “the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document”. Many migrants in an irregular situation have reasons to fear contacting any authorities, especially if they have been subjected to ill-treatment, arbitrary detention or are traumatised by past experiences. Cooperation is often not their first reflex. More specifically, in the case of rejected applicants for international protection who have not received their final decision yet, obliging them to contact the authorities of their country of origin would be at variance with the right to asylum (Article 18 of the Charter) and the principle of *non-refoulement* (Article 19 of the Charter).

⁶⁷ 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, Article 13 (also expressly acknowledged by the Explanatory Memorandum to the proposal, p. 7).

⁶⁸ CJEU, C-82/16, *K.A. and Others*, 8 May 2018, para. 103; CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, paras. 49 and 50.

The prohibition to contact the authorities of the country of origin during a pending asylum procedure derives from the duty of confidentiality. Such duty of confidentiality of asylum-related information is a well-established principle under international refugee law⁶⁹ and EU law.⁷⁰ When the contact with the country of origin is established by the applicant him or herself, this can be wrongly interpreted as proving an absence of well-founded fear of persecution, leading to a rejection of a possibly well-founded claim during the appeal, and thus exposing the third-country national to a risk of *refoulement*. In other cases, the consular authorities of the country of origin may take retaliatory measures against family members who remained at home to force a person perceived to be a dissident to return or subject the person to other forms of ill-treatment, including possible kidnapping. For certain refugee profiles, the contact with the country of origin may create a *sur place* refugee claim – particularly, when a third country disproportionately punishes persons who unlawfully left their country (see also Section 5.1).

Furthermore, the “duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document” could also disproportionately affect stateless persons who would find it impossible to provide the information necessary to obtain travel documents, given that stateless persons are not considered as nationals by any state under the operation of its laws.⁷¹ The recognition of the fact that some people may not be practically able to obtain a travel document from a third country seems to be missing from the text.

Paragraph (3) of proposed Article 7 requires Member States to inform the apprehended migrants in an irregular situation about the consequences of not complying with the obligation to cooperate with the authorities. Although informing the people concerned about this duty is a positive element, the text remains silent about what these consequences could be (except for detention in application of proposed Article 6 (1) (j) and proposed Article 18 (1) (a)-(b)). If not specified further, Member States may sanction non-compliance in very different ways. This would go against legal certainty and the underlying rationale of the directive as an EU legal instrument to harmonise Member States’ laws and policies related to return procedures.

⁶⁹ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, para. 33; UNHCR (2006), *Guidelines on International Protection No. 7: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para. 42; and consider also in its entirety, UNHCR (2005), *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005.

⁷⁰ See [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 (OJ L 180, 29.6.2013, pp. 60–95), Article 30 (relating to collection of information on individual cases); European Commission (2016), [Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person \(recast\)](#), COM(2016)270 final/2 – 2016/0133 (COD), 4.5.2016, Article 38 (3).

⁷¹ See the definition of ‘stateless person’ under Article 1 (1) of the 1954 New York Convention relating to the Status of Stateless Persons. This definition is universally accepted and already considered customary international law (see UN International Law Commission (2006), *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 49).

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Article 7 of the proposal seeks to introduce the obligation of the returnees to cooperate with the authorities throughout the return process, listing four non-exhaustive examples of what such duty entails. The duty to request a travel document from the authorities of the country of origin, if implemented against persons who sought asylum and whose application is not yet decided in the final instance, creates a risk of violating the right to asylum and the principle of *non-refoulement*. Added to this, the consequences of not complying with the obligation to cooperate are not set out in the proposal, giving Member States wide discretion to establish potential sanctions.

To better respect the principle of human dignity, the right to asylum and the principle of non-refoulement, the EU legislator should delete subparagraph (d) of proposed Article 7 (1) or, alternatively, exclude its application to stateless persons, as well as to rejected asylum applicants until a final decision has been taken on their application. This could, for example, be achieved by adding a ‘without prejudice clause’ at the end of subparagraph (d) of the above-mentioned provision, also acknowledging the specific situation of stateless persons.

To ensure legal certainty and to avoid excessive divergences in Member States’ practices, Article 7 (3) of the proposal should specify the limits of the measures that national authorities can apply in case of non-compliance with the obligation to cooperate, having due regard to applicable fundamental rights safeguards.

2.3. Avoiding entry bans without a return decision

Entry bans serve the purpose of preventing the re-entry of certain third-country nationals subject to a return decision to the territory of the Member States bound by the Return Directive and to the Schengen Associated Countries. Entry bans are defined in Article 3 (6) of the Return Directive and are issued for a specified period. They are inserted in the Schengen Information System and are thus visible to visa authorities and border guards across the EU.⁷²

The Return Directive prescribes cases where Member States are obliged to issue an entry ban and where this is optional. It also lists exceptions from the general principle of issuing an entry ban, for example for humanitarian reasons or for cases of trafficking in human beings. These rules remain unchanged under proposed Article 13 (current Article 11). In all cases, entry bans are the result of a valid return decision issued under proposed Article 8 (current Article 6) of the Return Directive, in line with the definition of ‘entry ban’ set out in Article 3 (6).

However, newly proposed Article 13 (2) introduces the possibility to impose an entry ban also in the absence of a return decision to persons whose ‘illegal stay’ is only detected when they leave the territory, i.e. during exit checks conducted pursuant to the Schengen Borders Code.⁷³ Recital (25) states that issuing an entry ban without a return decision would reduce the risk of irregular re-entry while avoiding postponing the departure of the

⁷² Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006n OJ L 312, 7.12.2018, p. 14–55, Article 24.

⁷³ [Regulation \(EU\) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders \(Schengen Borders Code\) \(codification\)](#), OJ L 77/1, Article 8.

third-country national, for example making sure that the returnee does not miss the flight. The Explanatory Memorandum to the proposal does not give further clarity about the necessity of such new category of entry bans issued without an accompanying return decision.

Understanding the fundamental rights risk of allowing Member States to issue EU-wide entry bans without the existence of a return decision, proposed Article 13 (2) requires that such measure must be “justified on the basis of the specific circumstances of the individual case” and take into account the principle of proportionality. The proposal, however, does not elaborate on what specific circumstances would justify an entry ban.

According to the Return Directive, decisions on entry bans must be subject to the same requirements and procedural safeguards as return decisions, including as regards their form (proposed Article 15, current Article 12) and remedies (proposed Article 16, current Article 13).

Moreover, Member States need to respect the right to be heard, which is part of the right to good administration, a general principle of EU law mirrored also in Article 41 (2) of the Charter.⁷⁴ The CJEU interpreted the right to be heard in case of decisions related to return. The CJEU requires that every person must have the right to be heard before any individual measure that could adversely affect him or her. Individuals must also have access to their files and recourse to legal advice prior to the adoption of the decision. The right to good administration also requires the relevant authorities to examine carefully and impartially all the relevant aspects of the individual case and give reasons for their decision.⁷⁵

As an additional requirement stemming from the impact of entry bans on the individuals and the Member States’ discretion to decide on their duration, the Return Directive requires in proposed Article 13 (3) (current Article 11 (2)) that the length of an entry ban is determined with due regard to all relevant circumstances of the individual case. This does not prevent Member States from envisaging varying timeframes for typical case categories, e.g. based on the type and severity of non-compliance with immigration legislation, but each case must be assessed individually in accordance with the principle of proportionality.⁷⁶

Respecting the formal and procedural requirements flowing from current Articles 12 and 13 of the Return Directive and from the right to good administration requires resources and time. As entry bans are often issued together with a return decision as part of the same decision, there may be the perception that it is significantly simpler to issue an entry ban than to issue a return decision. However, removing the requirement of issuing a return decision would not result in the possibility to issue entry bans without procedural safeguards. If authorities only issue an entry ban, they would still have to comply with the formal requirements of the Return Directive and with the safeguards flowing from the right to good administration. It is, therefore, questionable whether issuing “only” an entry ban, rather than a return decision together with an entry ban, would simplify the procedure and avoid the postponement of departure.

⁷⁴ See e.g. CJEU, C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, paras. 85-89.

⁷⁵ CJEU, C-383/13 PPU, *G. and R.*, 10 September 2013, para. 35, and CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, paras. 37-39.

⁷⁶ [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 L 339, 19.12.2017, p. 50.

Efforts to simplify the procedure for issuing entry bans to persons whose irregular stay is detected on exit might result in considerable fundamental rights risks. If the aim is to issue the decision during the short timeframe available during an exit check, or before the departure of a flight, this will lead to increased pressure upon the border authority to finalise the procedure as quickly as possible. It is difficult to see how this setting would allow for a personal interview to examine the circumstances of the individual case, which is required both under the right to good administration as interpreted by the CJEU in relation to return-related decisions, as well as in order to determine the length of the entry ban in light of the relevant circumstances of the case.

A speedy issuing of entry bans at the border is also likely to reduce the practical opportunity to object to possible mistakes based on incorrect data contained in national or EU databases which may be used as a basis to justify the issuance of an entry ban. As illustrated in the FRA report on large-scale information systems and fundamental rights, mistakes in such systems are not infrequent but very hard to rebut. More than half of the border guards surveyed for this report indicated that they have experienced inaccurate, incorrect or not updated personal data in the Visa Information System or the Schengen Information System.⁷⁷

Another modality that might be attractive to Member States wishing to expedite the procedures is to issue entry bans *in absentia*, i.e. after the person has already left the EU territory. Such proceedings, however, invariably raise the question of how the procedural safeguards provided for by the Return Directive on form and remedies can be meaningfully applied in the absence of the third-country national. Applying these safeguards largely relies on the person's direct communication with the authorities, including the right to be heard and the right to be provided, upon request, with a translation of the main elements of the decision. The right to an effective remedy might prove impossible to exercise if the person never receives the decision issued *in absentia*, for example due to a change of address in the country of origin.

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Proposed Article 13 (2) introduces the possibility for Member States to impose an entry ban on third-country nationals whose irregular stay is detected by border guards when the third-country nationals leave EU territory, without issuing a return decision. The proposal indicates that this would allow to issue entry bans in a more expedited manner. This could foreseeably lead to decisions on entry bans that are issued in a swift manner without adhering to the non-derogable procedural requirements stemming from the right to good administration. Any measure issued under the Return Directive which negatively affects individuals needs to comply with the formal requirements and procedural safeguards flowing from current Articles 12 and 13 of the Return Directive and the right to good administration, including the right to be heard, which is a general principle of EU law.

The EU legislator should reconsider the possibility to give Member States the option of issuing EU-wide entry bans to people whose irregular stay is detected when they leave EU territory, without issuing to them also a return decision.

⁷⁷ FRA (2018), *Under watchful eyes: biometrics, EU IT systems and fundamental rights*, Luxembourg, Publications Office of the European Union, p. 83.

3. Remedies

Third-country nationals subject to a return procedure must have access to a practical and effective legal remedy against all return-related decisions (e.g. return decisions, removal orders and entry-ban decisions) when alleging a breach of their fundamental rights. The right to an effective remedy as a general principle of EU law mirrored in Article 47 of the Charter is a key safeguard to ensure protection from *refoulement*.

