

## The Return Directive Seeking improved implementation

### SUMMARY

Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals is part of the European Union's Global Approach to Migration and Mobility (GAMM). It sets out to protect returnees by establishing Schengen-wide standards and procedures for their return, based on EU and international fundamental rights and refugee-protection obligations. At the same time, it recognises the Member States' right to remove illegal stayers and safeguard their public policy and national-security interests.

Given the growing numbers of non-EU nationals seeking protection or better lives in the European Union, the proper implementation of this Directive plays a crucial role in ensuring that those who do not need protection are returned safely, in dignity and with due regard to their human rights. Since its adoption, a number of judgments of the Court of Justice of the European Union (CJEU) have either confirmed or clarified certain aspects of the Return Directive, in order to identify and address non-compliant national practices.

The Commission's March 2014 communication appraised EU return policy and explored future developments. The Council responded in its June 2014 conclusions on return policy, emphasising the need to focus on improving implementation and consolidating existing rules rather than new legislative initiatives.

The European Parliament's resolution of 17 December 2014 advocated, *inter alia*, swift processing, in collaboration with non-EU countries of origin and return, and of transit, for those who do not qualify for asylum and protection in the EU.



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### Glossary

**Return:** This refers to the process of non-EU nationals going back to their country of origin or transit in voluntary or enforced compliance with an obligation to return.

**Third-country or non-EU national:** This refers to anyone who is not an EU citizen within the meaning of Article 17(1) of the Treaty and does not enjoy the right of free movement, as defined in Article 2(5) of the Schengen Borders Code.

**Entry ban:** This refers to an administrative or judicial decision or act accompanying a return decision, which prohibits entry into and a stay in the Member States for a specified period.

**Removal:** This refers to the enforcement of the obligation to return, namely the physical transportation out of the Member State.

## Background

As the European Commission prepares to present its proposals for a new holistic approach to migration in mid-May, the other EU institutions, national authorities and various stakeholders are assessing what they expect from a new approach.

## International context

### Conflict and crisis

There are now over 50 million refugees worldwide, with most of them driven from their countries by conflict. Some 80% of them are hosted in developing countries, which are often ill-equipped to accommodate them. In this context, it is not surprising that so many of them seek protection further afield and try to reach developed countries. Their numbers are augmented by the many thousands who might not qualify for asylum but who face such serious hardship that they are prepared to risk their lives rather than remain where they are. In such a context, the EU's return policy is crucial to its capacity to manage migration flows without losing sight of the fact that individual human beings are involved.

Eurostat data point to a considerable gap between the number of [return decisions issued](#) (around 397 960 in 2014, 450 230 in 2013, 483 650 in 2012, 491 310 in 2011 and 540 080 in 2010) and [effected returns](#) to a non-EU country from the EU28 (around 156 470 in 2014, 215 885 in 2013, 206 675 in 2012, 194 110 in 2011 and 225 415 in 2010).

### Figures

In 2014 alone, about [626 000](#) people applied for asylum in the European Union. This figure was around 200 000 more than for the preceding year, when some 435 000 applied for asylum and almost the same number (430 450) of non-EU nationals were ordered to leave. However, only half of them were actually returned. This was also the case in 2014. The reasons include lack of cooperation from non-EU countries of origin or transit, for the purposes of obtaining documentation, or from returnees themselves, who may conceal their identities or try to abscond.

## European framework

The [Directive](#) tries to reconcile fair, transparent, rights-based common return procedures with the Member States' right to return illegal stayers and safeguard their public policy and security interests. It forms part of the European Union's [Global Approach to Migration and Mobility \(GAMM\)](#), which was established in 2005 and renewed in 2011.

The Directive ties in with other EU instruments concerning the repatriation of illegal stayers, namely [Council Directive 2001/40/EC](#) (mutual recognition of decisions on the

expulsion of non-EU nationals); [Council Directive 2003/110/EC](#), (assistance in cases of transit for the purposes of removal by air); and [Council Decision 2004/573/EC](#) (now repealed – organisation of joint flights for removals of non-EU nationals from more than one state).

In addition, the EU also enters into [readmission agreements](#) with non-EU countries to facilitate the return of people residing in the EU without authorisation. These are discussed in a [parallel briefing](#).

Financial support is available under the [Asylum, Migration and Integration Fund](#) (AMIF), with a budget of €3.137 billion for 2014-20, which was established under [Regulation \(EU\) No 516/2014](#). Previously, funding was provided through the European Return Fund (2008-13) under [Decision No 575/2007/EC](#) (now repealed).