In this context, the CJEU stressed in the *Abdida* ruling (C-562/13) that “the characteristics of [...] a remedy [under the Return Directive] must be determined in a manner which is consistent with Article 47 of the Charter.”⁷⁸ This Charter right serves as a yardstick when assessing envisaged changes to the system of return-related remedies. It is vital that these amendments do not compromise returnees’ meaningful access to independent, effective and timely oversight mechanisms, including legal remedies.

The proposal introduces several changes to the rules concerning legal remedies. Proposed Article 16 of the recast directive frames the system of legal remedies applicable in the return procedures. The changes it introduces need to be seen in the context of other amendments of the text as well as of the legislative proposals aiming at reforming the Common European Asylum System. In particular, the amendments in proposed Article 16 of the recast Return Directive have to be considered together with the newly introduced obligation to issue a return decision in connection with the termination of a legal stay, as provided for in proposed Article 8 (6). Overall, the planned changes blur the distinction between two distinct EU legal regimes, namely the return *acquis* and the asylum *acquis*.⁷⁹

3.1. Maintaining Member States’ flexibility in relation to judicial review

It is commendable that under the proposed new rules any remedy must be before a judicial authority. Thus, an administrative authority cannot be entrusted any longer to review return cases. This proposed change reflects the CJEU case law on appeals against rejected visa applications: in the *El-Hassani* ruling (C-403/16), the CJEU held that the Charter requires judicial control of decisions refusing a visa. Hence, Member States must provide for a judicial appeal against such decisions at a certain stage of proceedings.⁸⁰ In light of Article 47 of the Charter, this finding applies by analogy to all immigration decisions, including return-related ones, as is implicitly apparent from the *Gnandi* judgment (C-181/16).⁸¹

However, a new clause inserted into proposed Article 16 (1) states that rejected asylum applicants will have only one instance of judicial review against a return decision, provided that they have already had effective judicial review within the asylum procedure. This is meant to codify the CJEU’s case law in *Gnandi* (C-181/16),⁸² *X v. Belastingdienst/Toeslagen* (C-175/17)⁸³ and *X and Y v. Staatssecretaris van Veiligheid en*

⁷⁸ CJEU, C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*, 18 December 2014, para. 45.

⁷⁹ See also: European Council on Refugees and Exiles (2018), *Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, p. 15.

⁸⁰ CJEU, C-403/16, *Soufiane El Hassani v. Minister Spraw Zagranicznych*, 13 December 2017, paras. 41-42.

⁸¹ CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018, paras. 52, 57.

⁸² CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018.

⁸³ CJEU, C-175/17, *X v. Belastingdienst/Toeslagen*, 26 September 2018.

Justitie (C-180/17),⁸⁴ where the court held that neither the Asylum Procedures Directive (2013/32/EU), nor the Return Directive or the Charter require that there must be two levels of jurisdiction in case of appeals. These rulings do not preclude Member States from maintaining two levels of jurisdiction. They merely confirm that applying a single level of judicial review is compatible with EU law. In light of Member States' procedural autonomy, which is a general principle of EU law, Member States are free to set up their system of courts and to determine "procedural rules governing actions for safeguarding rights which individuals derive from EU law."⁸⁵ By taking a more restrictive approach than the CJEU above jurisprudence, the proposal disregards the principle of procedural autonomy.

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Article 16 (1) of the proposed recast Return Directive would require Member States to have only one instance of judicial review against return-related decisions in case of rejected asylum seekers subject to a return procedure. Applying a one instance only judicial review at national level is compatible with EU law. CJEU case law, however, also emphasises the procedural autonomy of Member States to set up their system of courts and determine procedural rules governing actions for safeguarding rights which individuals derive from EU law.

The EU legislator should consider adding the word "at least" after the term "the right to appeal" in the second subparagraph of proposed Article 16 (1) to properly codify applicable CJEU case law in view of the principle of procedural autonomy and taking into account relevant fundamental rights safeguards.

3.2. Avoiding undue restriction of the suspensive effect of appeals

Article 16 (3) of the proposal seeks to limit the suspensive effect of appeals on the enforcement of removals, i.e. suspending the removal from the Member State concerned pending the judicial review, in different ways:

- The first level of appeal must have automatic suspensive effect, but only where there is a risk of breaching the principle of *non-refoulement* – first sentence of first subparagraph of proposed Article 16 (3);
- In the event of further appeals, the removal can be suspended, but this is in the discretion of the reviewing national court, taking into account the specific circumstances of the case – second sentence of first subparagraph of proposed Article 16 (3);
- The reviewing court must, in principle, rule on a request to suspend removal during the appeals procedure within 48 hours; this time limit might be extended in individual cases with complex issues of fact and law – second subparagraph of proposed Article 16 (3);
- For persons who receive a return decision after the rejection of their claim for international protection, the rules in the first three bullet points do not apply, unless "relevant new elements or findings have arisen or have been presented" – third subparagraph of proposed Article 16 (3).

⁸⁴ CJEU, C-180/17, *X and Y v. Staatssecretaris van Veiligheid en Justitie*, 26 September 2018.

⁸⁵ CJEU, C-425/16, *Raimund*, 19 October 2017, para. 40. See also: CJEU, C-3/16, *Aquino*, 15 March 2017; CJEU, 33-76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, 16 December 1976.

The envisaged new system runs the risk of violating the right to an effective judicial remedy under Article 47 of the Charter.

The ECtHR has laid down general principles as to what constitutes an effective remedy in expulsion cases. Applicants must have a remedy at national level capable of addressing the substance of any “arguable complaint” under the ECHR and, if necessary, granting appropriate relief.⁸⁶ For example, in *Gebremedhin [Gaberamadhien] v. France*,⁸⁷ the ECtHR considered that the applicant’s allegations as to the risk of ill-treatment in Eritrea had been sufficiently credible to make his complaint under Article 3 of the ECHR an “arguable” one. The applicant could, therefore, rely on Article 13 taken in conjunction with Article 3 of the ECHR. More specifically, the ECtHR repeatedly 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”.⁸⁸ In the *Čonka v. Belgium* judgment, the ECtHR underscored 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 [...], for instance, if the applicant would be subjected to ill-treatment in the country of destination.” The Court also added that “in such cases, the remedy [...] would not be sufficiently effective”.⁸⁹ The ECtHR case law needs to be duly taken into account by the CJEU when interpreting Article 47 of the Charter on effective remedies which mirrors Articles 6 and 13 of the ECHR.

Suspending the enforcement of the return decision while such decision is appealed is a key safeguard to prevent unlawful removals from the EU territory. The absence of it would defeat the very purpose of such an appeal and make the judicial review meaningless, and thereby would empty the right to an effective remedy, including the returnee’s right to be heard and the equality of arms, once the person concerned is not present any longer in the Member State.

The third subparagraph of proposed Article 16 (3) excluding suspensive effect of appeals in certain circumstances assumes that the review available under the EU asylum *acquis* covers all relevant Charter rights, which may not be the case. According to Recital (20), the differentiation between rejected asylum seekers and other third-country nationals subject to a return decision is justified by the fact that for asylum applicants, “the assessment of the risk to breach the principle *non-refoulement* already took place and judicial remedy was effectively exercised as part of the asylum procedure carried out prior to the issuing of a related return decision”. However, the scope of the review under the EU asylum *acquis* covers only the circumstances that give rise to refugee status or subsidiary protection status and, depending on national law, non-harmonised national humanitarian protection statuses. This review does typically not cover the prohibition of *refoulement* as an absolute human rights imperative, beyond the refugee context as well as other rights, such as the right to respect for private and family life, which also in some circumstances constitute a bar to removal. In addition, it remains unclear what is meant under “new relevant elements or findings” the individuals must present to avoid that suspensive effect of the appeal is excluded and what threshold would apply concerning

⁸⁶ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 288; ECtHR, *Kudła v. Poland* [GC], No. 30210/96, 26 October 2000, para. 157.

⁸⁷ ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007.

⁸⁸ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, para. 82; ECtHR, *M.A. v. Cyprus*, No. 41872/10, 23 July 2013, para. 137.

⁸⁹ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, para. 82. See also *A.C. and Others v. Spain*, No. 6528/11, 24 April 2014, para. 88 for an overview of other case law on this issue.

the extent to which they should “significantly modify the specific circumstances of the individual case”. This wording seems having been inspired by the language in the Asylum Procedures Directive relating to the lodging and the inadmissibility of subsequent asylum applications (Article 33 (2) (d) and Article 40 (2)-(3)). The lack of clarity and the use of such a high standard with respect to the right to an effective remedy would create an unduly high burden of proof for the individual, which would undermine his or her access to justice.⁹⁰

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Interfering with Member States’ procedural autonomy by limiting the availability of the suspensive effect of appeals (proposed Article 16 (3)) is at odds with the right to an effective remedy under Article 47 of the Charter. The envisaged new modalities regulating the suspensive effect to appeals for rejected asylum seekers subject to a return decision (third subparagraph of Article 16 (3)) do not take into account the different nature of the judicial review in the asylum and return context, notably when assessing the risk of *refoulement* and whether the right to respect for private and family life bars the removal.

To avoid unduly restricting the suspensive effect of appeals on removals, the EU legislator should delete the third subparagraph of Article 16 (3). The general rule in Article 16 (2) should apply to these situations.

3.3. Establishing reasonable time limits for seeking a remedy

Proposed Article 16 (4) reduces the deadline for appeals against a return decision to maximum five days in case of rejected asylum applicants subject to a return procedure – contrary to the general requirement for Member States to “establish reasonable time limits [...] to ensure the exercise of the right to an effective remedy” set out in the same provision. This suggested change may undermine the right to an effective remedy (Article 47 of the Charter).

The proposed deadline would be the lowest deadline in place in EU law for a comparable type of proceedings in the field of migration and asylum. Such a short deadline does not appear to be compatible with CJEU and ECtHR case law concerning deadlines considered as “reasonable” for exercising the right to an effective remedy. In the *Samba Diouf* ruling (C-69/10), the CJEU stated that in the context of accelerated procedures, a “15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate”.⁹¹ However, it is for “the national court to determine” whether 15 days was insufficient in a given situation “in view of the circumstances”.⁹² In a similar manner, the ECtHR considered that the speed of the proceedings should not undermine the effectiveness of the procedural guarantees that aim to protect an applicant against *refoulement*.⁹³ In some Member States, national constitutional courts have already ruled against similarly short deadlines. For example, in 2016, the Czech Constitutional Court concluded that a period of five days to appeal against a return decision would be in many cases insufficient to ensure

⁹⁰ See also similarly, European Council on Refugees and Exiles (2018), *Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, p. 18.

⁹¹ CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, 28 July 2011, para. 67.

⁹² *Ibid.*, para. 68.

⁹³ ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, para. 147.

effective access to legal assistance, especially if the returnee is detained.⁹⁴ Shortly afterwards, an amendment of the Act on the Residence of Foreign Nationals changed the time limit for such appeals from five to 10 days.⁹⁵

In light of the above, setting five days to appeal a return decision for a selected group of third-country nationals subject to a return decision would undermine the right to an effective remedy which must be available and accessible in practice.⁹⁶ It would also severely affect the effective access to legal assistance, as well as interpretation and translation, in particular when the individual is deprived of liberty for the purpose of removal.

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Reducing the time limit to appeal a return decision to five days in case of rejected asylum applicants in proposed Article 16 (4) does not appear to be “reasonable” in light of the CJEU and ECtHR jurisprudence.

The EU legislator should delete the second subparagraph of Article 16 (4), or alternatively, it could provide for a time limit that complies with the CJEU requirements in the Samba Diouf ruling.

⁹⁴ Czech Republic, Constitutional Court (*Ústavní soud*), Decision US 630/2016 of 29 November 2016.

⁹⁵ Czech Republic, Act No. 222/2017 Coll., amending Act on the Residence of Foreign Nationals (*Zákon o pobytu cizinců na území České republiky*), 326/1999 Coll.

⁹⁶ ECtHR, *S.J. v. Belgium*, No. 70055/10, 19 March 2015.

4. Detention

A person's right to liberty and security, including the prohibition of arbitrary detention, is a fundamental right enshrined at all three levels of the multi-layered regulatory scheme in the area of human rights law – namely that of the UN, the Council of Europe and the EU.⁹⁷ Depriving someone's right to liberty, stipulated by Article 6 of the Charter and Article 5 of the ECHR, is permissible, including as a measure to prevent unauthorised entry or to prepare removal. However, pre-removal detention represents an exception to the right to liberty and, as such, must be interpreted narrowly. It needs to comply with the principles of necessity and proportionality expressed in Article 52 (1) of the Charter. At the UN level, Article 9 of the International Covenant on Civil and Political Rights⁹⁸ (ICCPR) requires that any deprivation of liberty imposed, also in an immigration context, must be lawful, necessary and proportionate.

This framework requires that pre-removal detention is only used for limited and clearly defined purposes. Authorities must examine carefully in each individual case, whether deprivation of liberty is lawful and not arbitrary, in light of all the circumstances of the specific case. The CJEU echoed such guarantees as well.⁹⁹ It also recalled in *J.N. v. Staatssecretaris voor Veiligheid en Justitie* (C-601/15) that “in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary.”¹⁰⁰

As highlighted in the Introduction of this FRA Opinion, one of the underlying principles of the Return Directive is the use of deprivation of liberty as a measure of last resort. The proposal introduces a set of amendments without a thorough impact assessment. The amendments suggest a shift away from the principle of imposing detention as a measure of last resort towards permitting a more flexible, and therefore more extensive, use of detention for the purpose of removal.

4.1. Ensuring that detention remains a measure of last resort

In the current text of the Return Directive, Article 15 (1) stipulates that Member States may only keep in detention a third-country national who is the subject of return procedures to prepare the return or carry out the removal process, and only if other sufficient but less coercive measures (i.e. alternatives to detention) cannot be applied effectively in a given case. Current Recital (16) states that the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. These provisions aim at ensuring that detention, as a serious

⁹⁷ FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union, p. 25.

⁹⁸ [International Covenant on Civil and Political Rights](#) of 16 December 1966 (UNTS No. 14668, vol. 999, p. 171).

⁹⁹ CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 37.

¹⁰⁰ CJEU, C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, para. 56.

intrusion into the fundamental right to liberty, is used as a measure of last resort, a principle explicitly highlighted also by the European Commission in the Return Handbook.¹⁰¹

In *El Dridi* (C-61/11), the CJEU clarified that the Return Directive requires weighing if the deprivation of liberty is proportionate to the objective pursued, and if other, less coercive measures can be applied effectively. The CJEU identifies a gradation of measures “which goes from the measure which allows the person concerned the most liberty [...] to measures which restrict that liberty the most.”¹⁰² When reviewing cases concerning pre-removal detention and assessing whether such detention is legal and not arbitrary, the ECtHR looked at whether or not a less intrusive measure could have been imposed instead of resorting to deprivation of liberty.¹⁰³ The UN Human Rights Committee has explicitly found that detention must be necessary and proportionate to comply with Article 9 of the ICCPR.¹⁰⁴

The proposal amends renumbered Recital (27) (current Recital (16)) by deleting the reference to the use of pre-removal detention being “limited”. Second, it proposes to delete the word “only” in the first sentence of proposed Article 18 (1) (current Article 15), which at present clearly restricts the use of detention under the directive only to third-country nationals subject to return procedures for the purpose of preparing the return and/or carrying out the removal process. At the same time, Article 18 (1) also introduces a new requirement that all grounds for detention must be laid down in national law.

Particularly in combination with the proposed change to new Recital (27), and in absence of any other justification, the changes to Article 18 (1) can be interpreted as transforming the restrictive formulation of current Article 15 (1) into a provision that seeks to enable Member States to use detention more extensively. Also, it appears to give Member States the option of using detention for other purposes than “for the preparation of return and for carrying out removal”, as long as such ground is laid down in national law.

This amendment is likely to result in deprivation of liberty also in cases where there is no evidence that it would be necessary to prepare the return and/or carry out the removal. Detention that is not necessary to achieve these objectives would constitute an infringement of the right to liberty, which is not justified under Article 52 (1) of the Charter. Both the CJEU and the ECtHR have consistently ruled that pre-removal detention is arbitrary when, for example, there are no reasonable prospects for removing the person within the detention period permitted by law. In *Kadzoev* (C-357/09), the CJEU has held that such reasonable prospects only exist where there is “a real prospect that removal can be carried out successfully” and it does not exist where “it appears unlikely that the person concerned will be admitted to a third country” having regard to those periods (of detention).¹⁰⁵ In

¹⁰¹ 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 L 339, 19.12.2017, p. 66.

¹⁰² CJEU, C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, 28 April 2011, para 41.

¹⁰³ ECtHR, *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, para. 68, ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 109; ECtHR, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, paras. 124–125.

¹⁰⁴ UN Human Rights Committee, *A v. Australia*, Communication No. 560/1993, views of 30 April 1997.

¹⁰⁵ CJEU, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, paras. 65–67. For an overview of ECtHR jurisprudential developments in this respect, see: FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union, p. 48.

Louled Massoud v. Malta, the ECtHR challenged the validity of grounds for detention in the absence of any immediate prospect for removal.¹⁰⁶

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By removing the wording in proposed Recital (27) whereby pre-removal detention should be “limited” and deleting the word “only” in proposed Article 18 (1), the proposal unduly broadens the scope of interpretation of what constitutes lawful, proportionate and necessary use of pre-removal detention. It thus moves away from the principle of detention as a measure of last resort.

The EU legislator should maintain the reference to detention being “limited” in Recital (27) and keep the word “only” in Article 18 (1), first sentence, of the proposal, to ensure that pre-removal detention remains a measure of last resort.

4.2. Streamlining the concept of ‘risk of absconding’

The Return Directive uses the concept of ‘risk of absconding’ in different settings:

- first, it is one of the grounds permitting pre-removal detention under Article 18 (1) of the proposal (current Article 15 (1));
- second, it justifies not granting a period for voluntary departure under Article 9 (4) of the proposal;
- by virtue of the combination of these Articles, establishing the existence of ‘risk of absconding’ also affects the issuing of entry bans which are mandatory for cases where no period for voluntary departure has been granted (Article 13 (1) of the proposal, current Article 11 (1)).

Open-ended list of criteria to establish the existence of a risk of absconding

The Explanatory Memorandum to the proposal refers to a “strong need for EU-wide objective criteria” for the determination of the existence of a risk of absconding. To prevent “diverging or ineffective interpretations”, the proposal sets out a “common, non-exhaustive list of objective criteria”.¹⁰⁷ Such a list is not present in the current version of the Return Directive. A list is included in the Return Handbook, which is not binding.¹⁰⁸

‘Risk of absconding’ is defined in Article 3 (7) of the directive. This definition requires that the reasons to believe that a third-country national may abscond should be based on objective criteria defined by law. The CJEU has confirmed the need for such criteria to be clearly defined in national law in relation to the similarly phrased text of the Dublin Regulation. In the revised Return Handbook, the European Commission recalls the *Al Chodor* (C-528/15) ruling when recommending the list of specific criteria. Speaking about limitations on the exercise of the right to liberty under Article 6 of the Charter, the CJEU stated that the individual discretion enjoyed by the authorities when determining if there is a risk of absconding “should be exercised within a framework of certain predetermined limits. Accordingly, it is essential that the criteria which define the existence of such a risk, which constitute the basis for detention, are defined clearly by an act which is binding and

¹⁰⁶ ECtHR, *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, paras. 68-69.

¹⁰⁷ Explanatory Memorandum to the proposal, pp. 6-7.

¹⁰⁸ [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 L 339, 19.12.2017, pp. 10-11.

foreseeable in its application.”¹⁰⁹ The CJEU nevertheless did not request that such a list must be provided in EU law. It merely interpreted the requirement stemming from EU law for Member States to set up such list in their national legislation rather than, for example, only administrative practice or case law.

Following the logic applied by the CJEU, a list of criteria for assessing the risk of absconding should play the role of a fundamental rights safeguard, limiting the discretion of national authorities and ensuring clarity and foreseeability. Therefore, if such a list is established at the EU level, it should be an exhaustive list of clearly defined criteria. Newly inserted Article 6 (1) of the proposal is instead formulated as an open-ended list of sixteen criteria which the Member States must as a minimum include in their legislation. Each Member State remains free to provide for additional criteria in its national legislation. The proposal contains no justification for the approach taken.

Assessment of all circumstances of the individual case

Proposed Article 6 (2) requires Member States to conduct “an overall assessment of the specific circumstances of the individual case” to determine the existence of a risk of absconding. When making such assessment, Member States must take into account the list of sixteen criteria referred to in Article 6 (1).

The criteria listed in paragraph (1) focus solely on indications in favour of the presumption of absconding. None of them prescribes the Member States to take into account indicators that may point to the absence of such risk, such as the age and the health and social conditions of the person,¹¹⁰ the presence of family members or of a social network or a long period of stay in the Member State. This means that, when undertaking the overall assessment envisaged in Article 6 (2) national authorities will, in practice, mainly look at factors pointing to a risk of absconding and not to those indicating the absence of such a risk.

The Return Handbook takes a more nuanced approach and could be used to inspire an adjustment to proposed Article 6. The Return Handbook states that all relevant factors must be taken into account when assessing the risk of absconding in an individual case. Some of these factors “may in certain cases lead to the conclusion that there is no risk of absconding even though one or more of the criteria fixed in national law are fulfilled.”¹¹¹ The handbook underlines that the list of criteria cannot be the sole basis for assuming automatically a risk of absconding as concluding the existence of such a risk will frequently be based on a combination of several of these criteria. Therefore, “any automatic conclusion, such as that illegal entry or lack of documents mean the existence of a risk of absconding, must be avoided.”¹¹² The proposal does not contain a similar safeguard.