The EU's border-management agency, Frontex, plays a practical role by coordinating [Joint Return Operations \(JROs\)](#) and training return officers on the rights and dignity of returnees during forced return operations.

The [Schengen Information System \(SIS\)](#) has proved helpful in giving effect to the European aspect of the primarily preventive Schengen-wide entry bans issued under the Return Directive. During the 2008-13 period, some 700 000 Schengen-wide entry bans were stored in the system. The [Visa Information System \(VIS\)](#) is also expected to become a significant tool for the identification and documentation of returnees.

## Application, reach and safeguards

### Application

The Return Directive applies to illegal stayers. However, Member States need not apply it to non-EU nationals who are (i) subject to a refusal of entry or extradition proceedings, (ii) being returned as a criminal-law sanction or (iii) apprehended or intercepted at the border and not subsequently authorised to stay. Asylum applicants should not be regarded as illegal stayers until/unless their application has been rejected.

### Reach

It is binding upon all EU Member States (except the United Kingdom and Ireland) and four Schengen associated States, namely Switzerland, Liechtenstein, Norway and Iceland. Its national implementation must take due account of the best interests of children, family life, the non-EU national's state of health and the principle of [non-refoulement](#).

EU legislation, including the Return Directive, cannot prevent Member States from considering irregular entry or stay in their territories as a criminal offence. The findings of an [evaluation](#) done for the Commission and [research](#) carried out by the Fundamental Rights Agency (FRA) show that most Member States treat irregular entry and/or stay as a criminal offence and define what they consider to be irregular staying (expired visas or residence permits; the withdrawal of residence permits or refugee status and irregular entry). However, several judgments of the Court of Justice of the European Union (CJEU) circumscribe their ability to detain returnees on these grounds.

### Safeguards

The Directive calls for voluntary return to be preferred to forced return. It limits the grounds and conditions for detaining illegal stayers. Pre-removal detention orders must be based on reasons in fact and law, and issued in writing by an administrative or

judicial authority. Detention is limited to six months except in cases where, despite all reasonable efforts, removal is likely to take longer due to non-cooperation from the person or the third countries concerned. In such cases, detention may be extended for a period not exceeding a further 12 months, in accordance with national law. Furthermore, detention should only be used if less coercive measures cannot be effectively applied; if there is a risk of absconding or the illegal stayer obstructs return preparations. Pre-removal detainees must be held in specialised facilities and if this is impossible, they should at least be kept apart from ordinary prisoners.

Unaccompanied minors are to be assisted by bodies other than those enforcing return, and repatriated only after ensuring their return to a family member, nominated guardian or adequate reception facilities. They should be detained only as a last resort, in specialised facilities, with access to age-appropriate recreational activities and, depending on the length of stay, education.

Return decisions should be in writing, setting out their basis in fact and law, with information on legal remedies and translations where necessary. They should provide opportunities to appeal or seek an impartial and independent judicial or administrative review. Information on procedures, access to legal advice and representation, and linguistic assistance must be provided. Safeguards pending return include maintaining family unity, access to medical treatment and education for minors, and attention to the special needs of vulnerable people.

Victims of human trafficking granted residence permits pursuant to [Council Directive 2004/81/EC](#) or who cooperate with the authorities are not subject to entry bans. The Schengen-wide ban accompanying the return decision should not exceed five years, unless a serious public policy or national security threat is involved.

### Related CJEU case law

Since 2008, a number of CJEU rulings have clarified aspects of the Return Directive with a view to ensuring better compliance.

Through these judgments the Court has established or reinforced a number of points concerning the grounds and conditions for pre-removal detention. These include the Member States' responsibility to provide separate facilities for pre-removal detainees (e.g. [Case C-474/13](#) and [Joined Cases C-473/13 and C-514/13](#)) and to release the detainee as soon as the grounds prescribed by the Directive are no longer fulfilled ([Case C-357/09 PPU](#)). The Court also confirms that refusal to leave the country is not sufficient grounds to impose a prison sentence since this interferes with the Directive's purpose, namely to implement an effective removal and repatriation policy (e.g. [Case C-61/11 PPU](#)). It interprets the Directive as precluding national legislation allowing an extension of the initial six-month period of detention solely because the non-EU national concerned has no identity documents ([Case C-146/14 PPU](#)).