Suitability of the criteria to determine a ‘risk of absconding’

The 16 criteria listed in Article 6 (1) are formulated in a broad manner and, if taken together, cover an extensive range of situations.

¹⁰⁹ CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 42.

¹¹⁰ [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 L 339, 19.12.2017, p. 11.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

The list was originally developed for the non-legally binding Return Handbook, as a compilation of examples of criteria used by different Member States; it was not intended to be eventually transformed into a legal obligation. As a result, some of the criteria overlap, whereas others are so general in their scope that it prevents their uniform and foreseeable interpretation at the Member State level, which is one of the declared aims of the proposal. While the proposal clearly allows Member States to stipulate additional criteria to conclude the risk of absconding, they would not be able to restrict the list. Although Member States may adopt more favourable provisions to the persons subject to a return procedure under Article 4 (3), this only applies as long as such provisions are compatible with the Return Directive.

In addition, some criteria in themselves raise concerns in terms of their impact on fundamental rights.

- Subparagraph (k) of proposed Article 6 (1) introduces the criterion of an existing conviction for a criminal offence. First, this point duplicates the proposed additional detention ground under newly inserted Article 18 (1) (c), covering a risk to public policy, public security or national security (see *infra* Section 4.3) which is a separate ground for detention under the Return Directive and has, therefore, to be distinguished from the risk of absconding. Second, unless the past criminal behaviour has clear relevance to establishing a risk of absconding in the specific individual case, any deprivation of liberty based on this argument could be seen as being arbitrary and having a punitive rather than preventive character. Third, the wording is conceived in a manner which covers any criminal sentence regardless of its severity and date (i.e. also petty offences committed several decades ago). Only in case of offences in other Member States than the one carrying out the return procedure, the proposal speaks of serious criminal offences, although it does not specifically define them or explain their relevance to a risk of absconding.
- Subparagraph (l) of proposed Article 6 (1) envisages that a risk of absconding could be also determined based on the existence of ongoing criminal investigations or proceedings. Again, this point confuses the purpose of and mechanisms available in the administrative (return) procedure and the criminal procedure. In case of an ongoing criminal procedure, it is up to the competent criminal court to decide on a measure to prevent absconding, namely pre-trial detention. This is rigorously regulated and subject to robust safeguards in criminal proceedings as it entails a limitation of the presumption of innocence as well as deprivation of liberty. Use of administrative detention would mean bypassing this mechanism and creating a significant risk of fundamental rights violations, particularly if it is applied not only to accused but also to mere suspects in any criminal investigation. In fact, by not at all defining the role and degree of involvement of the person in the investigations or proceedings, the proposed wording could, theoretically, apply to anyone from a suspect or accused to a witness or even a victim. Finally, in those Member States that criminalise irregular entry and stay, this criterion could lead to a general assumption of a risk of absconding for all irregular migrants.
- Subparagraphs (a), (d) and (m) of proposed Article 6 (1) are likely to result in a systematic use of pre-removal detention of all those third-country nationals who entered the EU in an unauthorised manner. Subparagraph (a) of proposed Article 6 (1) covers lack of documentation proving the person's identity, subparagraph (d) covers unauthorised entry and subparagraph (m) covers, among others, the use of false or forged identity documents. These three criteria, taken together, would

result in assuming a risk of absconding for virtually all persons who came to the EU fleeing persecution or armed conflicts and whose request for international protection was rejected or terminated (for example due to a change in the situation in the country of origin). Many persons fleeing persecution or armed conflicts are forced to do so without valid documents, or documents may be taken from them during their journey, and many of them have to rely on the use of false documents and irregular entry to be able to seek international protection. In a similar manner, dissidents may not be able to leave the country of origin using genuine travel documents. The criteria proposed in Article 6 (1) (a), (d) and (m) could affect all third-country nationals coming from specific countries, for example, where after the end of an armed conflict Member States change their position in assessing requests for international protection.

The applicability of some of the other proposed criteria also raises doubts. Some of them may, depending on other circumstances, even decrease the risk of absconding. For example, lack of financial resources under subparagraph (c) of proposed Article 6 (1) could also be seen as restricting the person's ability to hide from the authorities and making it more likely that the person remains at her or his place of stay.

Reversing the burden of proof for some criteria

The last sentence of proposed Article 6 (2) requires that some of the criteria listed in paragraph (1) automatically give rise to the presumption of the risk of absconding. These include the following subparagraphs:

- subparagraph (m) – use of false or forged identity documents, destroying existing documents or refusing to provide fingerprints where required by EU or national law;
- subparagraph (n) – opposing the return procedures in a violent or fraudulent manner;
- subparagraph (o) – non-compliance with an alternative to detention; and
- subparagraph (p) – non-compliance with an existing entry ban.

The proposal does not specify whether it would be up to the third-country national to rebut the assumption in these cases, or if the authorities would still be required to look at other circumstances of the case. The Return Handbook which suggested to the Member States to use such presumption in its 2017 revision, states that in such cases “the third-country national should rebut that, notwithstanding the existence of the circumstances below, such risk does not exist.”¹¹³ It can, therefore, be assumed that the burden of proof would be shifted from the authorities to the third-country national.

Neither the Explanatory Memorandum nor the relevant Recital (11) explain why shifting the burden of proof is considered necessary. Where a risk of absconding exists, a proper overall assessment of the specific circumstances of the individual case should lead to the same conclusion without having to resort to shifting the burden of proof. FRA, therefore, assumes that the main rationale is to facilitate the role of the national authorities by absolving them of having to produce further evidence for cases falling under subparagraphs (m) to (p), and to strengthen the position of the issuing authority in case of a review by making it more difficult to challenge the decision.

¹¹³ 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 L 339, 19.12.2017, p. 11.

The existence of a rebuttable presumption cannot fully absolve the national authorities of having to conduct a proper individual assessment of the case and seek evidence both in favour and against concluding the existence of a risk of absconding. The CJEU clarified this in relation to prioritised procedures for granting international protection in case of applicants coming from a country designated as a safe country of origin, which also operate with a rebuttable presumption (of safety). It ruled that the authority must still carry out “a fair and comprehensive examination” of the case.¹¹⁴ Introducing such presumption must not render ineffective the right to be heard (as part of the right to good administration as a general principle of EU law and also incorporated in Article 41 (2) of the Charter (see Section 2.3)) and the right to an effective remedy (Article 47 of the Charter). The Return Handbook, while recommending Member States to apply such rebuttable presumptions, also states that these must be without prejudice to the rights of third-country nationals concerned to be heard and to an effective remedy.¹¹⁵

However, no such safeguards are accompanying the proposal to ensure that these rights are respected. This may be particularly problematic in case of persons not represented by a lawyer and, therefore, not necessarily in the position to challenge the presumption of a risk of absconding, especially in a legal system and language they are often not familiar with. This gives rise to a serious risk of arbitrary deprivation of liberty. The ECtHR has repeatedly stated that the notion of arbitrariness extends beyond lack of conformity with national law, and a deprivation of liberty might be lawful in terms of domestic law yet still arbitrary and thus contrary to the ECHR.¹¹⁶ The notion of ‘arbitrariness’ must therefore be understood broadly, not simply as ‘against the law’ but to include such elements as inappropriateness and injustice.¹¹⁷ Necessity and proportionality of the proposed measure need to be examined very carefully. Administrative convenience cannot be a legitimate objective for decisions leading to the deprivation of liberty under the Return Directive.

For each of the four proposed criteria, one can imagine situations where a third-country national would typically face serious obstacles to rebut the assumption that he or she will abscond. For example:

- use of false or forged identity documents, destroying existing documents or refusing to provide fingerprints under subparagraph (m): a person fleeing the country of origin in haste due to a conflict or a perceived risk of persecution is forced to use a false passport; similarly, such persons may be hesitant to provide their fingerprints due to a fear that they are shared with their country of origin;¹¹⁸ when request for international protection is rejected e.g. due to a change in the situation in the country of origin, the person’s status as a “rejected asylum seeker” would likely undermine the credibility of the alleged reasons for flight in the eyes of the authorities involved in the return proceedings;

¹¹⁴ CJEU, C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 31 January 2013, para 75.

¹¹⁵ [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 L 339, 19.12.2017, p. 11.

¹¹⁶ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 67; ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164.

¹¹⁷ UN Human Rights Committee, *A v. Australia*, Communication No. 560/1993, views of 30 April 1997.

¹¹⁸ FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact on fundamental rights of the proposal for a revised Eurodac Regulation*, FRA Opinion – 6/2016 [Eurodac], Vienna, 22 December 2016, p. 16.

- opposing the return procedures in a violent or fraudulent manner under subparagraph (n): during apprehension the person responds in a manner which is perceived as aggressive of violent manner; such person may be a child who does not understand the situation and the potential consequences of his or her actions;
- non-compliance with an alternative to detention under subparagraph (o): a traumatised person fails to report to the authorities, but is not able to provide reasonable explanations due to his or her mental health state;
- non-compliance with an existing entry ban under subparagraph (p): an entry ban is issued *in absentia* and the person does not receive the decision due, for example, to a change of address in the country of residence, hence has no knowledge of it but cannot prove it.

These examples illustrate only some of the possible scenarios where the proposed wording of the last sentence of Article 6 (2) may lead to arbitrary detention and to violations of other fundamental rights. They nevertheless demonstrate that to establish the actual existence of a risk of absconding, the competent authorities will always have to conduct an individual assessment of the case, regardless whether any of the specific criteria normally showing a risk of absconding is present. From a practical perspective, proceedings where the burden of producing evidence is upon the person rather than the authority might also more frequently lead to delays, can be subject to rebuttals which would increase administrative work, and could frequently result in a reversal of the decision, upon review. Therefore, basing the decision on a full assessment of the individual case will make the system both less likely to violate fundamental rights as well as more sustainable and effective.

In conclusion, the added value of the provision can be questioned. As stated above, in cases where the risk of absconding exists, a proper overall assessment required under the first sentence of Article 6 (2) would reach the same conclusion and achieve the same aim without putting in question the fairness of the proceedings. At the same time, where the risk of absconding does not exist despite the existence of one of the criteria under subparagraphs (m) to (p) of proposed Article 6 (1), conducting such overall assessment of specific circumstances of the individual case would be instrumental in preventing fundamental rights violations.¹¹⁹

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Article 6 of the proposal introduces a non-exhaustive list of criteria that Member States must use to determine the existence of a risk of absconding. Some of the criteria proposed give rise to a rebuttable presumption of the existence of such risk. The broad scope of the criteria in paragraph (1) could lead to assuming a risk of absconding for the majority of irregular migrants in the EU, and some of its elements may not be suitable for properly assessing the risk of absconding. The introduction of a rebuttable presumption of a risk of absconding under paragraph (2) would shift the burden of proof to the third-country national, absolving the national authorities from conducting an individual assessment of the circumstances of the case. In combination, the elements of proposed Article 6 give rise to a risk of arbitrary detention with deprivation of liberty being resorted to also when not

¹¹⁹ See also Meijers Committee (2018), *CM1816 Comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, COM(2018) 634 final, Amsterdam, 27 November 2018, p. 2.

necessary and proportionate. In practice, the proposed changes could lead to the prioritisation of detention and forced removal over less intrusive means.

To avoid that the proposed Article 6 leads to a reversal of the principle of imposing detention as a measure of last resort, the EU legislator should clearly stipulate that an overall assessment of the specific circumstances of the individual case must always be conducted. Such assessment must not only take into account those criteria pointing to the existence of a risk of absconding but also those indicating the absence of such risk, some of which could be expressly mentioned in the text. To this end, the EU legislator should:

- ***rephrase the first sentence of proposed Article 6 (1) using a more nuanced wording, such as: “When assessing the existence of a risk of absconding referred to in Article 3 (7), Member States shall take into due account the following criteria indicating that a third-country national may abscond:”;***
- ***change the first sentence of proposed Article 6 (2) as follows: “The existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria referred to in paragraph (1), as well as all relevant factors indicating the absence of a risk of absconding. Any automatic conclusion of the existence of a risk of absconding based on a single criterion must be avoided.”;***
- ***delete subparagraphs (k) and (l) of proposed Article 6 (1);***
- ***delete the second sentence of proposed Article 6 (2) which intends to introduce a rebuttable presumption of a risk of absconding.***

4.3. Avoiding inappropriate use of public policy, public security or national security concepts

In Article 18 (1) (current Article 15 (1)), the proposal introduces a new ground for imposing pre-removal detention, namely when the returnee “poses a risk to public policy, public security or national security”. It largely matches a ground already existing in Article 8 (3) (e) of the Reception Conditions Directive which refers to “national security or public order”.¹²⁰ According to the European Commission, this ground for detention is necessary as “new risks have emerged in recent years, which make it necessary that illegally staying third-country nationals who pose a threat to public order or national security can be detained.”¹²¹ No further, more specific justification is provided.

The current text of the Return Directive does not contain the possibility to detain a third-country national pending return for the reasons of public policy or security. The Return Handbook provides a clear justification, underlining that “Member States are not allowed to use immigration detention for the purposes of removal as a form of ‘light imprisonment’”, and that “the legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and

¹²⁰ [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 180/96.

¹²¹ Explanatory Memorandum to the proposal, p. 8.

legislation covering the ending of legal stay for public order reasons".¹²² The CJEU took the same approach in the *Kadzoev* ruling (C-357/09) declaring that detention of a person on grounds of public order and public safety cannot be based on the current text of the Return Directive.¹²³ Without a more elaborate justification, it is difficult to understand why a change in this approach included in the proposal would be necessary and proportionate.

The CJEU has already provided an interpretation of the scope of "national security and public order" as a ground for detention of asylum seekers under the Reception Conditions Directive as well as of the meaning of the term "risk to public policy" under the Return Directive, and construed it narrowly in both cases. As a limitation to the right to liberty (Article 6 of the Charter), detention on these grounds needs to meet the requirements of Article 52 (1) of the Charter, including the principle of proportionality. On this basis, the CJEU ruled that the concepts of public policy and national security, constituting necessarily an exception from the general rule, had to be interpreted in EU immigration and asylum legislation restrictively, similarly to their narrow interpretation in EU free movement legislation.¹²⁴ According to the CJEU, this requires that the exception is applied on a case-by-case basis to decide if the personal conduct of the returnee poses a genuine and present risk to public policy. A suspicion of committing a criminal offence, or even an already existing conviction, would in themselves not be sufficient to justify the application of the "public policy" exception.¹²⁵

Any discussion on a potential amendment of the Return Directive in this direction needs to be based on this restrictive interpretation of the concepts of "public policy" and "national security" in EU immigration legislation.

The proposed new ground also overlaps significantly with several of the criteria to assess the existence of a risk of absconding proposed in Article 6 (1), particularly the existence of a conviction for a criminal offence under subparagraph (k) and the ongoing criminal investigations and proceedings under subparagraph (l) of the same provision. To avoid an inconsistent application of the directive, the partial overlap between proposed Article 6 and proposed Article 18 should be resolved (see also Section 4.2).

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In Article 18 (1) (c), the proposal introduces an additional ground for detention of third-country nationals in the return procedures. This relates to those third-country nationals who pose a risk to public policy, public security or national security. The Explanatory Memorandum to the proposal does not provide a detailed justification explaining why such cases cannot be addressed through the standard criminal law instruments. According to the Court of Justice of the EU, the scope of the "national security and public order" as well as "public policy" exceptions in the context of EU asylum and immigration legislation must be interpreted narrowly.

¹²² [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 L 339, 19.12.2017, p. 67.

¹²³ CJEU, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, para. 70.

¹²⁴ CJEU, C-554/13, *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, 11 June 2015, paras. 50 and 57; CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 24 June 2015, paras. 78-79; CJEU, C-601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, paras. 63-69.

¹²⁵ *Ibid.*

The detention of third-country nationals who pose a risk to public policy, public security or national security should be addressed by using already available criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. Should the EU legislator conclude that it is necessary and proportionate to provide an additional ground for deprivation of liberty for this category of persons under the Return Directive, it should include a new recital in the proposal, reflecting the narrow scope of these concepts as interpreted by the CJEU. Such recital should not only apply to the grounds for detention but to all references to public policy, public security and national security included in the Return Directive.

4.4. Refraining from setting a bottom limit to maximum detention periods

Article 18 (5) of the proposal requires each Member State to set in national law a maximum period of detention which does not exceed six months (extendable by an additional period of up to twelve months under two specific circumstances in accordance with paragraph (6) of the same article). Article 18 (5) of the proposal develops this obligation further by suggesting that the maximum detention period Member States establish under national law must not be shorter than three months.

In the Explanatory Memorandum to the proposal, the European Commission justifies this proposal by stating that in some Member States, the maximum detention period permitted by law is significantly shorter than the six months allowed by the Return Directive, and a longer period is needed to successfully carry out return and readmission procedures to third countries.¹²⁶

Since the adoption of the Return Directive in 2008, the majority of Member States bound by it have aligned their national legislation with the maximum detention periods permitted by the directive. Only in single cases, the maximum period is shorter than the three months envisaged in the proposal.¹²⁷

The length of the maximum period of detention included in national law does not seem to impact on the effectiveness of returns. Among the Member States with the lowest return rate, there are Member States that apply shorter detention periods, as well as those taking advantage of the maximum detention periods permitted under the Return Directive. Some of the Member States with the shortest maximum permitted detention periods actually show an above-average return rate.¹²⁸ The most recent focused study on the effectiveness of return in EU Member States, prepared by the European Migration Network based on contributions of national authorities, does not list the maximum length of detention established by national law among the key challenges influencing the rate of returns.¹²⁹

¹²⁶ Explanatory Memorandum to the proposal, p. 8.

¹²⁷ FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union, Figure 13, p. 59. Since the publication of the report, France has changed the maximum period from 45 to 90 days, applicable as of 1 January 2019. See France, Code for Entry and Residence of Foreign Persons and the Right of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*, CESEDA), Article L552-7.

¹²⁸ European Commission (2018), *Communication from the Commission to the European Parliament and the Council. Progress report on the Implementation of the European Agenda on Migration*, COM(2018) 301 final, Brussels, 16 May 2018, Annex 5 – Statistics on Return.

¹²⁹ European Migration Network (2017), *The effectiveness of return in EU Member States: challenges and good practices linked to EU rules and standards – Synthesis Report*, Brussels: European Migration Network.

Available data do not support the need for a rule whereby the maximum period of detention should not be shorter than three months. Given the small number of Member States affected by such requirement, the proposed changes to Article 18 (5) should also be examined in light of the principle of subsidiarity under Article 5 (3) of the Treaty on the European Union, recalled in proposed Recital (41) of the directive. According to this principle, the EU must act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.

Furthermore, the law of some Member States stipulates different maximum period of detention for children held with their families and unaccompanied children.¹³⁰ This approach builds on current Article 17 of the Return Directive (Article 20 of the proposal) which underlines that children (both unaccompanied and with their families) must only be detained as a measure of last resort and for the shortest appropriate period of time, and that the best interests of the child must be a primary consideration in this context. Prescribing in a blanket manner, as a general rule, that such maximum periods of detention must not be set below a certain length would also deprive Member States of the possibility to provide for more favourable general rules for specific categories of vulnerable people, and children in particular.

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The proposal requires, in Article 18 (5), that Member States must ensure that the maximum length of detention provided for under national law is not less than three months. Available data does not support that this would be necessary to stimulate effective returns, as there does not seem to be a clear correlation between the maximum period of detention established under national law and the effectiveness of return from individual Member States.

The EU legislator should consider keeping the rules on the maximum length of detention included in Article 15 (5) of the current version of the Return Directive unchanged.

¹³⁰ FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union, p. 60.

5. Protecting personal data in the context of return

Return procedures entail the processing of personal data. In the absence of a dedicated framework in the Return Directive, Regulation (EU) 2016/679 (General Data Protection Regulation, GDPR) applies.¹³¹ When processing personal data, including their transfer, Member State authorities conducting such transfers are “controllers” within the meaning of Article 4 (7) of the GDPR. Under Article 52 (1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

This chapter looks at two specific issues arising from the proposal, namely the designation of returns as an “important reason of substantial public interest” which affects the application of GDPR provisions related to the processing of sensitive data and the sharing of personal data with third countries, as well as the processing of personal data through national return management systems. The formulation of the proposal follows largely the proposal for a new Regulation on the European Border and Coast Guard (EBCG Regulation),¹³² on which FRA submitted a legal opinion at the request of the European Parliament on 27 November 2018.¹³³ This chapter, therefore, draws extensively on the FRA EBCG Opinion.

5.1. Reducing risks of defining return as an “important reason of substantial public interest”

When transferring personal data to third countries for the purpose for return, Member States are bound by EU law. They have the duty to respect the fundamental rights and freedoms enshrined in the Charter, including the right to protection of personal data.

Recital (46) of the proposal indicates that effective implementation of returns represents an “important reason of substantial public interest”. Such designation – which mirrors Recital (67) of the proposed EBCG Regulation – must be read together with the rules on processing of personal data enshrined in the GDPR. It has two specific implications:

- First, according to Article 9 (2) (g) of the GDPR, “reasons of substantial public interest” is an exception that can be invoked to permit the processing of sensitive data, namely personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural

¹³¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

¹³² European Commission (2018), *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°98/700/JHA, Regulation (EU) No. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council*, Brussels, 12 September 2018, 2018/0330(COD); COM(2018)631 final.