Other judgments concern legal guarantees and proceedings. The Court confirms, for instance, the right to consult a legal adviser before the adoption of a return decision, provided that this does not interfere with the due progress of the return procedure, but does not recognise the right to be heard as an automatic right to free legal aid ([Case C-249/13](#)). Moreover, it establishes that the right to be heard in all proceedings means that a national authority does not need to hear non-EU nationals specifically on the subject of a return decision, if that authority has determined that they are staying illegally on the conclusion of a procedure which fully respected their right to be heard,

for instance in connection with the refusal of a residence permit ([Case C-166/13](#)). It confirms the need to take the returnee's health into consideration when enforcing a return decision ([Case C-562/13](#)).

### Stakeholder views

Despite the misgivings that accompanied the Directive's adoption in 2008, the [Eighth report on the expulsion of aliens](#) of the UN Special Rapporteur acknowledged that the EU's Return Directive contained extremely progressive provisions that were far more advanced than the norms found in other regions of the world.

Nevertheless, the Return Directive continues to face [criticism](#), for example from Izabella Majcher, that its human rights safeguards are undermined because it does not require a case-by-case assessment of the availability and feasibility of non-custodial measures; it does not establish an unequivocal presumption in favour of release or make pre-removal detention automatic, leaving it up to the national authorities to provide for review or grant the right to apply for it; and it does not provide for free legal or language assistance. It has been argued that since immigration detention is administrative rather than punitive, it enables states to evade the procedural safeguards available under criminal law.

Notwithstanding this criticism, a 2014 [synthesis report](#) of the European Migration Network (EMN) indicates that 24 out of 26 consulted states have developed alternatives to detention, which include reporting obligations; residence requirements; the obligation to surrender identity or travel documents; release on bail; electronic monitoring; provision of a guarantor; and release to care workers or under a care plan.

In the run-up to the adoption of the European Council's [Strategic Guidelines](#) for future development of the area of freedom, security and justice of June 2014, the UN High Commissioner for Refugees (UNHCR) [recognised](#) that a functioning asylum system required people who were not in need of protection to be returned swiftly, safely and with dignity. Nevertheless, it also [expressed concern](#) about the situation of failed asylum-seekers living in limbo in certain Member States. It pointed out that asylum systems only work if functioning return mechanisms exist in all Member States and recommended that Assisted Voluntary Return programmes should be established by Member States and accessible to all failed asylum-seekers. It [urged](#) caution regarding readmission agreements with countries that were either unsafe or unable to accommodate more refugees. It also drew attention to cases where people in need of protection were sent back to non-EU countries for lack of access to interpreters or clear instructions to border guards.

### The Commission's findings

The Commission based its [report](#) on its meetings with the [Return Directive Contact Group](#), the findings of six comparative [studies](#), and an organised programme of work on

#### Transposition

Four states (Estonia, Spain Portugal and Slovakia) notified full transposition before the deadline (24 December 2010). Nineteen states (Bulgaria, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Italy, Latvia, Malta, Portugal, Slovakia, Spain, France, Romania, Luxembourg, Slovenia, Switzerland and Norway) notified transposition in 2011, and five states (Belgium, Lithuania, the Netherlands, Poland and Sweden) notified transposition in 2012. Iceland [completed its transposition](#) in May 2014. The Commission has opened a number of [return policy infringements](#) since January 2011, many of which have since been closed.

the transposition of the Directive (2012-13), following which seven Member States amended their national law to comply with the Commission's requests, six took steps to amend their legislation and 13 committed to doing so (as of 28 March 2014). It acknowledges progress in terms of general acceptance among Member States of the policy concepts of respect for fundamental rights; fair and efficient procedures; fewer instances of migrants left without clear legal status; the primacy of voluntary departure and the promotion of reintegration and alternatives to detention. However, it also notes areas for improvement, particularly with respect to detention conditions, effective legal remedies, faster procedures and higher rates of voluntary return.

### **Voluntary return**

According to the 2014 Communication on EU return policy, all but seven states had established forced-return monitoring bodies (NGOs, ombudsman, or authorities linked to a ministry) to evaluate whether voluntary return was being preferred to forced return.

### **Protection of unaccompanied minors and families**

Shortcomings were identified with respect to separate accommodation for families and the provision of age-appropriate recreational activities and education. Some 17 countries were identified as sometimes detaining unaccompanied minors, and 19 as detaining families.

### **Return decisions and Schengen-wide entry bans.**

The Directive was found to have resulted in more EU-wide harmonisation on granting the right to stay on compassionate, humanitarian or other grounds and regarding the maximum five-year entry bans. Most Member States had set a maximum period for entry bans for returnees regarded as national security threats. Entry bans were shorter in eight states and fewer in six. In practice, all states allowed for entry bans to be withdrawn or suspended in exceptional humanitarian circumstances.