¹³³ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications*, FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018.

person, data concerning health or data concerning a natural person's sex life or sexual orientation. The processing of such data is otherwise prohibited.

- Second, under Article 49 (1) (d) and Article 49 (4) of the GDPR “important reasons of substantial public interest” recognised in Union law or in the law of the Member State constitute an exception to the general rule requiring an adequacy decision by the European Commission or other appropriate safeguards to transfer personal data to third countries or international organisations. The proposal states in Recital (47) that readmission agreements concluded by the EU or Member States, which could contain such safeguards, cover a limited number of “main countries of origin of illegally staying third-country nationals subject to an obligation to return”. This, according to the proposal, justifies the transfers of personal data by Member States to third countries for the purposes of “implementing return operations of the Union” under the exception of Article 49 (1) (d) of the GDPR.¹³⁴ Article 49 of the GDPR represents a derogation from the general principle. As such, this provision must be interpreted restrictively.

To justify the need for defining return as an “important reasons of substantial public interest”, Recital (47) states, “It is not always possible to ensure [that] third countries systematically fulfil the obligation established by international law to readmit their own nationals”. Nor do they intend to conclude a readmission agreement with the EU, which would contain the necessary data protection safeguards. Hence, the need to share personal data that is necessary for identification, documentation and implementation of return using this exceptional provision in the GDPR.

As stated in the FRA Opinion on the proposed EBCG Regulation, the processing of some categories of core personal data necessary for identification and documentation of returnees (namely name, date and place of birth, travel document details, and, depending on the situation, fingerprints) may be justified in specific circumstances using the derogation of “important reason of public interest”. Nevertheless, this cannot be perceived as authorising the Member States to transfer personal data to third countries, without assessing whether all data processing requirements are fulfilled, and if such transfers are in compliance with the GDPR and Article 8 of the Charter on the protection of personal data. Furthermore, it certainly does not justify the sharing of all data or documents that may be useful for identification purposes, particularly those directly or indirectly revealing sensitive personal data.¹³⁵

The prohibition to share information with the country of origin disclosing that a person applied for international protection under EU law governing the asylum procedure,¹³⁶

¹³⁴ [Directive \(EU\) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA](#), OJ L 119/89.

¹³⁵ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications*, FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018, p. 39.

¹³⁶ See [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 (OJ L 180, 29.6.2013, pp. 60–95), Article 30 (relating to collection of information on individual cases); European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection*

reflecting the well-established principle of confidentiality under international refugee law,¹³⁷ is of particular relevance in this regard. Personal data that can allow the country of origin to deduce directly or indirectly that a person has applied for asylum in another country are extremely sensitive as it can expose the person concerned and/or his or her family members remaining in the country of origin to retaliation measures.¹³⁸ This sensitivity concerns not only the information that a person has applied for international protection but also data revealing political opinions, religious or philosophical beliefs. Their wrong handling may also create a *sur place* refugee claim.¹³⁹ In *F.N. and Others v. Sweden*, the ECtHR concluded that the set of documents the Swedish authorities shared with Uzbekistan to facilitate the return of a rejected asylum applicant family were likely to raise the suspicion that they had been possibly involved in anti-government protests and other activities, leading at a minimum to questioning the applicants upon their return by the authorities. The ECtHR concluded that the applicants' return would violate Article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment).¹⁴⁰ Following this approach, Article 37 (2) of the proposed recast Eurodac Regulation, bans the transfer of personal data to third countries if there is a real risk that as a result of such transfer the data subject may be subjected to torture, inhuman and degrading treatment or punishment or any other violation of his or her fundamental rights. This is an important safeguard, which is also relevant for data that are not stored in Eurodac.

The mere designation of returns to be of "important reason of substantial public interest" does not automatically mean that the processing of sensitive personal data is necessary for achieving the objective. All the other elements of Article 9 (2) (g) of the GDPR – proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject – also need to be met in every individual case.

The absence of an adequacy decision or an EU readmission agreement should arguably serve as an argument for more stringent rules on personal data transfer rather than their relaxation.¹⁴¹

Unlike the proposed EBCG Regulation which sets out the activities of the European Border and Coast Guard Agency in the field of returns, the Return Directive does not limit the scope for the Member States' cooperation with third countries, nor does it contain a

lodged in one of the Member States by a third-country national or a stateless person (recast)
COM(2016)270 final/2 - 2016/0133 (COD), 4.5.2016, Article 38 (3).

¹³⁷ See e.g. UNHCR (2003), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, para. 33; UNHCR (2006), *Guidelines on International Protection No. 7: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006, para. 42; and consider also in its entirety, UNHCR (2005), *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005.

¹³⁸ FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on the impact of the proposal for a revised Eurodac Regulation on fundamental rights*, FRA Opinion – 6/2016 [Eurodac], Vienna, 22 December 2016, Section 3.1.

¹³⁹ This concerns persons who leave their own country for non-refugee related reasons but acquire a well-founded fear of persecution once they are already in the host country. See UNHCR (2007), *Refugee Protection and International Migration*, Rev.1, 17 January 2007, paras. 20-21.

¹⁴⁰ ECtHR, *F.N. and Others v. Sweden*, No. 28774/09, 18 March 2013, paras. 73-79.

¹⁴¹ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications*, FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018, p. 40.

specific data protection framework. Although Recital (47) refers to transfers of personal data “for the purposes of implementing return operations of the Union”, it can be assumed that the intention was to include also return operations conducted by individual Member States. The reference to transfers of personal data to third countries would have to be interpreted in light of the rules on cooperation on return and readmission foreseen in legislation on foreigners of each Member State. Although such cooperation would presumably primarily focus on identification, obtaining travel documents and conducting removals, the impact of designation of returns as important reasons of substantial public interest will be broader and less foreseeable than in the case of the proposed EBCG Regulation. The Return Directive should, therefore, clearly point to the relevant requirements of applicable EU legislation regulating the processing of personal data.

The question of the time of the data sharing is also of importance. Sharing personal data of an applicant for international protection with the country of origin to initiate a return procedure before the asylum claim has been rejected in the final instance may create significant protection risks. If the person is sought by the country of origin, it may use the information received to put pressure on family members back home or, in extreme cases, take persecutory measure in the country where the person sought asylum. Therefore, Member States should avoid sharing personal data pending a final decision on an asylum application, and this important principle should be appropriately reflected in the Return Directive.

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The proposal designates return as an important issue of substantial public interest. Without adequate safeguards, this designation may be perceived as authorising Member States to share with third countries or international organisations all information that may be considered relevant for returns, and absolving the national authorities of applicable data protection obligations.

If the EU legislator considers that it is justified to designate return as an important issue of substantial public interest, reliance on "substantial public interest" as a legal ground for the processing of personal data must be accompanied by adequate safeguards. Proposed Recital (47) or another relevant recital should therefore:

- ***remind Member States of Article 8 of the Charter (right to protection of personal data) and of their obligation to ensure that the requirements under Article 9 (2) (g) of the Regulation (EU) 2016/679 (General Data Protection Regulation) must continue to be met. This includes proportionality to the aim pursued, respecting the essence of the right to data protection, and the existence of suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;***
- ***clearly state that qualifying return as an important reason of substantial public interest does not justify the sharing of all data or documents that may be considered useful for returns, without further limitations;***
- ***remind Member States of the need to avoid any contacts with asylum applicants' country of origin as long as no final decision on the application for international protection has been taken.***

To be effective, similar safeguards would need to be introduced in the proposed new Regulation on the European Border and Coast Guard.

5.2. Framing national return management systems

New Article 14 introduced by the proposal sets out an obligation for each Member State to have in place a national return management system processing all necessary information for implementing the directive. The national systems should be linked and automatically communicate data to a central system operated by the European Border and Coast Guard Agency, which is envisaged by Article 50 of the proposed EBCG Regulation.¹⁴² According to proposed Recital (38), such national systems should be also linked to the Schengen Information System.

The proposal implies – more clearly than the proposed new EBCG Regulation in relation to the central system – that the national return systems would store personal data of returnees. Proposed Recital (38) refers to providing timely information on “the identity and legal situation” of the third-country national that are relevant for monitoring and following up on individual cases. The categories of personal data stored in the system and the scope of and rules for its exchange with other Member States or the European Border and Coast Guard Agency via the central system are, however, not further specified.

Any processing of personal data prescribed by the Return Directive would need to comply with applicable data protection legislation and be governed by data protection principles – lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability of the data controller.¹⁴³

The principles of purpose limitation and data minimisation deserve special attention in the context of the return management systems.¹⁴⁴ Under the principle of purpose limitation, mirrored also in Article 8 (2) of the Charter, personal data may only be collected for specified, explicit and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes. Under the principle of data minimisation, personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”.

Proposed Article 14 (1) refers not only to the management of individual (presumably return) cases, but also to “any return-related procedure”. Considering that the proposal emphasises the need for “coherence and synergies with the asylum procedures”,¹⁴⁵ it does not specify whether this should also be achieved by means of the return management systems. In other words, it may create the risk that return management systems will contain information related to (past or even ongoing) asylum procedures. The efforts to increase synergies between the asylum and the return procedures should not result in undermining the confidentiality of asylum information as stipulated in Articles 15 and 48

¹⁴² European Commission (2018), *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°98/700/JHA, Regulation (EU) No. 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council*, Brussels, 12 September 2018.

¹⁴³ These principles are stipulated in Article 5 of *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, OJ L 119/1.

¹⁴⁴ FRA (2018), *Opinion of the European Union Agency for Fundamental Rights on the revised European Border and Coast Guard Regulation and its fundamental rights implications*, FRA Opinion – 5/2018 [EBCG], Vienna, 27 November 2018, p. 43.

¹⁴⁵ Explanatory Memorandum to the proposal, p. 2.

of the Asylum Procedures Directive.¹⁴⁶ In practice, in FRA's view this means that only information about the identity, the travel route and the state of the asylum procedure may be utilised for return purposes. Information collected during the personal interview under Article 15 of the Asylum Procedures Directive should under no circumstances be used for return purposes. This would undermine the trust that is necessary to allow applicants for international protection to present the grounds for their applications in a comprehensive manner as required by Article 15 (3) of that directive.

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Under proposed Article 14 (1), Member States will be required to set up, operate, maintain and further develop national return management systems, automatically communicating data to a central system operated by the European Border and Coast Guard Agency. The return management systems will contain further unspecified personal data of returnees. Without further safeguards, this may lead to data protection violations and to including confidential information from the asylum file.

In view of fully complying with Article 8 of the Charter and the EU acquis on data protection, the EU legislator should modify Recital (38) to:

- ***remind Member States of the applicability of EU data protection legislation to any processing of personal data in their return management systems, including the communication of this data to the central system operated by the European Border and Coast Guard Agency. The principles of lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality; and accountability of the data controller could be explicitly mentioned;***
- ***underline that the national return management systems should not contain any information obtained during the personal interview carried out on the basis of Article 15 of Directive 2013/32/EU (Asylum Procedures Directive).***

¹⁴⁶ 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, OJ L 180/60.