### **Grounds for pre-removal detention**

National practices regarding the grounds for detention were fairly uniform. The risk of absconding and/or hampering return were the main reasons, followed by the need to clarify documentation and identification of the person in cooperation with non-EU countries.

### **Conditions of pre-removal detention**

Shortcomings were noted in detention conditions. Nine countries did not meet the requirement to keep detainees separate from ordinary prisoners. Some still detained irregular migrants in prisons, either occasionally or frequently. In practice, only half of them invariably provided specialised detention facilities. However, the length of detention went down between 2010 and 2013. Furthermore, as [pointed out](#) by Steve Peers, the Commission says nothing about the rules governing the extension of detention for up to 18 months; he also noted that information on the number of people actually detained for longer periods would have been useful.

### **Lawfulness of detention orders**

Considerable variations were identified in the interpretation of 'reasonable intervals' for reviewing detention. Some Member States held reviews on a weekly basis, whereas in others, it was only guaranteed at the end of the detention period (i.e. up to six months). The Commission called for more consistency. Nevertheless, Steve Peers draws attention to the [lack of information](#) on how often appeals were successful.



## The way forward

The Commission is working in consultation with the Return Directive Contact Group to prepare a Return Handbook on common guidelines, best practice and recommendations for national authorities. It will include recommendations based on a 2012 Fundamental Rights Agency (FRA) [study](#) and CJEU case law. In the meantime, the European Court of Human Rights and the FRA have jointly published a [Handbook on European law relating to asylum, borders and immigration](#), which includes a chapter on forced returns and the manner of removal.

According to the Communication, areas that the Commission intends to develop include improving dialogue and cooperation with non-EU countries of origin or transit, incorporating cooperation on return, readmission and reintegration into balanced and consolidated external EU policies, based on shared interests, and building third-country capacities to respond to readmission applications and manage return and reintegration. It also intends to use the AMIF to encourage voluntary departure, improve the sustainability and effectiveness of the return process and promote intra-EU solidarity to support the countries most affected by migration and asylum flows. It also sees scope for better operational cooperation between the Member States' child protection systems, as well as with non-EU states, for the purposes of returning and reintegrating unaccompanied minors. Furthermore, it believes that Frontex should step up coordination and fundamental-rights training in relation to return, and sees potential for improving VIS and SIS II support for return policy. These recommendations may be augmented by its proposals due in May on a holistic approach to migration.

The [Council conclusions on EU Return Policy](#) of 5-6 June 2014 welcomed the general thrust of the Commission's Communication, but emphasised the need to focus on more effective implementation and the thorough consolidation of existing rules rather than new legislative initiatives. It advocated a comprehensive EU approach towards non-EU countries in identifying and re-admitting their own nationals. It reiterated the value of properly functioning readmission agreements with due respect for fundamental rights and the principle of *non-refoulement*, identifying strengthened cooperation with third countries as a key challenge for a more successful return policy. Finally, it called on the Commission to ensure that sufficient financial resources were available under the external cooperation instruments for capacity building in non-EU countries for relevant aspects of return management, and for re-integration support in selected third-countries. It also called on the Commission to ensure that the handbook under preparation focuses on the efficiency of administrative procedures, in full respect of the Member States' competences, and avoids any message which could be understood as encouraging illegal immigration or stay.

The [European Parliament resolution](#) of 17 December 2014 on the situation in the Mediterranean and the need for a holistic EU approach to migration advocated, inter alia, swift processing in collaboration with non-EU countries of transit, of origin and of return for those who do not qualify for asylum and protection in the EU, ensuring that resources are best utilised for those who require protection. It stressed the need to encourage voluntary return policies, while guaranteeing the protection of rights for all migrants and safe and legal access to the EU asylum system.

## Main references

[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

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['Crimmigration' in the European Union through the Lens of Immigration Detention](#) / Izabella Majcher / Global Detention Project Working Paper No. 6, September 2013

[The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?](#) / Steve Peers, Professor of EU and Human Rights Law at the University of Essex / EU Law Analysis, March 2014

[The EU Returns Directive and the Use of Prisons for Detaining Migrants in Europe](#) / Izabella Majcher, Researcher at [Global Detention Project](#) and [Global Migration Centre](#) / EU Law Analysis, July 2014

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[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu)

<http://www.eprs.ep.parl.union.eu> (intranet)

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