6. Border procedure

As a new element, the proposal introduces in Article 22 a simplified return procedure for third-country nationals whose application for international protection was examined in a border procedure under the proposed Regulation establishing a common procedure for international protection (Asylum Procedure Regulation).¹⁴⁷ The border procedure in Article 41 of the proposed Asylum Procedures Regulation is intended for examining the admissibility of applications made at the border or in transit zones, as well as for examining the merits when such applications are processed in an accelerated procedure.

As is the case in the current Asylum Procedures Directive (Directive 2013/32/EU),¹⁴⁸ the border procedure under the asylum *acquis* should remain optional in the new regulation. The border procedure under proposed Article 22 of the recast Return Directive, on the other hand, will be compulsory, meaning that Member States will have to establish a border procedure also if they decide not to have border procedures to examine asylum applications.

For border procedures, proposed Article 22 envisages a set of derogations from the general rules under the Return Directive. This includes:

- the form of return decisions,
- not granting a period of voluntary departure unless the person is in possession of a valid travel document,
- providing for a reduced period for lodging an appeal against the return decision,
- further limiting suspensive effect of appeals, and
- providing for systematic deprivation of liberty in the border procedure.

The proposed Asylum Procedures Regulation is still far from being adopted, as there are significant issues that remain to be negotiated. It is, therefore, still unclear how the future border procedure under the new EU asylum legislation will look like, including which categories of third-country nationals may be covered by such procedure and what procedural safeguards would be in place. The issue of safeguards is of particular importance given that the border procedure is intended as an exception from the regular asylum procedure, and according to the Commission's proposal on the Asylum Procedures Regulation, it would usually involve detention and no automatic suspensive effect of appeals.¹⁴⁹ Similarly, the personal scope of the asylum border procedure is not clear. It is not yet known whether it will apply only to persons apprehended directly at the border or if it will be possible, for example, to channel into the border procedure also persons apprehended elsewhere in the territory of a Member State, or if it can apply to all categories of applicants for international protection, including vulnerable persons.¹⁵⁰

¹⁴⁷ European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM(2016) 467 final, 2016/0224(COD), COM(2018)634 final, Brussels, 13 June 2016.

¹⁴⁸ 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, OJ L 180/60.

¹⁴⁹ European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM(2016) 467 final, 2016/0224(COD), COM(2018)634 final, Brussels, 13 June 2016, Explanatory Memorandum, p. 16.

¹⁵⁰ See in this regard Articles 24 and 25 of the currently applicable Directive 2013/32/EU.

The Return Directive already foresees a specific ‘opt-out’ provision for persons refused entry at the border or apprehended or intercepted in direct connection with an irregular crossing of the border. For such cases, Article 2 (2) (a) of the Return Directive permits Member States to decide not to apply the majority of the directive’s provisions, with the exception of key standards listed in Article 4 (4), relating to, among other things, the special needs of vulnerable persons, detention conditions, or the principle of *non-refoulement*. A number of Member States use the opportunity provided by Article 2 (2) (a). The proposed Article 22 comes as an additional, independent mechanism, unrelated to the current Article 2 (2) (a).

Given this present state of play, any discussion about an introduction of a border procedure in the return context would mean attempting to first design the second step in a two-step procedure, when the first step is not yet set. This would result in acting in a temporary situation of legal uncertainty (proposed Article 22 refers six times to EU asylum instruments in the making) and prejudicing the outcome of the – highly complex and sensitive – legislative process in the asylum *acquis*. The absence of a thorough impact assessment should be underlined in the context of this particular proposal.

FRA believes that it is, therefore, not possible to design the border procedure under the Return Directive in a manner that would put in place appropriate safeguards minimising the risk of fundamental rights violations. The analysis below highlights, in a non-exhaustive manner, some of the elements of the proposal that already at this stage raise obvious fundamental rights issues, irrespective of the rules for a border procedure adopted in the asylum context. In the absence of an agreed, clear legal framework governing ‘step one’ of the border procedure in the asylum context, FRA is unable to propose alternative solutions that would assist in establishing such procedure in a fundamental rights compliant manner.

Although the proposed Article 22 (2) stipulates that many provisions of the Return Directive continue to apply also to the border procedure, it contains an extensive set of derogations reducing fundamental rights safeguards. This is presumably based on the logic, similar to that of proposed Article 16 (see Section 3.2) that the case has been sufficiently assessed by the competent authorities in the asylum procedure and only minimum safeguards are needed in the connected return procedure.

As underlined in relation to combining decisions on the end of legal stay and return decisions (see Section 2.1), even if both decisions are combined within one administrative act, these remain two distinct procedures governed by two different legal regimes. Also the CJEU refers to “joint handling [...] of the administrative proceedings leading to such decisions”¹⁵¹ and not to the merging of these into a single immigration procedure that would override the safeguards required to accompany the other decision. Proposed Article 8 (6) confirms this. According to it, the adoption of a return decision immediately after or together with a decision on ending legal stay, is without prejudice to the procedural safeguards required by the directive and other relevant provisions of EU and national law. As a result, the safeguards available in relation to the return decision must in themselves be robust enough to guarantee the right to be heard (being a general principle of EU law mirrored in Article 41 of the Charter) as well as the right to an effective remedy (Article 47 of the Charter). These principles would apply equally in the proposed border procedure.

¹⁵¹ CJEU, C-181/16, *Sadikou Gnandi v. État belge*, 19 June 2018, para. 49.

Insufficient time for appeals

Proposed Article 22 (5) prescribes to Member States to grant a period no longer than 48 hours to appeals against return decisions that are issued to persons whose application for international protection had been previously rejected by a final decision in the border procedure conducted at the border or in a “transit zone” (a term which is not defined in the Return Directive). By setting a maximum rather than a minimum period, the proposal would allow Member States to set even shorter deadlines to appeal.

Setting a period for appeal within the border procedure at 48 hours or less appears unreasonably and unjustifiably short. In comparison, the current asylum legislation requires Member States to provide for “reasonable time limits” for exercising the right to an effective remedy, including where they apply the border procedure, which “shall not render such exercise impossible or excessively difficult.”¹⁵² This principle is not reflected in proposed Article 22. Both, the CJEU and the ECtHR have made it clear that in order to provide for an effective remedy, the period to lodge an appeal must be reasonable both generally as well as in light of the specific case.¹⁵³

As highlighted in relation to proposed Article 16 (4) (see Section 3.3), already in case of a 15-day period in the context of an accelerated asylum procedure, the CJEU refrained from declaring an appeal period of 15 days sufficient. It concluded that, while such period does not seem, generally, to be insufficient, it was for the national court to determine whether it was insufficient in a given situation.¹⁵⁴ This illustrates the clear requirement of providing appeal periods that correspond both to the severity of the impact of the decision on the person, as well as to the nature and complexity of the proceedings. The period of 48 hours or shorter appears clearly insufficient in light of both. As regards the impact of the decision on the person, this entails removal to a third country, likely accompanied by other consequences such as detention and an entry ban. As regards the nature of the proceedings, appeals require, among others, effective access to legal advice, interpretation and translation as well as, generally, meaningfully preparing for the hearing. None of these seem to be taken into account by the proposal. Furthermore, the proposal to impose a maximum period for lodging an appeal (regardless its length) seems to disregard the very different availability and effectiveness of legal, linguistic and practical support to third-country nationals subject to return in different Member States, whether provided by the authorities or other actors.

Absence of an automatic suspensive effect in refoulement cases

Similarly to Article 16 (3) of the proposal, Article 22 (6) seeks to limit the requirement to automatically grant suspensive effect to certain appeals. According to the proposal, the enforcement of the return decision during the appeal would only be automatically suspended where there is a risk of breach of the principle of *non-refoulement* and at the same time, either:

¹⁵² 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, OJ L 180/60., Article 46 (4).

¹⁵³ ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, paras. 144-148.

¹⁵⁴ CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, paras. 67-68.

- new elements or findings have arisen or have been presented by the third-country national which significantly modify the specific circumstances of the individual case in comparison to the situation assessed during the asylum procedure; or
- the previous asylum decision was not subject to an effective judicial review.

The proposal seems to seek to incorporate recent CJEU rulings in *X v. Belastingdienst/Toeslagen* (C-175/17),¹⁵⁵ and *X and Y v. Staatssecretaris van Veiligheid en Justitie* (C-180/17),¹⁵⁶ which stated that Member States are not required to maintain two levels of jurisdiction in case of appeals, both granting an automatic suspensive effect to an alleged risk of *refoulement*. However, the rulings dealt with the re-examination of the risk of *refoulement* in the context of a single decision rejecting an application for international protection and imposing an obligation to return, i.e. where not only the asylum application, but also the obligation to return have already been assessed at an appeal stage, with a suspensive effect.

The review available under the EU asylum *acquis* covers only the circumstances which give rise to refugee status or subsidiary protection status and possibly national humanitarian protection statuses. This review does typically not cover other rights which may also constitute a bar to removal, such as the right to respect for private and family life (see *supra* Section 3.2). Furthermore, the protection against *refoulement* extends also to persons that are specifically excluded from international protection under Articles 12 and 17 of the Qualification Directive (2011/95/EU). In this manner, protection from *refoulement*, unlike the right to asylum, is an absolute human rights imperative. Denying an automatic suspensive effect in the return procedure in cases where the return decision was preceded by a judicial review of a negative asylum decision, as proposed in Article 22 (6) (a) and (b), would, at the very least, mean limiting the protection from *refoulement* only to cases which justify granting international protection.

Similar to the third subparagraph of proposed Article 16 (3), the exact meaning of “new relevant elements or findings” and the threshold to decide whether they “significantly modify the specific circumstances of the individual case”, are unclear. The burden on the individual is particularly high given the maximum 48-hour period during which an appeal meeting such requirements would need to be submitted.

Furthermore, the proposed wording of Article 22 (6) is rather ambiguous in referring to situations where there “**is a risk** of breach of the principle of *non-refoulement*”. In those cases, where the authorities have already established the existence of such a risk, all further actions to remove the person must be suspended *ex officio*. Otherwise, the authorities’ conduct would be a flagrant breach of the principle of *non-refoulement*. Article 22 (6) should thus focus only on situations where “**the person presents an arguable claim** invoking such a risk”.

Use of the standard form for return decisions

Article 22 (3) of the proposal prescribes that Member States issue return decisions in the border procedure by means of a standard form in accordance with Article 15 (3) of the proposal (current Article 12 (3)). At present, the Return Directive permits the use of such standard forms set out under national legislation, as a derogation from the requirements of Article 15 (2) of the proposal (current Article 12 (3)) in cases of illegal entry. Under

¹⁵⁵ CJEU, C-175/17, *X v. Belastingdienst/Toeslagen*, 26 September 2018.

¹⁵⁶ CJEU, C-180/17, *X and Y v. Staatssecretaris van Veiligheid en Justitie*, 26 September 2018.

proposed Article 15 (2) of the directive, Member States have the obligation to provide, upon request, a written or oral translation of the main elements of the decisions related to return (covering also detention and entry ban decisions), including information on the available legal remedies, in a language that the person understands. In those circumstances when proposed Article 15 (3) of the directive applies, Member States using the standard form are only obliged to provide generalised information sheets explaining the main elements of the form, in at least five most common languages used by irregular migrants entering the Member State in question.

In itself, the use of standard forms raises fundamental rights issues. Although it does not absolve the national authorities from having to give reasons in fact and in law and information on applicable legal remedies, the simplified form (which is not attached to the Return Directive and may significantly differ from one Member State to another) effectively reduces the scope for providing “reasons in fact”, namely providing information on the individual case beyond a reference to the fact of illegal entry. This limits the effective exercise of the right to be heard guaranteed under Article 41 of the Charter and confirmed by CJEU case law in this context.¹⁵⁷ It is also an obstacle for a thorough review of the administrative procedure for issuing such a decision in case the third-country national seeks a remedy. The derogation from the right to a translation of at least the main elements of the decision means that a large proportion of third-country nationals (particularly in cases where the structure of migratory movements to a given Member State is more dynamic and the main nationalities of arrivals change rapidly) will not understand the decision and the avenues to seek legal remedies. This clearly raises issues as regards the right to an effective remedy under Article 47 of the Charter as interpreted by the CJEU.

The compulsory use of the standard form in the proposed border procedure would further exacerbate these issues, expanding them to a yet undefined but presumably large share of third-country nationals, possibly speaking many different languages, particularly if this approach is applied at airports. Persons not sufficiently understanding the contents of the return decision would be particularly disadvantaged by the strict conditions for appeals under paragraphs (5) and (6) of proposed Article 22.

Furthermore, given that the majority of the persons subject to a border procedure would receive an entry ban, it would likely be incorporated in the return decision issued by means of a standard form. This would mean that third-country nationals not covered by the five languages in which the information sheets exist could not be reasonably expected to understand the scope of the entry ban. This could lead to future situations of re-entering the EU in violation of a valid entry ban, with the resulting adverse consequences under the Return Directive as well as national criminal law.

Deprivation of liberty in the border procedure

In Article 22 (7), the proposal enables Member States to continue the deprivation of liberty of third-country nationals previously detained under Article 8 (3) (d) of the proposed recast

¹⁵⁷ CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, paras. 36-38; CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis*, 6 November 2014, para. 48; CJEU, C-383/13 PPU, *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013, para. 32.

of the Reception Conditions Directive (2013/33/EU).¹⁵⁸ This latter provision permits detention in order to decide, in the context of a border procedure in accordance with Article 41 of the proposed Asylum Procedure Regulation, on the applicant's right to enter the territory. This part of the proposal raises several fundamental rights issues.

First, the proposal refers to the possibility to "keep in detention" a third-country national detained in the context of the border procedure under Article 41 of the proposed Asylum Procedure Regulation, in order to prepare the return and/or carry out the removal process. It does not stipulate whether such detention would require a new detention decision, and in what form (including whether it would have to comply with the requirements under the relevant existing provisions of the Return Directive), or if the previous detention under the EU asylum legislation would simply continue despite a new legal regime. This would, among others, impact on the interpretation of what constitutes the starting point of such detention which is important in the context of judicial supervision over detention, including the requirement of speedy judicial review of the lawfulness of detention under Article 18 (2) and the review at reasonable intervals under Article 18 (3) of the proposal (current Article 15 (2) and (3)).

Second, based on the assumption made by the European Commission in relation to Article 41 of the proposed Asylum Procedure Regulation according to which "in most cases detention is involved when applying the border procedure" in the asylum context,¹⁵⁹ it can be safely assumed that the majority of applicants for international protection rejected in the border procedure would likewise be deprived of liberty. The unclear structure of Article 22 of the proposal and its interplay with the upcoming asylum legislative framework give rise to a genuine risk of introducing an element of systematic detention into the Return Directive, without the requirement to first consider less coercive measures. It is difficult to imagine how the systematic detention without an individual necessity and proportionality assessment would be compatible with Article 52 (1) of the Charter.

Third, the proposal envisages that detention under Article 22 (7) can be maintained for a period of up to four months, presumably from the moment when the person's application for international protection is rejected in the asylum border procedure. It, nevertheless, adds that if the return decision cannot be enforced within this maximum period, the person may be "further detained" in accordance with Article 18 of the proposal (current Article 15). This means that as long as removal arrangements are in progress and executed with due diligence, the regular detention framework may be applied which allows pre-removal detention for up to six months under paragraph (5) extendable in specific cases by an additional twelve months under paragraph (6) of Article 18 of the proposal. The formulation of Article 22 (7) of the proposal and the associated Recital (36) does not exclude the possibility that this period only begins to run after the up to four months of detention under the border procedure, permitting up to 22 months of pre-removal detention in addition to any detention in the asylum procedure. In such case, the border procedure would represent an unjustifiable tool for extending the maximum period of

¹⁵⁸ European Commission (2016), *Proposal for a Directive of the European Parliament and the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465 final, 2016/0222 (COD), Brussels, 13 July 2016.

¹⁵⁹ European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM(2016) 467 final, 2016/0224(COD), Brussels, 13 June 2016, Explanatory Memorandum, p. 16.

detention under the directive, particularly in light of its systematic nature, and would be in clear conflict with proposed Article 18 (6).

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Article 22 of the proposal would oblige Member States to introduce a special procedure at borders for third-country nationals whose application for international protection has been rejected in the border procedure under the proposed revision of the EU asylum legislation. Given that the reform of the Common European Asylum System is ongoing and the scope of the border procedure under the asylum *acquis* and safeguards applicable during such procedure are not yet known, it is premature to create a legislative framework that seeks to reflect and be closely interlinked with the proposed Asylum Procedure Regulation.

Furthermore, a number of specific elements of the proposed Article 22 raise serious fundamental rights risks, including the proposed very short deadline to submit an appeal, the absence of an automatic suspensive effect in cases where the applicant presents an arguable claim of risk of *refoulement*, the form of decisions and the regulation of detention in the border procedure.

In the absence of agreed legislation on asylum framing the border procedure, it is not possible to suggest solutions that would re-design the proposed border procedure in the Return Directive to ensure its fundamental rights compliance.

The EU legislator should omit Article 22 from the proposal. The proposed text raises a number of specific fundamental rights issues.

Given the interdependence between the proposed border procedure and the asylum procedure, any discussion to design a border procedure for returns should be postponed until a final agreement on the details of the new EU asylum framework is reached.

Annex 1: CJEU judgments relating to the Return Directive

Case	Date	Subject-matter
<i>Kadzoev</i> (C-357/09 PPU) ECLI:EU:C:2009:741	Judgment of 30 November 2009	detention – reasons for prolongation; link to asylum related detention
<i>El Dridi</i> (C-61/11 PPU) ECLI:EU:C:2011:268	Judgment of 28 April 2011	criminalisation – penalisation of illegal stay by imprisonment
<i>Achughbabian</i> (C-329/11) ECLI:EU:C:2011:807	Judgment of 6 December 2011	criminalisation – penalisation of illegal stay by imprisonment
<i>Sagor</i> (C-430/11) ECLI:EU:C:2012:777	Judgment of 6 December 2012	criminalisation – penalisation of illegal stay by fine; expulsion order; house arrest
<i>Mbaye</i> (C-522/11) ECLI:EU:C:2013:190	Order of 21 March 2013	criminalisation of illegal stay
<i>Arslan</i> (C-534/11) ECLI:EU:C:2013:343	Judgment of 30 May 2013	return or asylum related detention
<i>G. and R.</i> (C-383/13 PPU) ECLI:EU:C:2013:533	Judgment of 10 September 2013	right to be heard before prolonging detention
<i>Filev and Osmani</i> (C-297/12) ECLI:EU:C:2013:569	Judgment of 19 September 2013	entry bans – need to determine ex officio length; historic entry bans
<i>Mahdi</i> (C-146/14 PPU) ECLI:EU:C:2014:1320	Judgment of 5 June 2014	detention – reasons for prolongation and judicial supervision
<i>Da Silva</i> (C-189/13) ECLI:EU:C:2014:2043	Judgment of 3 July 2014	criminalisation – illegal entry
<i>Bero</i> (C-473/13) and <i>Bouzalmate</i> (C-514/13) ECLI:EU:C:2014:2095	Judgment of 17 July 2014	detention conditions – obligation to provide for specialised facilities
<i>Pham</i> (C-474/13) ECLI:EU:C:2014:2096	Judgment of 17 July 2014	detention conditions – not at disposal of detainee to choose
<i>Mukarubega</i> (C-166/13) ECLI:EU:C:2014:2336	Judgment of 6 November 2014	right to be heard before issuing a return decision
<i>Boudjlida</i> (C-249/13) ECLI:EU:C:2014:2431	Judgment of 11 December 2014	right to be heard before issuing a return decision
<i>Abdida</i> (C-562/13) ECLI:EU:C:2014:2453	Judgment of 18 December 2014	rights pending postponed return
<i>Zaizoune</i> (C-38/14) ECLI:EU:C:2015:260	Judgment of 23 April 2015	obligation to issue return decision
<i>Zh. & O.</i> (C-554/13) ECLI:EU:C:2015:94	Judgment of 11 June 2015	risk to public policy
<i>Celaj</i> (C-290/14) ECLI:EU:C:2015:640	Judgment of 1 October 2015	prison sanction, entry ban and removal
<i>Affum</i> (C-47/15) ECLI:EU:C:2016:408	Judgment of 7 June 2016	transit passenger and illegal stay

Case	Date	Subject-matter
<i>Ouhrami</i> (C-225/16) ECLI:EU:C:2017:590	Judgment of 26 July 2017	starting point of the duration of an entry ban
<i>E</i> (C-240/17) ECLI:EU:C:2018:8	Judgment of 16 January 2018	return decision, entry ban, and consultations with another Member States having issued a residence permit
<i>K.A. and Others</i> (C-82/16) ECLI:EU:C:2018:308	Judgment of 8 May 2018	suspension of entry ban and family life
<i>Gnandi</i> (C-181/16) ECLI:EU:C:2018:465	Judgment of 19 June 2018	suspensive effect and effective remedy
<i>C and others</i> (C-269/18 PPU) ECLI:EU:C:2018:544	Order of 5 July 2018	suspensive effect and effective remedy
<i>X v. Belastingdienst/Toeslagen</i> (C-175/17) ECLI:EU:C:2018:776	Judgment of 26 September 2018	suspensive effect of appeal (risk of <i>refoulement</i>)
<i>X and Y v. Staatssecretaris van Veiligheid en Justitie</i> (C-180/17) ECLI:EU:C:2018:775	Judgment of 26 September 2018	suspensive effect of appeal (risk of <i>refoulement</i>)

Note: Table updated to reflect case law as at 10 January 2019.

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